AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL REGISTER

Vol. 86 Tuesday

No. 69 April 13, 2021

Pages 19127–19566

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 86 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**

General online information **202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Printed on recycled paper.

Contents

Federal Register

Vol. 86, No. 69

Tuesday, April 13, 2021

Agricultural Marketing Service
PROPOSED RULES
Continuance Referendum:
Pecans Grown in the States of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas, 19152
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19211

Agriculture Department
See Agricultural Marketing Service
See Food Safety and Inspection Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19211–19212

Air Force Department
NOTICES
Exchange of Air Force Real Property for Non-Air Force Real Property, 19229–19230

Census Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Household Pulse Survey, 19219
Meetings:
National Advisory Committee, 19219–19220

Centers for Disease Control and Prevention
NOTICES
Meetings, 19267

Centers for Medicare & Medicaid Services
PROPOSED RULES
Medicare Program:
FY 2022 Inpatient Psychiatric Facilities Prospective Payment System and Quality Reporting Updates for Fiscal Year Beginning October 1, 2021 (FY 2022), 19480–19529
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19267–19269

Civil Rights Commission
NOTICES
Meetings:
Washington Advisory Committee, 19218–19219

Coast Guard
PROPOSED RULES
Security Zone:
Electric Boat Shipyard, Groton, CT, 19171–19173
Special Local Regulations:
Mystic Sharkfest Swim, Mystic River, Mystic, CT, 19169–19171

Commerce Department
See Census Bureau
See Foreign-Trade Zones Board
See Industry and Security Bureau
See International Trade Administration
See National Institute of Standards and Technology
See National Oceanic and Atmospheric Administration

Commodity Futures Trading Commission
RULES
Bankruptcy Regulations, 19324–19477

Consumer Product Safety Commission
NOTICES
Meetings; Sunshine Act, 19229

Council on Environmental Quality
RULES
Guidance Document Procedures Rescission, 19149–19151

Defense Department
See Air Force Department
NOTICES
Request for Comments:
America's Supply Chains, 19230–19231

Education Department
RULES
Final Priority and Requirements:
Activities for Traditionally Underserved Populations, 19135–19145
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Pell Grant Reporting Under the Common Origination and Disbursement System, 19232
Applications for New Awards:
Activities for Traditionally Underserved Populations, 19242–19249
Personnel Development To Improve Services and Results for Children With Disabilities; Interdisciplinary Preparation in Special Education, Early Intervention, and Related Services for Personnel Serving Children With Disabilities Who Have High-Intensity Needs, 19232–19242
Eligibility Designations and Applications for Waiving Eligibility Requirements:
Programs Under Parts A and F of Title III and Programs Under Title V of the Higher Education Act; Reopening, 19231–19232
Inviting Applications for Funds:
Institutions of Higher Education That Meet the Criteria for the Minority Serving Institutions Program, 19252–19256
Institutions of Higher Education That Meet the Criteria for the Strengthening Institutions Program, 19249–19252

Energy Department
NOTICES
Meetings:
Environmental Management Site-Specific Advisory Board, Northern New Mexico, 19256

Environmental Protection Agency
RULES
Pesticide Tolerances:
MCPA ((4-chloro-2-methylphenoxy) acetic acid), 19145–19149
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Ohio; Ohio Permit Fee Rule Removal, 19174–19176
National Emission Standards for Hazardous Air Pollutants:
Municipal Solid Waste Landfills Residual Risk and Technology Review; Correction, 19176–19184
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
41 Source Categories, 19256–19262
Contact-Handled Transuranic Waste Characterization Program; Baseline Approval:
Department of Energy's Savannah River Site, 19262–19265
Meetings:
Board of Scientific Counselors Safe and Sustainable Water Resources Subcommittee, 19262

Federal Aviation Administration
RULES
Airspace Designations and Reporting Points:
Northeast United States, 19129–19135
Airworthiness Directives:
Leonardo S.p.a. Helicopters, 19127–19129
PROPOSED RULES
Airworthiness Directives:
Airbus Helicopters, 19157–19160
The Boeing Company Airplanes, 19160–19162

Federal Communications Commission
RULES
Emergency Broadband Benefit Program, 19532–19566

Federal Deposit Insurance Corporation
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19265–19267

Federal Reserve System
PROPOSED RULES
Federal Reserve Bank Capital Stock, 19152–19157

Fish and Wildlife Service
PROPOSED RULES
Endangered and Threatened Species:
Reclassification of Layia carnosa (Beach Layia) From Endangered to Threatened Species Status With Section 4(d) Rule, 19184–19185
Threatened Species Status for Streaked Horned Lark With Section 4(d) Rule, 19186–19207

Food and Drug Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Scientific and Technical Issues Related to Pharmaceutical Current Good Manufacturing Practice, 19270–19271
Meetings:
Development Considerations of Antimicrobial Drugs for the Treatment of Gonorrhea, 19271–19272
Pediatric Oncology Subcommittee of the Oncologic Drugs Advisory Committee, 19272–19274

Food Safety and Inspection Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Animal Disposition Reporting, 19212–19214
Public Health Information System, 19215–19217
Requirements To Notify FSIS of Adulterated or Misbranded Product, Prepare and Maintain Written Recall Procedures, and Document Certain HACCP Plan Reassessments, 19214–19215
Voluntary Recalls of Meat, Poultry, and Egg Products, 19217–19218

Foreign Assets Control Office
NOTICES
Blocking or Unblocking of Persons and Properties, 19321–19322

Foreign-Trade Zones Board
NOTICES
Application for Subzone:
Woodfield Distribution, LLC, Foreign-Trade Zone 49, Newark, NJ, 19220

Geological Survey
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
The National Map Corps—Volunteered Geographic Information Project, 19280–19281

Health and Human Services Department
See Centers for Disease Control and Prevention
See Centers for Medicare & Medicaid Services
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Advisory Council on Alzheimer's Research, Care, and Services, 19275

Health Resources and Services Administration
NOTICES
Solicitation of Nominations:
Advisory Committee on Training in Primary Care Medicine and Dentistry, 19274–19275

Homeland Security Department
See Coast Guard
See Transportation Security Administration

Housing and Urban Development Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Indian Housing Block Grant Program, 19278–19279
Public Housing Contracting With Resident-Owned Business/Application Requirements, 19277–19278
Requirements for Designating Housing Projects, 19279–19280

Indian Affairs Bureau
PROPOSED RULES
Indian Business Incubators Program, 19162–19169

NOTICES
Meetings:
Student Progress and Promotion and Certificate of Completion, 19281–19282

Industry and Security Bureau
NOTICES
Meetings:
Information Systems Technical Advisory Committee, 19221
Sensors and Instrumentation Technical Advisory Committee, 19220–19221

Interior Department
See Fish and Wildlife Service
See Geological Survey
See Indian Affairs Bureau

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Oil Country Tubular Goods From India, 19221–19222

International Trade Commission
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain LED Landscape Lighting Devices and Components Thereof, 19282
Certain Steel Grating From China, 19286–19287
Certain Toner Supply Containers and Components Thereof, 19287–19288
Certain Toner Supply Containers and Components Thereof (I), 19284–19286
Meetings:
Caribbean Basin Economic Recovery Act—Impact on U.S. Industries and Consumers and on Beneficiary Countries, 19283–19284

National Aeronautics and Space Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Generic Clearance for the Office of STEM Engagement Performance Measurement and Evaluation (Testing), 19288–19289
New Technology Reporting System, 19288

National Highway Traffic Safety Administration
NOTICES
Petition for Decision of Inconsequential Noncompliance:
Nissan North America, Inc., 19319–19321

National Institute of Standards and Technology
NOTICES
Requests for Nominations:
Federal Advisory Committees, 19222–19227

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 19275–19276
National Heart, Lung, and Blood Institute, 19276
National Institute of Neurological Disorders and Stroke, 19275

National Oceanic and Atmospheric Administration
PROPOSED RULES
Pacific Halibut Fisheries; Catch Sharing Plan, 19207–19210
NOTICES
Meetings:
North Pacific Fishery Management Council, 19227–19228
South Atlantic Fishery Management Council, 19228–19229
Takes of Marine Mammals Incidental to Specified Activities:
Oil and Gas Activities in Cook Inlet, AK, 19228

National Science Foundation
NOTICES
Meetings; Sunshine Act, 19289

Nuclear Regulatory Commission
NOTICES
Meetings; Sunshine Act, 19289–19290

Postal Regulatory Commission
PROPOSED RULES
Market Dominant Products, 19173–19174

Securities and Exchange Commission
NOTICES
Application:
The Ohio National Life Insurance Company, et al., 19299–19303
Order:
Cboe BZX Exchange, Inc.; Scheduling Filing of Statements on Review, 19292–19293, 19298
Self-Regulatory Organizations; Proposed Rule Changes:
Cboe EDGX Exchange, Inc., 19313–19316
Financial Industry Regulatory Authority, Inc., 19306–19309
ICE Clear Credit LLC, 19311–19313, 19316–19318
Miami International Securities Exchange LLC, 19293–19298
MIAX PEARL, LLC, 19290–19292, 19303–19306
New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc., 19313
The Nasdaq Stock Market LLC, 19309–19311

Susquehanna River Basin Commission
NOTICES
Hearing, 19318–19319

Transportation Department
See Federal Aviation Administration
See National Highway Traffic Safety Administration

Transportation Security Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Customer Comment Card, 19276–19277

Treasury Department
See Foreign Assets Control Office

Veterans Affairs Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Request for Contact Information, 19322

Separate Parts In This Issue

Part II
Commodity Futures Trading Commission, 19324–19477

Part III
Health and Human Services Department, Centers for Medicare & Medicaid Services, 19480–19529

Part IV
Federal Communications Commission, 19532–19566

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

7 CFR

Proposed Rules:
986 19152

12 CFR

Proposed Rules:
209 19152

14 CFR
39 19127
71 19129

Proposed Rules:
39 (2 documents) 19157, 19160

17 CFR
1 19324
4 19324
41 19324
190 19324

25 CFR

Proposed Rules:
1187 19162

33 CFR

Proposed Rules:
100 19169
165 19171

34 CFR
Ch. III 19135

39 CFR

Proposed Rules:
3030 19173

40 CFR
180 19145
1519 19149

Proposed Rules:
52 19174
60 19176
63 19176

42 CFR

Proposed Rules:
412 19480

47 CFR
54 19532

50 CFR

Proposed Rules:
17 (2 documents) 19184, 19186
679 19207

Rules and Regulations

Federal Register

Vol. 86, No. 69

Tuesday, April 13, 2021

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

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–1077; Project Identifier 2016–SW–070–AD; Amendment 39–21493; AD 2021–07–16]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.a. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Leonardo S.p.a. Model AB412 helicopters. This AD was prompted by a cracked spiral bevel gear. This AD requires a one-time visual inspection and a recurring fluorescent magnetic particle inspection (FMPI) of affected spiral bevel gears for a crack, and depending on the inspection results, removing the spiral bevel gear from service. This AD also prohibits installing an affected spiral bevel gear unless it has recently passed an FMPI. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective April 28, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain document listed in this AD as of April 28, 2021.

The FAA must receive comments on this AD by May 28, 2021.

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

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

For service information identified in this final rule, contact Leonardo S.p.A. Helicopters, Emanuele Bufano, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–225074; fax +39–0331–229046; or at *https://www.leonardocompany.com/en/home.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1077.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1077; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the European Aviation Safety Agency (now European Union Aviation Safety Agency) (EASA) AD, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Rao Edupuganti, Aerospace Engineer, Dynamic Systems Section, Technical Innovation Policy Branch, Policy & Innovation Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *rao.edupuganti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2016–0166–E, dated August 12, 2016 and corrected October 4, 2017 (EASA AD 2016–0166–E), to correct an unsafe condition for Leonardo S.p.A. (formerly AgustaWestland S.p.A., Agusta S.p.A., Costruzioni Aeronautiche Giovanni Agusta) Model AB204B, AB205A1, and AB212 helicopters, all serial numbers (S/Ns), and AB412 helicopters all S/Ns up to S/N 25669 inclusive. EASA advises that a crack was found in a spiral bevel gear part number (P/N) 204–040–701–103 during a scheduled inspection of a main rotor (M/R) transmission P/N 212–040–001–59. The initial investigation determined that the crack originated from the bottom of one of the 32 threaded holes. EASA further advises that other spiral bevel gears manufactured with the same process as the defective one could be affected by the same issue. This condition, if not addressed, could lead to failure of the M/R transmission and possible loss of control of the helicopter.

Accordingly, EASA AD 2016–0166–E requires a one-time visual inspection and a recurring FMPI of certain serial-numbered spiral bevel gears P/N 204–040–701–103 for a crack, and if there is a crack, replacing the spiral bevel gear or the M/R transmission. EASA AD 2016–0166–E also prohibits installing an affected spiral bevel gear unless it is a serviceable part. EASA considers its AD an interim action and states that further AD action may follow.

FAA's Determination

This model helicopter has been approved by EASA and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all known relevant information and determining that the unsafe condition described previously is likely to exist or develop on other helicopters of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Finmeccanica Helicopter Division (FHD) Alert Bollettino Tecnico No. 412–146, Revision A, dated July 7, 2016. This service information specifies procedures for a one-time visual inspection of the spiral bevel gear by marking one tooth of the spiral bevel gear with white chalk (or equivalent), and with the aid of a light source, rotating the tail rotor blades, and visually inspecting the teeth of the spiral bevel gear for a crack. This service information also specifies procedures for a recurring FMPI of the spiral bevel gear for a crack. If there is a crack, this service information

specifies removing the spiral bevel gear from service and reporting findings to FHD Product Support Engineering.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

AD Requirements

This AD requires a one-time visual inspection and a recurring FMPI of certain serial-numbered spiral bevel gears P/N 204–040–701–103 for a crack, and if there is a crack, removing the spiral bevel gear from service. This AD also prohibits installing an affected spiral bevel gear unless it has previously passed an FMPI within less than 300 hours time-in-service.

Differences Between This AD and the EASA AD

EASA AD 2016–0166–E applies to Model AB204B, AB205A1, and AB212 helicopters, whereas this AD does not because those model helicopters are not FAA type-certificated. EASA AD 2016–0166–E applies to certain serial-numbered helicopters, whereas this AD applies to certain serial-numbered helicopters with certain serial-numbered spiral bevel gears P/N 204–040–701–103 installed instead. EASA AD 2016–0166–E also includes a compliance time of before the spiral bevel gear accumulates 1,200 flight hours since first installation on a helicopter, whereas this AD does not.

Interim Action

The FAA considers this AD to be an interim action. If final action is later identified, the FAA might consider further rulemaking then.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause. There are no helicopters with this type certificate on the U.S. Registry. Accordingly, notice and opportunity for prior public comment are unnecessary, pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, for the foregoing reason(s), the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2017–1077; Project Identifier 2016–SW–070–AD'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Rao Edupuganti, Aerospace Engineer, Dynamic Systems Section, Technical Innovation Policy Branch, Policy & Innovation Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *rao.edupuganti@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act

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

Costs of Compliance

There are no costs of compliance with this AD because there are no helicopters with this type certificate on the U.S. Registry.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed, I certify that this AD:

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–07–16 Leonardo S.p.a.: Amendment 39–21493; Docket No. FAA–2017–1077; Project Identifier 2016–SW–070–AD.

(a) Effective Date

This airworthiness directive (AD) is effective April 28, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Leonardo S.p.a. Model AB412 helicopters, certificated in any category, with a serial number up to 25669 inclusive, with a spiral bevel gear part number 204–040–701–103 with a serial number identified in Table 1 of Finmeccanica Helicopter Division Alert Bollettino Tecnico No. 412–146, Revision A, dated July 7, 2016 (Alert BT 412–146 Rev A).

(d) Subject

Joint Aircraft Service Component (JASC) Code: 6300, Main Rotor Drive System.

(e) Unsafe Condition

This AD was prompted by a cracked spiral bevel gear. The FAA is issuing this AD to prevent failure of the main rotor transmission. The unsafe condition, if not addressed, could result in loss of control of the helicopter.

(f) Compliance

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

(g) Required Actions

(1) Within 10 hours time-in-service (TIS) after the effective date of this AD:

(i) Visually inspect the spiral bevel gear teeth for a crack by following the Accomplishment Instructions, part I, paragraphs 9. and 10., of Alert BT 412–146 Rev A.

(ii) If there is a crack, before further flight, remove the spiral bevel gear from service.

(iii) If there is not a crack, within 100 hours TIS following paragraph (g)(1)(i) of this AD and thereafter at intervals not to exceed 300 hours TIS, fluorescent magnetic particle inspect the spiral bevel gear for a crack by following the Accomplishment Instructions, part II, paragraph 3., of Alert BT 412–146 Rev A. If there is a crack, before further flight, remove the spiral bevel gear from service.

(2) As of the effective date of this AD, do not install a spiral bevel gear that is identified in paragraph (c) of this AD unless the actions required by paragraph (g)(1)(iii) have been previously accomplished within less than 300 hours TIS.

(h) Alternative Methods of Compliance (AMOCs)

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

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

(i) Related Information

(1) For more information about this AD, contact Rao Edupuganti, Aerospace Engineer, Dynamic Systems Section, Technical Innovation Policy Branch, Policy & Innovation Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *rao.edupuganti@faa.gov.*

(2) The subject of this AD is addressed in European Aviation Safety Agency (now European Union Aviation Safety Agency) (EASA) AD 2016–0166–E, dated August 12, 2016 and corrected October 4, 2017. You may view the EASA AD on the internet at *https://www.regulations.gov* in Docket No. FAA–2017–1077.

(j) Material Incorporated by Reference

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

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

(i) Finmeccanica Helicopter Division Alert Bollettino Tecnico No. 412–146, Revision A, dated July 7, 2016.

(ii) [Reserved]

(3) For Finmeccanica Helicopter Division service information identified in this AD, contact Leonardo S.p.A. Helicopters, Emanuele Bufano, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–225074; fax +39–0331–229046; or at *https://www.leonardocompany.com/en/home.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on March 25, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–07481 Filed 4–12–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1146; Airspace Docket No. 20–AEA–10]

RIN 2120–AA66

Establishment, Amendment, and Revocation of Air Traffic Service (ATS) Routes; Northeast United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends nine VOR Federal airways, removes 10 VOR Federal airways; amends four low altitude RNAV routes (T-routes), establishes seven T-routes; amends two high altitude RNAV routes (Q-route), and establishes one Q-route. This action supports the Northeast Corridor Atlantic Coast Route Project and the VOR Minimum Operational Network (VOR MON) Program to improve the efficiency of the National Airspace System (NAS) and reduce dependency on ground-based navigational systems.

DATES: Effective date 0901 UTC, June 17, 2021. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence

Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the Air Traffic Route structure in the northeastern United States to maintain the efficient flow of air traffic.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA–2020–1146 in the **Federal Register** (86 FR 5046; January 19, 2021), modifying 11 VOR Federal airways; removing 10 VOR Federal airways; modifying four low altitude RNAV routes (T-routes); establishing seven T-routes; modifying two high altitude RNAV routes (Q-route); and establishing one Q-route. This action supports the Northeast Corridor Atlantic Coast Route Project, and the VOR Minimum Operational Network (VOR MON) Program to improve the efficiency of the NAS and reduce dependency on ground-based navigational systems. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

Domestic VOR Federal airways are published in paragraph 6010(a); United States area navigation routes are published in paragraph 6011; and Canadian area navigation routes are published in paragraphs 2007, and 6013; respectively, of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airways and area navigation routes listed in this document will be subsequently published in the Order.

Availability and Summary of Documents for Incorporation by Reference

This action amends FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020 and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this rule. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Differences From the Proposal

The following editorial corrections are included in this rule:

Subsequent to the publication of the NPRM, the FAA determined that the proposed amendments to VOR Federal airways V–39 and V–93 would be delayed to a later date. This is due to a delay in the planned decommissioning date for the Keene, NH (EEN), VORTAC. Therefore, the amendments to V–39 and V–93 are removed from this rule.

Q–844: A correction to route Q–844 is added to this rule to update the description of the VIBRU waypoint (WP) to reflect its new position. The NPRM included the VIBRU update in the description of route T–634, but the same change in Q–844 was unintentionally omitted from the NPRM.

T–662: In the NPRM preamble description, the spelling of the DEPIR WP is corrected to read DEPRI WP.

T–705: The spelling of the SRACK WP is corrected to read SRNAK WP.

The above changes do not affect the alignment of the routes.

The Rule

This action amends 14 CFR part 71 by modifying nine VOR Federal airways; removing 10 VOR Federal airways; modifying four low altitude RNAV routes (T-routes); establishing seven T-routes; amending two high altitude RNAV routes (Q-route); and establishing one Q-route.

The following section describes the VOR Federal airway changes.

V–2: V–2 extends, in two parts, between Seattle, WA, and Nodine, MN; and between Buffalo, NY, and Gardner, MA. The FAA is removing the sections between Buffalo and Gardner. RNAV route T–608 (described below) replaces V–2 between Buffalo, NY, and Gardner, MA. As amended, the route extends between Seattle, WA, and Nodine, MN.

V–3: V–3 extends between Key West, FL, and Quebec, PQ, Canada. The FAA is removing the segments between the intersection of the Boston, MA, 014°, and the Pease, NH, 185° radials, and Houlton, ME. As amended, V–3 consists of two parts: between Key West, FL, and Boston, MA; and between Presque Isle, ME, and Quebec, Canada. The airspace within restricted areas R–2916, R–2934, R–2935, and the airspace within Canada is excluded.

V–14: V–14 extends, in two parts, between Chisum, NM, and Flag City, OH; and between Buffalo, NY, and Norwich, CT. This action removes the sections between Buffalo and Norwich. RNAV route T–608 (described below) replaces V–14 between Albany, NY, and Norwich, CT. As amended, V–14 extends between Chisum, NM, and Flag City, OH.

V–29: V–29 extends between Snow Hill, MD, and Massena, NY. This action removes the sections between Watertown, NY, and Massena, NY. As amended, V–29 extends between Snow Hill, MD, and Syracuse, NY.

V–106: V–106 consists of two parts: between Johnstown, PA, and the intersection of the Wilkes-Barre, PA, 037°, and the Sparta, NJ, 300° radials; and between Barnes, MA, and Kennebunk, ME. This action removes the sections between Barnes, MA, and Kennebunk, ME. The amended route extends between Johnstown, PA, and the intersection of the Wilkes-Barre, PA, 037°, and the Sparta, NJ, 300° radials.

V–145: V–145 extends between Utica, NY, and the intersection of the Watertown, NY, 005°, and the Ottawa, ON, Canada 185° radials. The FAA is removing the entire route.

V–196: V–196 extends between Utica, NY, and the intersection of the Saranac Lake, NY, 058°, and the Burlington, VT, 296° radials. The FAA is removing the entire route.

V–203: V–203 extends between the intersection of the Chester, MA, 266°, and the Albany, NY, 134° radials, and Massena, NY. The FAA is removing the entire route.

V–229: V–229 extends between Patuxent, MD, and Burlington, VT. This action removes the segments between Hartford, CT, and Burlington, VT. As amended, V–229 extends between Patuxent, MD, and Hartford, CT.

V–249: V–249 extends between Robbinsville, NJ, and Utica, NY. This action removes the segments between DeLancey, NY, and Utica, NY. The amended route extends between Robbinsville, NJ, and DeLancey, NY.

V–273: V–273 extends between the intersection of the Huguenot, NY, 134°, and the Solberg, NJ, 044° radials, and Syracuse, NY. The FAA is removing the segments between Hancock, NY, and Syracuse, NY. As amended, the route extends between the intersection of the above noted Huguenot and Solberg radials, and Hancock, NY.

V–282: V–282 extends between Saranac Lake, NY, and the intersection of the Saranac Lake, NY, 008° and the Massena, NY, 080° radials. The FAA is removing the entire route.

V–318: V–318 extends between the intersection of the Beauce, PQ, Canada, 103°, and the Quebec, PQ Canada, 047° radials, through United States airspace, to St. John, NB, Canada. The FAA is removing the entire route.

V–322: V–322 extends between Concord, NH, and the intersection of the Concord, NH, 022°, and the Augusta, ME, 265° radials. The FAA is removing the entire route.

V–352: V–352 extends between the intersection of the Beauce, PQ, Canada 085° and the Bangor, ME, 336° radials, and Houlton, ME. The FAA is removing the entire route.

V–428: V–428 extends between Georgetown, NY, and Utica, NY. The FAA is removing the entire route.

V–471: V–471 extends between Bangor, ME, and the intersection of the Houlton, ME, 085° radial, and the United States Canadian border. This action remove the segments between Millinocket, ME, and the above border intersection. As amended, the route extends between Bangor, ME, and Millinocket, ME.

V–490: V–490 extends Utica, NY, and Manchester, NH. The FAA is removing the entire route.

V–542: V–542 currently extends between Elmira, NY, and Rockdale, NY. This action removes the entire route.

The following section describes changes to U.S. low altitude RNAV routes.

T–295: T–295 extends between the LOUIE, MD, waypoint (WP), and the Bangor, ME, VORTAC. This action extends the route northeastward from Bangor, ME, to Presque Isle, ME. The Keene, NH (EEN) VORTAC is replaced by the KEYNN, NH, WP, which is located 60 feet north of the Keene VORTAC. The amended route extends between LOUIE, MD, and Presque Isle, ME.

T–314: T–314 is a new route that extends between the Barnes, MA, VORTAC, and the Kennebunk, ME, VOR/DME.

T–315: T–315 is a new route that extends between the Hartford, CT, VOR/DME and the Burlington, VT, VOR/DME.

T–316: T–316 is a new route that extends between the LAMMS, NY, WP, and the MANCH, NH, WP.

T–391: T–391 extends between the TUMPS, NY, Fix, and the SSENA, NY, WP. This action removes the TUMPS Fix and extends the route southeast from the Syracuse, NY, VORTAC, to the Hancock, NY, VOR/DME. As amended, the route extends between Hancock, NY, and SSENA, NY.

The following section describes changes to Canadian low altitude RNAV routes.

T–608: T–608 is an existing Canadian route that was extended into U.S. airspace in 2014 (79 FR 57758; September 26, 2014). It currently extends from the HOCKE, MI, WP, through Canadian airspace, and ends at the WOZEE, NY, WP. This action extends the route from the WOZEE WP eastward into U.S. airspace to the YANTC, CT, WP. The amended T–608 replaces VOR Federal airway V–2 between the WOZEE, NY, WP and the Gardner, MA (GDM), VORTAC; and replaces V–14 between the Albany, NY (ALB), VORTAC and the YANTC, CT, WP. The YANTC, CT, WP replaces the Norwich, CT (ORW), VOR/DME. The LAMMS, NY, WP replaces the Utica, NY (UCA), VORTAC. As amended, T–608 extends from the HOCKE, MI, WP, through Canadian airspace, to the WOZEE, NY, WP, and from the WOZEE WP, to the YANCT WP. The order of points listed in the route description is changed to read from ''west to east'' to comply with formatting requirements.

T–634: T–634 is an existing Canadian route that is being extended into U.S. airspace. The route currently ends at the VIBRU, Canada, WP (adjacent to the U.S./Canadian border). The VIBRU WP is moved 0.55 nautical miles (NM) to the south of its current position to align it with the U.S./Canada border. It is re-labeled as ''VIBRU, NY.'' The FAA is extending T–634 into U.S. airspace between the Syracuse, NY, VORTAC, and the VIBRU, NY, WP. The extended portion of the route replaces VOR Federal airway V–145 as described above.

T–662: T–662 is a Canadian route that is extended into U.S. airspace between the DEPRI, ME, WP, and the HULTN, ME, WP. The HULTN WP replaces the Houlton, ME, (HUL) VOR/DME. The HULTN WP is located 60 feet east of the Houlton VOR/DME. T–662 extends across Maine from the DEPRI, ME, WP to the KATAH, ME, WP, to the HULTN, ME, WP. T–662 replaces VOR Federal airway V–352 as described above.

T–698: T–698 is a Canadian route that is extended across the State of Maine from the EBGIX, ME, WP, to the HULTN, ME, WP, to the ACTON, ME, WP. The EBGIX WP is moved 1.16NM east of its current position to coincide with the U.S./Canada border in western Maine. The ACTON WP is a new point added on the U.S./Canada border to the southeast of the Houlton, ME (HUL), VOR/DME.

T–705: T–705 is an existing Canadian route that was extended into U.S. airspace, between the U.S./Canadian border, and the Utica, NY, VORTAC, in 2018 (83 FR 31855; July 10, 2018). This action extends T–705 further southward to the DANZI, NY, WP (near the Delancey, NY, VOR/DME). The Utica, NY, VORTAC, and the Saranac Lake, NY, VOR/DME are removed from the route. The new LAMMS, NY, WP replaces the Utica VORTAC, and the new SRNAC, NY, WP replaces the Saranac Lake VOR/DME in the route description. The MUTNA, Canada, WP is moved 0.79NM southward to align with the U.S./Canada border. It is re-labeled as ''MUTNA, NY.'' As amended, the U.S. portion of T–705 extends between the DANZI, NY, WP and MUTNA, NY, WP at the U.S./Canadian border.

T–781: T–781 is a Canadian route that was extended into U.S. airspace in 2014 (79 FR 57758; September 26, 2014). Currently, the U.S. portion of the route extends from the Flint, MI, VORTAC, eastward to the AXOBU, Canada, WP (in the vicinity of the U.S./Canadian border near Port Huron, MI). T–781 then continues eastward across Canada and terminates at the PINTE, Canada Fix (on the U.S./Canadian border). The PINTE Fix is moved 0.07 NM east to align with the U.S./Canada border and is converted to a WP. This action extends T–781 eastward from the PINTE, ME, WP to terminate at the HULTN, ME, WP. As amended, the U.S. portion of T–781 extends between the Flint, MI, VORTAC, and the AXOBU, Canada, Fix; and between the PINTE, ME, WP, and the HULTN, ME, WP.

The following section describes the changes to Canadian high altitude RNAV routes.

Q–844: Q–844 is a Canadian route that extends between the Syracuse, NY, VORTAC (SYR) and the VIBRU, Canada, WP. The VIBRU, Canada, WP is moved 0.55 NM south of its current position to coincide with the U.S./Canada border. The WP is renamed ''VIBRU, NY,'' and the geographic latitude/longitude is updated to reflect the new position.

Q–806: Q–806 is a Canadian route that was extended into U.S. airspace in 2014 (79 FR 57758; September 26, 2014). The U.S. portion currently extends from the MEKSO, Canada, WP, eastward through the Millinocket, ME, VOR/DME, to the CANME, ME, WP, and the VOGET, Canada, WP. Canada is realigning Q–806 by shifting the route segment from the MEKSO, Canada, WP, southward to the VINDI, Canada, WP. The VINDI WP is moved 0.13NM eastward to align with the U.S./Canada border and listed as ''VINDI, ME.'' Consequently, this action removes the route segment between the MEKSO WP and the Millinocket, ME, VOR/DME, and adds the segment

between the VINDI, ME, WP, and the Millinocket VOR/DME. The VIGDU, Canada, WP is moved 0.50 NM westward to align with the U.S./Canada border and listed as ''VIGDU, ME.'' The VIGDU, ME, WP is added east of the CANME, ME, WP. As amended, the U.S. portion of Q–806 extends from the VINDI, ME, WP, eastward to the Millinocket, ME, VOR/DME, to the CANME, ME, WP, to the VIGDU, ME, WP.

Q–864: Q–864 is an existing Canadian route that is extended into U.S. airspace across northern Maine. The route currently ends at the EBGIX, Canada, WP (at the U.S./Canadian border in western Maine). This action extends the route eastward from the EBGIX WP, across the State of Maine, running north of the Millinocket, ME, VOR/DME, to the TUGUB, Canada, WP (located southeast of the Houlton, ME, VOR/DME) where it rejoins the remainder of Q–864 into Canada. The EBGIX WP is moved 1.16NM eastward to align with the U.S./Canadian border, and the TUGUB WP is moved 1.23NM westward to align with the U.S./Canada border. The amended Q–864 extends between the EBGIX, ME, WP, and the TUGUB, ME, WP.

The full descriptions of the above route changes are found in ''The Amendment'' section of this rule.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this action only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of modifying nine VOR Federal airways; removing 10 VOR Federal airways; amending four T-routes; establishing 7 T-routes; amending two Q-routes; and establishing one Q-route, in the northeast United States, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points). As such, this action is not expected to cause any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020 and effective September 15, 2020, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–2 [Amended]

From Seattle, WA; Ellensburg, WA; Moses Lake, WA; Spokane, WA; Mulan Pass, ID; Missoula, MT; Helena, MT; INT Helena 119° and Livingston, MT, 322° radials; Livingston; Billings, MT; Miles City, MT; 24 miles, 90 miles 55 MSL, Dickinson, ND; 10 miles, 60 miles 38 MSL, Bismarck, ND; 14 miles, 62 miles 34 MSL, Jamestown, ND; Fargo, ND; Alexandria, MN; Gopher, MN; to Nodine, MN.

V–3 [Amended]

From Key West, FL; INT Key West 083° and Dolphin, FL, 191° radials; Dolphin; Ft. Lauderdale, FL; Palm Beach, FL; Treasure, FL; Melbourne, FL; Ormond Beach, FL; Brunswick, GA; INT Brunswick 014° and Savannah, GA, 177° radials; Savannah; INT Savannah 028° and Vance, SC, 203° radials; Vance; Florence, SC; Sandhills, SC; Raleigh-Durham, NC; INT Raleigh-Durham 016° and Flat Rock, VA, 214° radials; Flat Rock; Gordonsville, VA; INT Gordonsville 331° and Martinsburg, WV, 216° radials; Martinsburg; Westminster, MD; INT Westminster 048° and Modena, PA, 258° radials; Modena; Solberg, NJ; INT Solberg 044° and Carmel, NY, 243° radials; Carmel; Hartford, CT; INT Hartford 084° and Boston, MA, 224° radials; to Boston. From Presque Isle, ME; to Quebec, PQ, Canada. The airspace within R–2916, R–2934, R–2935, and within Canada is excluded.

* * * * *

V–14 [Amended]

From Chisum, NM; Lubbock, TX; Childress, TX; Hobart, OK; Will Rogers, OK; INT Will Rogers 052° and Tulsa, OK, 246° radials; Tulsa; Neosho, MO; Springfield, MO; Vichy, MO; INT Vichy 067° and St. Louis, MO, 225° radials; St. Louis; Vandalia, IL; Terre Haute, IN; Brickyard, IN; Muncie, IN; to Flag City, OH.

* * * * *

V–29 [Amended]

From Snow Hill, MD; Salisbury, MD; Smyrna, DE; DUPONT, DE; Modena, PA; Pottstown, PA; East Texas, PA; Wilkes-Barre, PA; Binghamton, NY; INT Binghamton 005° and Syracuse, NY, 169° radials; to Syracuse.

* * * * *

V–106 [Amended]

From Johnstown, PA; INT Johnstown 068° and Selinsgrove, PA, 259° radials; Selinsgrove; INT Selinsgrove 067° and Wilkes-Barre, PA, 237° radials; Wilkes-Barre; to INT Wilkes-Barre 037° and Sparta, NJ 300° radials.

* * * * *

V–145 [Removed]

* * * * *

V–196 [Removed]

* * * * *

V–203 [Removed]

* * * * *

V–229 [Amended]

From Patuxent, MD; INT Patuxent 036° and Atlantic City, NJ, 236° radials; Atlantic City; INT Atlantic City 055° and Colts Neck, NJ, 181° radials; INT Colts Neck 181° and Kennedy, NY, 209° radials; Kennedy; INT Kennedy 040° and Calverton, NY, 261°

radials; INT Calverton 261° and Kennedy 053° radials; INT Kennedy 053° and Bridgeport, CT, 200° radials; Bridgeport; to Hartford, CT; The airspace within R–5002B is excluded during times of use. The airspace below 2,000 feet MSL outside the United States is excluded.

* * * * *

V–249 [Amended]

From Robbinsville, NJ; INT Robbinsville 320° and Solberg, NJ, 161° radials; Solberg; Sparta, NJ; INT Sparta 018° and Delancey, NY, 119° radials; to DeLancey.

* * * * *

V–273 [Amended]

From INT Huguenot, NY, 134° and Solberg, NJ, 044° radials; Huguenot; INT Huguenot 303° and Hancock, NY, 148° radials; to Hancock;

* * * * *

V–282 [Removed]

* * * * *

V–318 [Removed]

* * * * *

V–322 [Removed]

* * * * *

V–352 [Removed]

* * * * *

V–428 [Removed]

* * * * *

V–471 [Amended]

From Bangor, ME; to Millinocket, ME.

* * * * *

V–490 [Removed]

* * * * *

V–542 [Removed]

* * * * *

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T–295 LOUIE, MD to Presque Isle, ME (PQI) [Amended]

LOUIE, MD	WP	(Lat. 38°36′44.33″ N, long. 076°18′04.37″ W)
BAABS, MD	WP	(Lat. 39°19′51.39″ N, long. 076°24′40.87″ W)
Lancaster, PA (LRP)	VOR/DME	(Lat. 40°07′11.91″ N, long. 076°17′28.66″ W)
Wilkes-Barre, PA (LVZ)	VORTAC	(Lat. 41°16′22.08″ N, long. 075°41′22.08″ W)
LAAYK, PA	WP	(Lat. 41°28′32.64″ N, long. 075°28′57.31″ W)
SAGES, NY	WP	(Lat. 42°02′46.33″ N, long. 074°19′10.33″ W)
SASHA, MA	WP	(Lat. 42°07′58.70″ N, long. 073°08′55.39″ W)
KEYNN, NH	WP	(Lat. 42°47′39.99″ N, long. 072°17′30.35″ W)
Concord, NH (CON)	VOR/DME	(Lat. 43°13′11.23″ N, long. 071°34′31.63″ W)
Kennebunk, ME (ENE)	VOR/DME	(Lat. 43°25′32.42″ N, long. 070°36′48.69″ W)
BRNNS, ME	WP	(Lat. 43°54′08.64″ N, long. 069°56′42.81″ W)
Bangor, ME (BGR)	VORTAC	(Lat. 44°50′30.46″ N, long. 068°52′26.28″ W)
LAUDS, ME	FIX	(Lat. 45°25′10.13″ N, long. 068°12′26.96″ W)
HULTN, ME	WP	(Lat. 46°02′22.29″ N, long. 067°50′02.06″ W)
Presque Isle, ME (PQI)	VOR/DME	(Lat. 46°46′27.07″ N, long. 068°05′40.37″ W)

* * * * * * *

T–314 Barnes, MA (BAF) to Kennebunk, ME (ENE) [New]

Barnes, MA (BAF)	VORTAC	(Lat. 42°09′43.05″ N, long. 072°42′58.32″ W)
FAIDS, MA	FIX	(Lat. 42°17′00.75″ N, long. 072°30′33.91″ W)
PUDGY, MA	FIX	(Lat. 42°19′38.52″ N, long. 072°26′04.25″ W)
LAPEL, MA	FIX	(Lat. 42°27′40.92″ N, long. 072°12′15.79″ W)
Gardner, MA (GDM)	VOR/DME	(Lat. 42°32′45.31″ N, long. 072°03′29.48″ W)
JOHNZ, NH	FIX	(Lat. 42°43′22.87″ N, long. 071°40′55.80″ W)
MANCH, NH	WP	(Lat. 42°52′12.03″ N, long. 071°22′06.54″ W)
KHRIS, NH	FIX	(Lat. 42°57′01.09″ N, long. 071°15′35.56″ W)
RAYMY, NH	FIX	(Lat. 43°03′36.89″ N, long. 071°06′42.16″ W)
YUKES, ME	FIX	(Lat. 43°16′47.89″ N, long. 070°48′47.74″ W)
Kennebunk, ME (ENE)	VOR/DME	(Lat. 43°25′32.42″ N, long. 070°36′48.69″ W)

T–315 Hartford, CT (HFD) to Burlington, VT (BTV) [New]

Hartford, CT (HFD)	VOR/DME	(Lat. 41°38′27.98″ N, long. 072°32′50.70″ W)
DVANY, CT	WP	(Lat. 41°51′44.56″ N, long. 072°18′11.25″ W)
DARTH, CT	WP	(Lat. 41°56′55.86″ N, long. 072°16′20.80″ W)
WITNY, MA	WP	(Lat. 42°02′57.82″ N, long. 072°14′11.96″ W)
SPENO, MA	WP	(Lat. 42°16′48.55″ N, long. 072°09′14.70″ W)
Gardner, MA (GDM)	VOR/DME	(Lat. 42°32′45.31″ N, long. 072°03′29.48″ W)
KEYNN, NH	WP	(Lat. 42°47′39.99″ N, long. 072°17′30.35″ W)
JAMMA, VT	WP	(Lat. 43°16′11.87″ N, long. 072°35′10.63″ W)
EBERT, VT	FIX	(Lat. 43°32′58.08″ N, long. 072°45′42.45″ W)
MUDDI, VT	WP	(Lat. 43°44′39.85″ N, long. 072°51′26.92″ W)
Burlington, VT (BTV)	VOR/DME	(Lat. 44°23′49.58″ N, long. 073°10′57.48″ W)

T–316 LAMMS, NY to MANCH, NH [New]

LAMMS, NY	WP	(Lat. 43°01′35.30″ N, long. 075°09′51.50″ W)
ROOMS, NY	WP	(Lat. 43°01′09.84″ N, long. 074°35′03.27″ W)
PAYGE, NY	WP	(Lat. 43°00′50.48″ N, long. 074°15′12.76″ W)
GALWA, NY	FIX	(Lat. 43°00′34.00″ N, long. 074°00′34.51″ W)
ETZUN, NY	FIX	(Lat. 42°59′55.04″ N, long. 073°31′03.83″ W)
Cambridge, NY (CAM)	VOR/DME	(Lat. 42°59′39.44″ N, long. 073°20′38.47″ W)
DORIS, VT	WP	(Lat. 42°58′42.88″ N, long. 073°03′51.57″ W)
BRATS, VT	FIX	(Lat. 42°57′19.89″ N, long. 072°40′27.73″ W)
STRUM, NH	WP	(Lat. 42°55′51.18″ N, long. 072°16′48.88″ W)
DUBIN, NH	FIX	(Lat. 42°54′43.15″ N, long. 071°59′35.41″ W)
MUGGY, NH	WP	(Lat. 42°53′44.91″ N, long. 071°45′17.41″ W)
BASUU, NH	FIX	(Lat. 42°53′17.86″ N, long. 071°38′48.69″ W)
MANCH, NH	WP	(Lat. 42°52′12.03″ N, long. 071°22′06.54″ W)

* * * * * * *

T–391 Hancock, NY (HNK) to SSENA, NY [Amended]

Hancock, NY (HNK)	VOR/DME	(Lat. 42°03′47.01″ N, long. 075°18′58.62″ W)
OXFOR, NY	FIX	(Lat. 42°22′03.81″ N, long. 075°31′44.03″ W)
PITCH, NY	FIX	(Lat. 42°40′36.94″ N, long. 075°44′49.58″ W)

GTOWN, NY	WP	(Lat. 42°47′20.81″ N, long. 075°49′36.52″ W)
POMPY, NY	FIX	(Lat. 42°55′48.00″ N, long. 075°58′10.10″ W)
FATUP, NY	FIX	(Lat. 43°01′31.89″ N, long. 076°03′59.74″ W)
Syracuse, NY (SYR)	VORTAC	(Lat. 43°09′37.87″ N, long. 076°12′16.41″ W)
PAGER, NY	FIX	(Lat. 43°25′25.64″ N, long. 076°09′30.34″ W)
BRUIN, NY	FIX	(Lat. 43°39′59.04″ N, long. 076°06′55.97″ W)
Watertown, NY (ART)	VORTAC	(Lat. 43°57′07.67″ N, long. 076°03′52.66″ W)
WILRD, NY	FIX	(Lat. 44°15′43.61″ N, long. 075°47′03.12″ W)
LETUS, NY	FIX	(Lat. 44°37′22.34″ N, long. 075°27′11.44″ W)
SSENA, NY	WP	(Lat. 44°54′51.43″ N, long. 074°43′21.31″ W)

* * * * * *Paragraph 2007 Canadian Area Navigation Routes.*

* * * * *

Q–806 VINDI, ME to VIGDU, ME [Amended]

VINDI, ME	WP	(Lat. 45°40′16.23″ N, long. 070°31′10.90″ W)
Millinocket, ME (MLT)	VOR/DME	(Lat. 45°35′12.15″ N, long. 068°30′55.67″ W)
CANME, ME	WP	(Lat. 45°29′16.29″ N, long. 067°37′16.80″ W)
VIGDU, ME	WP	(Lat. 45°28′25.25″ N, long. 067°29′43.86″ W)

* * * * * * *

Q–844 Syracuse, NY (SYR) to VIBRU, NY [Amended]

Syracuse, NY (SYR)	VORTAC	(Lat. 49°09′37.87″ N, long. 076°12′16.41″ W)
VIBRU, NY	WP	(Lat. 44°20′21.30″ N, long. 076°01′19.96″ W)

* * * * * * *

Q–864 EBGIX, ME to TUGUB, ME [New]

EBGIX, ME	WP	(Lat. 45°43′32.67″ N, long. 070°23′50.92″ W)
TUGUB, ME	WP	(Lat. 45°58′42.08″ N, long. 067°46′52.21″ W)

* * * * * *Paragraph 6013 Canadian Area Navigation Routes.*

* * * * *

T–608 HOCKE, MI to YANTC, CT [Amended]

HOCKE, MI	WP	(Lat. 43°15′43.38″ N, long. 082°42′38.27″ W)
KATNO, Canada	WP	(Lat. 43°10′34.00″ N, long. 082°19′32.00″ W)
UKNIX, NY	WP	(Lat. 42°56′44.51″ N, long. 078°55′05.60″ W)
WOZEE, NY	WP	(Lat. 42°56′01.65″ N, long. 078°44′19.64″ W)
CLUNG, NY	WP	(Lat. 43°03′17.17″ N, long. 078°00′13.38″ W)
MONCK, NY	WP	(Lat. 43°04′33.36″ N, long. 077°53′36.67″ W)
Rochester, NY (ROC)	VOR/DME	(Lat. 43°07′04.65″ N, long. 077°40′22.06″ W)
LORTH, NY	FIX	(Lat. 43°07′47.93″ N, long. 077°19′05.32″ W)
MAGEN, NY	WP	(Lat. 43°08′03.28″ N, long. 077°11′00.84″ W)
KONDO, NY	WP	(Lat. 43°08′48.99″ N, long. 076°45′01.72″ W)
WIFFY, NY	WP	(Lat. 43°09′07.96″ N, long. 076°33′00.08″ W)
Syracuse, NY (SYR)	VORTAC	(Lat. 43°09′37.87″ N, long. 076°12′16.41″ W)
STODA, NY	WP	(Lat. 43°07′00.20″ N, long. 075°51′21.23″ W)
VASTS, NY	FIX	(Lat. 43°04′34.62″ N, long. 075°32′29.89″ W)
LAMMS, NY	WP	(Lat. 43°01′35.30″ N, long. 075°09′51.50″ W)
NORSE, NY	WP	(Lat. 42°57′37.88″ N, long. 074°50′03.72″ W)
MARIA, NY	WP	(Lat. 42°50′02.76″ N, long. 074°13′00.50″ W)
Albany, NY (ALB)	VORTAC	(Lat. 42°44′50.20″ N, long. 073°48′11.47″ W)
WARUV, NY	WP	(Lat. 42°45′52.14″ N, long. 073°34′41.41″ W)
GRAVE, NY	WP	(Lat. 42°46′47.34″ N, long. 073°22′20.91″ W)
GRISY, MA	WP	(Lat. 42°41′46.40″ N, long. 072°53′30.14″ W)
WARIC, MA	WP	(Lat. 42°37′42.00″ N, long. 072°30′37.72″ W)
HURLY, MA	FIX	(Lat. 42°35′19.49″ N, long. 072°17′30.40″ W)
Gardner, MA (GDM)	VOR/DME	(Lat. 42°32′45.31″ N, long. 072°03′29.48″ W)
GRAYM, MA	WP	(Lat. 42°06′04.27″ N, long. 072°01′53.49″ W)
BLATT, CT	WP	(Lat. 41°49′37.10″ N, long. 072°00′54.94″ W)
MOGUL, CT	WP	(Lat. 41°43′22.76″ N, long. 072°00′32.87″ W)
YANTC, CT	WP	(Lat. 41°33′22.81″ N, long. 071°59′56.95″ W)
Excluding the airspace within Canada.		

* * * * * * *

T–634 Syracuse, NY (SYR) to VIBRU, NY [New]

Syracuse, NY (SYR)	VORTAC	(Lat. 43°09′37.87″ N, long. 076°12′16.41″ W)
PAGER, NY	WP	(Lat. 43°25′25.64″ N, long. 076°09′30.34″ W)
BRUIN, NY	WP	(Lat. 43°39′59.04″ N, long. 076°06′55.97″ W)
Watertown, NY (ART)	VORTAC	(Lat. 43°57′07.67″ N, long. 076°03′52.66″ W)
VIBRU, NY	WP	(Lat. 44°20′21.30″ N, long. 076°01′19.96″ W)

* * * * * * *

T–662 DEPRI, ME to HULTN, ME [New]

DEPRI, ME	WP	(Lat. 45°57′13.32″ N, long. 070°15′23.83″ W)
KATAH, ME	WP	(Lat. 46°05′00.00″ N, long. 069°00′00.00″ W)
HULTN, ME	WP	(Lat. 46°02′22.29″ N, long. 067°50′02.06″ W)

* * * * * * *

T–698 EBGIX, ME to ACTON, ME [New]

EBGIX, ME	WP	(Lat. 45°43′32.67″ N, long. 070°23′50.92″ W)
HULTN, ME	WP	(Lat. 46°02′22.29″ N, long. 067°50′02.06″ W)
ACTON, ME	WP	(Lat. 46°02′33.81″ N, long. 067°46′51.65″ W)

* * * * * * *

T–705 DANZI, NY to MUTNA, NY [Amended]

DANZI, NY	WP	(Lat. 42°10′41.86″ N, long. 074°57′24.19″ W)
CODDI, NY	FIX	(Lat. 42°22′52.15″ N, long. 075°00′21.84″ W)
MILID, NY	FIX	(Lat. 42°30′25.88″ N, long. 075°02′12.28″ W)
LAMMS, NY	WP	(Lat. 43°01′35.30″ N, long. 075°09′51.50″ W)
USICI, NY	WP	(Lat. 43°11′23.04″ N, long. 075°03′06.15″ W)
GACKE, NY	WP	(Lat. 43°19′11.10″ N, long. 074°57′40.88″ W)
BECKS, NY	WP	(Lat. 43°32′56.63″ N, long. 074°48′03.47″ W)
SMAIR, NY	WP	(Lat. 44°03′32.47″ N, long. 074°26′20.99″ W)
FOSYU, NY	WP	(Lat. 44°12′25.39″ N, long. 074°19′58.15″ W)
SRNAC, NY	WP	(Lat. 44°23′05.00″ N, long. 074°12′16.11″ W)
UUBER, NY	WP	(Lat. 44°28′00.25″ N, long. 074°01′10.54″ W)
RIGID, NY	WP	(Lat. 44°35′19.53″ N, long. 073°44′34.07″ W)
PBERG, NY	WP	(Lat. 44°42′06.25″ N, long. 073°31′22.18″ W)
LATTS, NY	WP	(Lat. 44°51′29.78″ N, long. 073°32′29.26″ W)
MUTNA, NY	WP	(Lat. 45°00′20.84″ N, long. 073°33′27.65″ W)

* * * * * * *

T–781 Flint, MI (FNT) to HULTN, ME [Amended]

Flint, MI (FNT)	VORTAC	(Lat. 42°58′00.38″ N, long. 083°44′49.08″ W)
KATTY, MI	WP	(Lat. 42°57′50.59″ N, long. 083°30′50.76″ W)
HANKY, MI	WP	(Lat. 42°57′43.51″ N, long. 083°21′59.93″ W)
ADRIE, MI	WP	(Lat. 42°57′29.80″ N, long. 083°06′49.84″ W)
MARGN, MI	WP	(Lat. 42°56′59.18″ N, long. 082°38′49.14″ W)
BLUEZ, MI	WP	(Lat. 42°56′49.98″ N, long. 082°31′36.44″ W)
AXOBU, Canada	WP	(Lat. 42°56′39.51″ N, long. 082°23′42.31″ W)
PINTE, ME	FIX	(Lat. 46°26′44.89″ N, long. 070°03′01.26″ W)
HULTN, ME	WP	(Lat. 46°02′22.29″ N, long. 067°50′02.06″ W)
Excluding the airspace within Canada.		

* * * * *

Issued in Washington, DC, on April 8, 2021.

George Gonzalez,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2021–07529 Filed 4–12–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF EDUCATION

34 CFR Chapter III

[Docket ID ED–2020–OSERS–0063]

Final Priority and Requirements—Activities for Traditionally Underserved Populations

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

ACTION: Final priority and requirements.

SUMMARY: The Department of Education (Department) announces a priority and requirements under the Rehabilitation Act of 1973, as amended (Rehabilitation Act) for Activities for Traditionally Underserved Populations, Assistance Listing Number 84.315C. The Department may use this priority and requirements for competitions in fiscal year (FY) 2021 and later years. We take this action to focus attention on an identified national need to fund activities for traditionally underserved populations. Awards will be made to minority entities and Indian Tribes to conduct research, training and technical assistance, and related activities to improve services under the Rehabilitation Act, especially services provided to individuals from minority backgrounds. As defined in the Rehabilitation Act, a minority entity means an entity that is a historically Black college or university, a Hispanic-serving institution of higher education, an American Indian tribal college or university, or another institute of higher education whose minority student enrollment is at least 50 percent.

DATES: This priority and these requirements are effective May 13, 2021.

FOR FURTHER INFORMATION CONTACT: Kristen Rhinehart-Fernandez, U.S. Department of Education, 400 Maryland Avenue SW, Room 5094, Potomac Center Plaza, Washington, DC 20202–2800. Telephone: (202) 245–6103. Email: *Kristen.Rhinehart@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Purpose of Program: Activities for Traditionally Underserved Populations are designed to improve the quality, access, delivery of services, and the outcomes of those services under the Rehabilitation Act, especially services provided to individuals with disabilities from minority backgrounds, and also to increase the capacity of minority entities and Indian tribes to participate in activities funded under the Act.

Program Authority: 29 U.S.C. 718(b)(2)(B).

We published a notice of proposed priority and requirements (NPP) for this program in the **Federal Register** on July 22, 2020 (85 FR 44247). That document contained background information and our reasons for proposing the particular priority and requirements.

Except for minor editorial and technical revisions for grammar and clarity and one substantive change explained in the Analysis of Comments and Changes that follow, there are no differences between the proposed priority and requirements and this final priority and requirements.

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Public Comment: In response to our invitation in the NPP, six parties submitted comments on the proposed priority and requirements.

Generally, we do not address technical and other minor changes or suggested changes the law does not authorize us to make. We group major issues according to subject and discuss substantive issues under each of the titles under the priority and requirements to which they pertain. In addition, we do not address general comments that raise concerns not directly related to the proposed priority or requirements.

Analysis of Comments and Changes: An analysis of the comments and of any changes in the priority and requirements since publication of the NPP follows.

Comment: Three commenters noted that historic disparities among racial and ethnic minorities make this priority particularly relevant and urgent. Commenters stated that the impact of these disparities emphasizes the critical need for providing vocational rehabilitation (VR) services to individuals from traditionally underserved populations. Commenters also asserted that this priority has an obtainable goal that is important for the inclusion of minorities in providing VR services. Further, the commenters elaborated on the importance of advocacy efforts to engage and empower traditionally underserved and underrepresented communities. One commenter emphasized the importance of dismantling racism, ableism, sexism, and bigotry in all forms in the pursuit of cultural change within VR agencies and services.

Discussion: The Department agrees that the priority is critical in addressing racial and ethnic disparities within VR services. Applicants are encouraged to consider all forms of cultural change described in paragraph (c)(1)–(6) of the final priority, under *Project Activities,* for developing new or modifying existing cultural competency training curricula. However, the focus of this priority is on traditionally underserved populations, especially services provided to individuals with disabilities from minority backgrounds.

Changes: None.

Comment: One commenter noted that empathy, teachability, and open-mindedness are crucial for the successful development of professional-consumer relationships.

Discussion: The Department agrees with the comment and considers empathy, teachability, and open-mindedness to be valuable character traits in the VR profession rather than specific competencies. Applicants are encouraged to consider these character traits, and others, as part of developing new or modifying existing cultural competency training curricula.

Changes: None.

Comment: Some commenters addressed the need for program funding that supports individuals interested in studying VR at minority-serving institutions (MSIs). Commenters expressed a need for both doctoral and graduate level funding to be made available for students at MSIs. Commenters stated that expanding funding to MSIs with VR programs would assist in building a culturally competent VR workforce and reduce the current shortage of diverse VR workforce personnel. One commenter specifically recommended funding doctoral programs at MSIs to increase the number of trained university professors from minority backgrounds.

Discussion: The Department agrees with the comments related to the necessity of funding VR training programs that serve minorities. The Department currently funds Rehabilitation Long Term Training (RLTT) programs at Historically Black Colleges and Universities (HBCUs) and Hispanic Serving Institutions (HSIs) that are specifically designed to provide training in VR for those seeking graduate level degrees. Under Assistance Listing Number 84.129, the Department awarded five RLTT grants to HSIs and two grants to HBCUs in FY 2019 and, in FY 2020, the Department awarded six RLTT grants to HSIs and five grants to HBCUs. This final priority, however, requires the dissemination of training materials for incorporation into existing curricula, the analysis of data collected, evidence-based and promising practices, and lessons learned to a variety of stakeholders, including RLTT programs. The broad distribution of training materials makes them available to VR university professors and instructors, including at MSIs.

Changes: None.

Comment: One commenter noted that it would be valuable to establish an anonymous yearly performance evaluation tool for VR counselors to gather consumer feedback. The commenter suggested that consumer feedback could be used to evaluate the success or failure of cultural competency training among VR professionals and evaluate consumer job placement.

Discussion: The Department appreciates this suggestion. The priority outlines a similar evaluation approach under *Project Activities,* paragraph (j)(2), which states the grantee must assess whether the application of cultural competency practices led to improvements in policies, approaches, and behaviors in State VR agencies through the use of voluntary focus groups or another confidential approach. There are multiple approaches that a grantee could use to gather anonymous and/or confidential consumer feedback in the performance evaluation process, and an applicant's incorporation of an approach, such as the one suggested by the commenter, would be consistent with the project activities.

Changes: None.

Comment: One commenter noted that the focus areas listed in the priority, under *Project Activities,* paragraph (h)(2)(i)–(iv), are all beneficial, but some may hold more importance than others. The commenter explained that the varying degree of importance for each topic area is dependent on the data collected regarding successful and unsuccessful closures and identified disparities among minority VR participants at respective VR agencies. The commenter asserted that each VR agency is exposed to a unique and varying categorization of inequalities, which affect the specific needs of the VR agencies and ultimately influence the data collection process. The commenter expressed concern about the limitation of the focus areas and the ability to formulate solutions for identified inequalities from the collected data. To remedy the problem, the commenter recommended linking the data collection process and the focus areas to best resolve and address inequalities within VR agencies. In doing so, the grantee would be able to identify how the focus areas directly remedied inequalities within VR agencies.

Discussion: The Department agrees with the commenter that examining reasons for successful and unsuccessful closures among minority VR program participants and identifying disparities between minority and non-minority consumers, as described in the priority under *Project Activities,* paragraph (h)(1), should inform the selected focus areas. However, applicants may also be able to use other sources of data to inform their selections. For example, under *Project Activities,* paragraph (a), applicants must collect and analyze data, including from the RSA–911 and other relevant credible sources, about the minority populations and

subpopulations identified in the application. The Department acknowledges that by requiring applicants to select two areas of focus in the application, they will have to do so with limited opportunity to consider all potential sources of data, including successful and unsuccessful closures, to make informed selections. Therefore, the grantee will work with the assigned project officer to identify any adjustments to planned approaches and activities, based on data collected post award, to the selected focus areas.

Changes: None.

Comment: One commenter noted the importance of focusing on fostering regular interactions with professionals and other individuals from diverse cultural backgrounds to allow a greater understanding of the needs of underserved populations and barriers to employment.

Discussion: The Department agrees with the commenter's remarks. Informed interactions between VR counselors and paraprofessionals, human resource and professional development specialists, and consumers from traditionally underserved populations are described in the priority under *Project Activities.* First, focus area (h)(2)(ii) emphasizes establishing new partnerships and strengthening existing partnerships with community rehabilitation providers, workforce programs, and other relevant local community agencies to better meet the needs of individuals with disabilities from minority backgrounds. Second, focus area (h)(2)(iv) speaks to creating opportunities to involve participants from minority populations or subpopulations in the establishment of policies and procedures that encourage collaboration between State VR agencies and other State agencies. These two focus areas encourage and facilitate strong partnerships between individuals with disabilities from minority backgrounds and State VR agencies.

Changes: None.

Comment: One commenter asked for clarification on whether cultural competency training and focus area activities are connected and questioned if they should build upon each other. The commenter discussed the limitations of training counselors in cultural competency without the VR agency fully embracing cultural competency. The commenter stressed the importance of connecting cultural competency training and agency-level focus areas and recommended adding a focus area to emphasize this connection.

Discussion: The Department agrees that it is important to connect cultural competency training at the participant level and at the agency level. However, we do not believe that this concept warrants its own focus area, because it is woven throughout the priority in the following ways: (1) Under *Project Activities,* paragraph (e), requiring, as part of the training, that participants develop action plans to continue applying the knowledge, practices, and awareness gained from the training in their respective work settings; (2) under *Project Activities,* paragraph (g)(6), assessing participant progress towards completing their action plans and providing coaching to address issues or challenges, as needed; and (3) under *Project Activities,* paragraph (h), enabling State VR agencies to apply cultural competency practices to various activities of State VR agencies. These project activities allow for cultural competency training to create change at the participant level and the State VR agency level, which demonstrates the necessary connection between the two entities.

Changes: None.

Comment: One commenter noted the cost and level of effort for specific activities in the priority. The commenter highlighted the following three focus areas described in the priority under *Project Activities,* paragraph (h)(2), for their multiyear involvement and potentially high cost: Establishing new partnerships and strengthening existing partnerships, developing business engagement activities, and creating opportunities to involve participants from minority backgrounds. The commenter also referenced providing training and technical assistance on an ongoing basis and noted that the link between these activities and the outcomes may be longer term in nature.

Discussion: The Department acknowledges concerns about cost and level of effort for some of the focus areas and agrees that outcomes resulting from the training and technical assistance may be longer term in nature. However, with regard to providing training and technical assistance under paragraph (h)(2)(ii)–(iv), the priority states that the grantee must develop products, offer communities of learning, conduct webinars, and offer other training and technical assistance on delivery methods, as appropriate, related to paragraph (h)(1) and (2) and provide follow-up to State VR agencies to support the sustainability of cultural competency practices. Therefore, training and technical assistance should be developed and delivered in a manner that allows for participation from many State VR agencies. Applicants are encouraged to select focus areas based on their subject area expertise and level of effort and allow for the most cost-effective options for developing and delivering training and technical assistance. As stated under *Application Requirements,* paragraph (c) ''Adequacy of Project Resources,'' proposed costs should be reasonable in relation to the anticipated results and benefits.

Changes: None.

Comment: One commenter recommended expanding cultural competency training to management and leadership personnel rather than limiting the training to VR counselors and paraprofessionals, and human resource and professional development specialists as described in the priority. The commenter explained that management and leadership professionals within VR agencies are well positioned to influence system and structural inequalities. The commenter noted that structural inequalities within service culture and general lack of trust within VR agencies could best be addressed by management and leadership personnel. The commenter recommended incorporating the involvement of management and leadership personnel in cultural competency training to effectively reduce agency-level inequality and stimulate effective implementation of learned strategies.

Discussion: The Department agrees with this comment. We support involvement of management and leadership personnel in cultural competency training and believe it will encourage the participation of VR counselors and paraprofessionals, and human resource and professional development specialists in cultural competency training. Management and leadership personnel likely will sustain the practices learned through cultural competency training and ensure that they are applied to VR agency-level policies. Sustainability is key to implementing government-funded projects after the funding period has expired. Incorporating management and leadership personnel in training activities will help maintain sustainability at State VR agencies and ensure participation in cultural competency trainings.

Changes: We have expanded the list of participants expected to receive cultural competency training to include management and leadership personnel under *Project Activities* and *Application Requirements.* Participants include VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies.

Comment: One commenter suggested that initial data collection activities should take place before identifying the specific competencies that VR counselors and paraprofessionals, and human resource and professional development specialists, should be able to demonstrate after successfully completing cultural competency training. The commenter asserted that gathering input and feedback from a diverse group of stakeholders and subject matter experts to inform curricula is a critical phase in developing specific competency indicators.

Discussion: The Department agrees that gathering input and feedback from a diverse group of stakeholders and subject matter experts will inform the training curricula and will serve as a valuable tool in developing specific competency indicators. However, the Department disagrees that initial data collection activities, input, and feedback should take place before the identification of specific competencies that VR counselors and paraprofessionals and human resource and professional development specialists should be able to demonstrate after successful completion of cultural competency training. Under *Application Requirements,* ''Significance of the Proposed Project,'' paragraph (a)(4)(i), applicants must describe the cultural competencies that VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel must demonstrate to provide high-quality services to individuals with disabilities from minority backgrounds. The Department believes there is enough reference material to help inform applicants in identifying competencies for this project. The Department encourages applicants to examine existing research materials regarding cultural competency in the workplace. More information can be found in the *Background* section of the NPP. Upon award, the grantee will work with the assigned project officer to identify revisions or adjustments to the competencies described in the application, as needed, based on data collected and input and feedback gathered from diverse stakeholders, subject matter experts, and each pilot, during the first year of the project. Under *Project Activities,* paragraphs (d) and (f), the Department will clarify that input and feedback from a diverse group of stakeholders and subject matter experts and from the pilot may inform the competencies.

Changes: We added ''competencies'' under *Project Activities,* paragraph (d), to the list of items that will be informed by the input and feedback from stakeholders. Further, we added ''and competencies'' under *Project Activities,* paragraph (f), with respect to the items to which grantees must make revisions, as necessary.

Comment: One commenter discussed order of selection within VR agencies. The commenter suggested that VR agencies are likely to implement order of selection over the next few years. The commenter expressed concern that implementing an order of selection could further limit access to VR services for traditionally underserved populations.

Discussion: The Department appreciates the commenter's concern regarding the effect of the potential implementation of an order of selection by VR agencies for VR services for traditionally underserved populations. According to section 101(a)(5) of the Rehabilitation Act, as amended by title IV of the Workforce Innovation and Opportunity Act, and 34 CFR 361.36(a)(1), State VR agencies are required to implement an order of selection if they anticipate that they will not have sufficient fiscal or personnel resources to fully serve all eligible individuals. A State VR agency's decision to establish and implement an order or selection would not limit access to VR services for individuals with disabilities from traditionally underserved populations so long as those individuals are determined eligible for VR services and assigned to an open category under the VR agency's order of selection policy. Under an order of selection, individuals with the most significant disabilities are selected and assigned to the first priority category to be served, followed in order by additional priority categories determined by the VR agency for those with significant disabilities and individuals with disabilities. To the extent that individuals with disabilities from traditionally underserved populations are determined eligible for VR services and are assigned to open categories, they will be served alongside those who are not from underserved populations. Finally, it is important to note that not all VR agencies are implementing an order of selection and those who are may open and close priority categories as resources permit.

Changes: None.

Comment: One commenter recommended expanding cultural competency training to include personnel working for VR agencies, specifically community rehabilitation providers and identified business partners.

Discussion: The Department appreciates the commenter's suggestion. In paragraph (h)(2), under *Project Activities,* applicants must select two focus areas. Under focus area (h)(2)(ii), applicants must establish new partnerships and strengthen existing partnerships with community rehabilitation providers, workforce programs, and other relevant local community agencies and organizations to better meet the needs of individuals with disabilities from minority backgrounds. Further, under focus area (h)(2)(iii), applicants must develop business engagement activities for individuals with disabilities from minority backgrounds. Applicants may choose to extend cultural competency training to community rehabilitation providers and other identified business partners under focus areas (h)(2)(ii) and (iii).

Changes: None.

Comment: Two commenters recommended additional content areas that should be considered in cultural competency training. These included the effects of trauma and the effects of poverty on traditionally underserved populations. One commenter recommended trauma training for VR professionals to understand the role that trauma plays in the context of race, national origin, immigration status, and disability. The commenter stressed that trauma training would improve relationships between VR professionals and consumers from traditionally underserved populations. Another commenter encouraged RSA to incorporate the effects of poverty on underserved populations in cultural competency training curriculum. The commenter explained that working with individuals who are living in poverty requires its own form of cultural competency. Furthermore, the commenter stressed that understanding poverty among minority populations is crucial to reducing systemic barriers to accessing and receiving VR services and ultimately gaining successful employment. The focus on training in trauma and poverty outlines the increased need for trust, understanding, and rapport between VR counselors and consumers.

Discussion: The Department agrees that the intersection of topics such as trauma and poverty are important and critical to the development of cultural competency curriculum. In FY 2015, the Department funded the Vocational Rehabilitation Technical Assistance Center: Targeted Communities (VRTAC–TC)—Project E3. This program was

specifically designed to empower people with disabilities from underserved and unserved communities and help them achieve their independent living and employment goals. The goal of Project E3 was to provide State VR agencies and their partners with the skills and competencies needed to effectively and efficiently address barriers to competitive integrated employment and community integration encountered by persons with disabilities from economically disadvantaged targeted communities and high-leverage groups with national applicability. To learn more about Project E3, please visit the website (*https://projecte3.com/*). Applicants may incorporate topics such as trauma and poverty into the cultural competency curriculum, as well as other relevant topics, they deem critical to the project. For example, in the priority, under *Project Activities,* paragraph (c), applicants must develop new or modify existing cultural competency training curricula for VR counselors and paraprofessionals and human resource and professional development specialists working in State VR agencies and related agencies. To satisfy this requirement, the curricula must include other critical content as determined by the project, which could include poverty or trauma.

Changes: None.

Comment: One commenter requested clarification on whether RSA requires the applicant to identify a specific minority population that will be the focus of cultural competency training.

Discussion: The Department appreciates the commenter's question. Applicants must identify one or more minority population(s) and subpopulation(s) that will be the focus of the cultural competency training. Under *Project Activities,* paragraph (a), applicants must collect and analyze data about the minority populations and subpopulations identified in the application, and in paragraph (b) applicants must share the data about the identified minority populations and subpopulations. Applicants are strongly encouraged to incorporate foundational concepts, definitions, principles, and practices that address structural and systemic racism more broadly in the cultural competency training including history, relevant experiences, and subject matter expertise, as appropriate. Applicants may refer to *Project Activities,* paragraph (c), for further details about the content of the training.

Changes: None.

Application Requirements

Comment: One commenter expressed concern regarding a cost-sharing requirement as well as an eight percent limitation on indirect costs and the disadvantage this may create for applicants representing MSIs. The commenter explained that MSIs are currently confronting significant uncertainty because of the COVID–19 pandemic, which could result in a low yield of applicants from MSIs for this competition. The commenter also noted that the short turnaround time on grant application materials could further limit applications.

Discussion: The Department appreciates the concern regarding a possible cost share requirement and recognizes that this could result in a disadvantage for minority entities in this competition. As reflected in the notice inviting applications (NIA) for this program, published elsewhere in this issue of the **Federal Register**, there is no cost share or matching requirement for this competition. In addition, also as reflected in the NIA, the Department has determined that the applicable indirect cost rate for this grant is an unrestricted indirect cost rate, rather than the eight percent indirect cost rate for educational training grants. Finally, the deadline for transmittal of applications is 60 days from the date of publication in the **Federal Register**.

Changes: None.

Comment: One commenter raised a question concerning training versus technical assistance for this priority. The commenter noted that training is a crucial aspect of the ''Quality of Project Design'' section under the *Proposed Application Requirements.* The commenter also noted that technical assistance (TA) is mentioned in the ''Quality of Project Design'' section and questioned whether technical assistance refers to universal TA or targeted TA activities. The commenter asked whether intensive TA activities would be considered for this priority.

Discussion: The purpose of this project is to improve the delivery of VR services to, and the employment outcomes of, individuals with disabilities from minority backgrounds. This project is not a training and technical assistance center, and the goal of this project is not to provide intensive, targeted, or universal technical assistance. Rather, applicants should focus project design efforts on describing how cultural competency training will be provided to VR counselors and paraprofessionals, and human resource and professional development specialists working in State VR agencies. Under *Project Activities,* paragraph (h)(3), applicants must develop products, offer communities of learning, conduct webinars, and offer other training and technical assistance delivery methods, as appropriate. It is at the applicant's discretion to select technical assistance delivery methods that will achieve the intended outcomes of the project.

Changes: None.

Technical Changes

Comment: None.

Discussion: We are revising the priority and requirements to accurately reflect that all material produced by the project must be accessible to individuals with disabilities in accordance with section 504 of the Rehabilitation Act and title II of the Americans with Disabilities Act, as applicable.

Changes: We have revised *Project Activities,* paragraph (k)(2), and *Application Requirements,* ''Adequacy of Project Resources,'' paragraph (c)(2), to reflect this change.

Comment: None.

Discussion: We are revising the *Regulatory Flexibility Act Certification* section to accurately reflect that the small entities that this regulatory action will affect are minority entities and Indian Tribes, which are the eligible applicants for this competition.

Change: We have revised the types of small entities listed in the *Regulatory Flexibility Act Certification* section.

Comment: None.

Discussion: We are revising the language regarding nondiscrimination requirements and we are moving it into the Department's standard language to convey its general applicability.

Change: Under *Application Requirements,* ''Quality of Project Personnel'' we have removed paragraph (d)(2). Under *Program Authority,* we added a note stating that projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Comment: None.

Discussion: Executive Order 13985, ''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,'' (86 FR 7009) issued January 20, 2021, states, ''Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government. Because advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies must recognize and work to redress inequities

in their policies and programs that serve as barriers to equal opportunity.'' This priority addresses equity in providing services by State VR agencies, which is in line with the Executive order. The technical changes described below further align with and support the Executive order. We modified language to be more specific and to strengthen requirements associated with the training curricula so that applicants may formulate training content that will improve cultural competency in State VR agencies under *Project Activities,* paragraphs (c)(1), (2)(ii), and (2)(iii).

Changes: We have replaced the term ''systemic inequalities'' with the term ''systemic racism'' under *Project Activities,* paragraph (c)(1). We have added the term ''dynamics of oppression on an individual'' under *Project Activities,* paragraph (c)(2)(ii). We have added the term ''microaggressions'' under *Project Activities,* paragraph (c)(2)(iii).

Final Priority

Improving the Delivery of Vocational Rehabilitation Services to, and the Employment Outcomes of, Individuals With Disabilities From Minority Backgrounds

This priority funds a five-year cooperative agreement to focus on changing the status quo and improving outcomes for individuals with disabilities from minority backgrounds through providing cultural competency training and promoting application for Vocational Rehabilitation (VR) leadership and staff, collecting and analyzing relevant data, evaluating cultural competency training, and disseminating evidence-based practices. VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies need to be adequately prepared to effectively meet the needs of individuals with disabilities, especially those from minority backgrounds.

Project Activities:

To be considered for funding under this priority, applicants must, at a minimum, propose a project that will conduct the following activities in a culturally appropriate manner:

(a) Collect and analyze data, including from RSA–911 data [1] and other relevant sources, about the minority populations and subpopulations identified in the application. Data may include, but is not limited to, employment outcomes, earnings, retention, length of time in VR, challenges or barriers to employment and retention, education, and other relevant data, as available;

(b) Share the data about the identified minority populations and subpopulations with RSA, State VR agencies, RSA VR technical assistance centers, and other relevant partners and stakeholders;

(c) Develop new or modify existing cultural competency training curricula for VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies. To satisfy this requirement, the curricula must—

(1) Contain knowledge, critical awareness, and skills development that confront structural and systemic racism;

(2) Address:

(i) Actions that lead to change, such as full inclusion and participation in the mainstream of society, an individual's right to pursue a meaningful career, respect for self-determination and informed choice, and competitive employment;

(ii) Exploration of unconscious and conscious biases, privilege, stereotypes, prejudicial attitudes, and the dynamics of oppression on an individual; and

(iii) Examination of microaggressions, service culture, policies and practices, and lack of trust in the State VR agency;

(3) Incorporate principles of person-centered planning;

(4) Incorporate culturally appropriate and culturally sensitive training methods;

(5) Include evidence-based [2] content, to the extent possible; and

(6) Include other critical content, as determined by the project;

(d) Gather input and feedback from a diverse group of stakeholders and subject matter experts to inform the curricula, competencies, training and application, and evaluation, including RSA, State VR agencies, and other relevant partners;

(e) Require, as part of the training, that participants develop action plans to continue applying the knowledge, practices, and awareness gained from the training in their respective work settings;

(f) Create two cohorts to pilot the cultural competency training by the end of the first year and evaluate the results. The cohorts must be comprised of VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies. For the first cohort, the grantee must collect pre- and post-assessments and feedback from participants. After the first cohort, the grantee must make revisions and improvements to the training curricula and competencies, as necessary. The grantee must then test the training in a second cohort to determine if the revisions and improvements worked.

(g) Deliver cultural competency training to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies in years two, three, four, and five. To meet this requirement, the grantee will—

(1) Conduct outreach to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies so that they are aware of, and can participate in, cultural competency training;

(2) Offer training using a variety of methods such as a traditional classroom setting, distance learning facilitated by qualified instructors, regional trainings, and through other delivery methods, as appropriate, to meet the needs of the targeted audience;

(3) Use an online learning platform that is user friendly, compatible with most mobile devices and State VR agency platforms, and meets government and industry-recognized standards for accessibility and cybersecurity;

(4) Use grant funds to offset costs associated with travel for participants, as needed;

(5) Conduct an assessment before and after providing training for each participant to establish baseline knowledge, and assess strengths and specific areas for improvement, attainment, and application of skills, and any issues or challenges to be addressed post-training to ensure improved delivery of VR services to the minority populations and subpopulations identified in the application;

[1] The RSA–911 collects a variety of participant characteristics (sex, age, race, disability, health insurance, education level, etc.), barriers to employment (ex-offender, homeless, single parent, etc.), services provided (career, training, and other services), duration of VR case, employment status at the time of exit from the program, and employment status post-exit.

[2] For the purpose of this priority, ''evidence-based'' means the proposed project component is supported, at a minimum, by evidence that demonstrates a rationale (as defined in 34 CFR 77.1), where a key project component included in the project's logic model (as defined in 34 CFR 77.1) is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes (as defined in 34 CFR 77.1).

(6) Assess participant progress towards completing their action plans and provide coaching to address issues or challenges, as needed; and

(7) Offer continuing education units (CEUs), Commission on Rehabilitation Counseling Credit (CRCC), Certified Rehabilitation Counselor (CRC) credit, a certificate of completion, or another form of documentation or verification, as appropriate, to participants that successfully complete the training and fulfill their action plans.

(h) Enable State VR agencies to apply cultural competency practices to various activities of State VR agencies. In Assume Nothing! A Monograph from the 38th Institute on Rehabilitation Issues to Address Underserved Populations, Including Individuals Who Are Deaf-Blind (2014), several recommendations were offered to help State VR agencies remove attributes of service design and delivery that may result in inequality. In line with those recommendations, to meet this requirement, applicants must—

(1) Examine reasons for successful and unsuccessful closures among minority VR program participants and identify disparities between minority and non-minority participants; and collaborate and share data on the disparities between minority and non-minority participants with State VR agencies and the VR–TA Center-Quality Management (VRTAC–QM) and VR TA Center-Quality Employment (VRTAC–QE), which began on October 1, 2020, to inform their work with State VR agency personnel to ensure that management decisions are established that support sustainable changes in the way outreach, intake, and VR services are provided based on the cultural competency training VR personnel receive;

(2) Select two of the following focus areas—

(i) Update or revise existing policies and procedures or develop new action plans to strengthen and improve delivery of services in a culturally appropriate and culturally sensitive manner;

(ii) Establish new partnerships and strengthen existing partnerships with community rehabilitation providers, workforce programs, and other relevant local community agencies and organizations (*i.e.,* agencies and organizations that provide services related to behavior and mental health, substance dependence, and intellectual developmental disabilities) to better meet the needs of individuals with disabilities from minority backgrounds;

(iii) Develop business engagement activities for individuals with disabilities from minority backgrounds;

(iv) Create opportunities to involve participants from minority populations, or subpopulations, as appropriate, in the establishment of policies and procedures that encourage collaboration between State VR agencies and other State agencies;

(v) Develop opportunities for staff development and retention designed to provide new and existing VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel from minority populations and subpopulations with peer-to-peer mentorship, as well as guidance and support they may need to be successful; and

(vi) Any other activity that improves delivery of services to and outcomes for individuals with disabilities from minority backgrounds;

(3) Develop products, offer communities of learning, conduct webinars, and offer other training and technical assistance delivery methods, as appropriate, related to (1) and (2) above; and

(4) Follow up with State VR agencies to support the sustainability of cultural competency practices;

(i) Gather input and feedback from a diverse group of stakeholders and subject matter experts to inform the training curricula, application of cultural competency practices in each selected area of focus, the evaluation, the products developed, and the collaborative work with RSA, State VR agencies, and other relevant partners;

(j) Evaluate the project. To satisfy this requirement, the grantee must—

(1) Assess whether cultural competency training provided to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies contributed to improvements in the delivery of services to and employment outcomes for individuals with disabilities from minority backgrounds;

(2) Assess whether the application of cultural competency practices led to improvements in policies, approaches, and behaviors in State VR agencies;

(3) Through voluntary focus groups, use of a unique identifier, or another approach that adheres to participant confidentiality requirements in 34 CFR 361.38, gather input and feedback from VR program participants who identify as members of the minority populations or subpopulations described in the application about their experiences to assess whether the cultural competency training and application of cultural competency practices contributed to improvements in the delivery of service; and

(4) Develop a plan for an evaluation that includes, but is not limited to, approaches and methodologies, timelines, instruments, or tools that will be used, a timeline for the evaluation and measurement benchmarks, and a process for gathering feedback from VR counselors and paraprofessionals, human resource and professional development specialists, VR management and leadership personnel, and State VR agencies for continuous improvement throughout years two, three, four, and five of the project;

(k) Develop and maintain a state-of-the-art archiving and dissemination platform, or modify an existing platform, that is open and available to all VR counselors and paraprofessionals, human resource and professional development specialists, VR management and leadership personnel, and State VR agencies. To meet this requirement, the grantee must—

(1) Ensure the archiving and dissemination platform provides a central location for all materials related to the project, such as data collection, reports, training curricula, audiovisual materials, webinars, communities of learning, examples of evidence-based and promising practices related to the selected areas of focus, and other relevant material;

(2) Ensure that all materials developed by the project are accessible to individuals with disabilities in accordance with section 504 of the Rehabilitation Act and title II of the Americans with Disabilities Act, as applicable;

(3) Disseminate information about the project, including products such as outreach, training curricula, presentations, reports, outcomes, and other relevant information through RSA's National Clearinghouse of Rehabilitation Training Materials (NCRTM) (*https://ncrtm.ed.gov/*);

(4) In the final year budget period, ensure the archiving and dissemination platform can be sustained or coordinate with RSA to transition the platform to the NCRTM so that it may be archived and accessible to all after the grant ends;

(5) Disseminate, to all State VR agencies, RSA-funded Rehabilitation Long-Term Training projects and TA Centers, Department-funded programs, and Federal partners, as applicable, the training material for incorporation into existing curricula, as well as products, analysis of data collected, evidence-

based and promising practices, and lessons learned. To satisfy this requirement, the grantee must—

(i) Develop participant guides, implementation materials, toolkits, manuals, and other relevant material for instructors, facilitators, State VR agency directors, and human resource and professional development specialists to effectively deliver cultural competency training, in their respective organizations; and

(ii) Provide outreach to and support State VR agencies, RSA-funded Rehabilitation Long-Term Training projects and TA Centers, Department-funded programs, and Federal partners, as applicable, in incorporating or expanding cultural competency training and in applying cultural competency practices across selected focus areas.

Types of Priorities:

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)), or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Final Application Requirements:

The Assistant Secretary establishes the following requirements for this priority. We may apply these requirements in any year in which this priority is in effect.

Application Requirements of Priority:

To be considered for funding under this priority, applicants must, at a minimum, propose a project that will conduct the following activities in a culturally appropriate manner. The Department encourages innovative approaches to meet these requirements. Applicants must—

(a) Demonstrate, in the narrative section of the application under ''Significance of the Proposed Project,'' the minority populations and subpopulations that will be addressed by this project. To meet this requirement, applicants must—

(1) Describe the disparities that exist with respect to VR services and employment outcomes for individuals with disabilities from minority backgrounds, identify education and training needs and any challenges to obtaining education and employment, and present any relevant data;

(2) Describe how the project proposes to improve VR services for, and employment outcomes of, individuals with disabilities from the identified minority backgrounds and subpopulations;

(3) Describe how data about the identified minority populations and subpopulations will be collected and analyzed to inform the field and the training curricula;

(4) Demonstrate how the proposed project will increase the number of VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel trained in providing culturally competent VR services. To meet this requirement, applicants must—

(i) Describe the cultural competencies that VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel must demonstrate to provide high-quality services to individuals with disabilities from minority backgrounds; and

(ii) Present information about potential challenges or difficulties to effectively provide cultural competency training and to apply cultural competency practices and any evidence-based practices or strategies that may be used to address these challenges;

(b) Demonstrate, in the narrative section of the application under ''Quality of Project Design,'' how the proposed project will meet the requirements and intended outcomes of this priority. To meet this requirement, applicants must—

(1) Describe the plan for implementing the project, including key activities, timelines, milestones, and measurable intended project outcomes. The plan should contain adequate time to develop and pilot the training curricula, as well as develop content to support the selected areas of focus. The plan should also build in alternative ways to deliver training and conduct participant follow-up, in the event that convening face-to-face is not possible due to health and safety concerns;

(2) Describe how the proposed project will gather input and feedback from a diverse group of stakeholders and subject matter experts to inform the curricula, training and application, and evaluation, including communication and coordination with RSA, State VR agencies, and other relevant partners. The plan must include alternative forms of communication if in-person meetings are not permitted due to health safety and concerns;

(3) Describe how the proposed project will provide outreach to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies so that they are aware of, and can participate in, cultural competency training;

(4) Describe how cultural competency training will be provided to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies, which must include—

(i) Proposed methods, frequency, and duration of the training;

(ii) A proposed methodology for determining training topics;

(iii) A description of how the training needs of recipients, including their ability to respond effectively to the training will be assessed;

(iv) Proposed coaching techniques that may be provided to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies or related agencies to address issues or challenges, as needed;

(v) A proposed training module or an outline of a training module to demonstrate how VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel would be trained. The module or outline is a required attachment in the application and must include, at a minimum—

(A) The goals and objectives of the training module;

(B) A description of what participants should know and be able to do as a result of successfully completing the module or presentation;

(C) Up-to-date resources, publications, and other materials that may be used to develop the training module or outline;

(D) Exercises that will provide an opportunity for application of the subject matter;

(E) A description of how participant knowledge, skills, and abilities will be measured; and

(F) A description of how the outcomes and impact of the cultural competency training will be measured;

(5) Describe how the project will incorporate current research and evidence-based and promising practices, including research about adult learning principles and implementation science, in the development of culturally competent training curricula and enable State VR agencies to apply cultural competency practices to various activities of State VR agencies;

(6) Describe how the project will examine reasons for successful and unsuccessful closures among individuals with disabilities from minority backgrounds, identify disparities between minority and non-minority participants, and describe how this information will be shared with State VR agencies and the VRTAC–QM and VRTAC–QE in ways that will inform their work with State VR agency personnel to ensure that management decisions are established that support sustainable changes in the way outreach, intake, and VR services are provided based on the cultural competency training VR personnel receive;

(7) Select two focus areas from the list described in the priority and develop products, offer communities of learning, conduct webinars, and offer other training and technical assistance delivery methods that are of high quality and of sufficient intensity and duration to achieve the intended outcomes of the proposed project. To meet this requirement, applicants must describe—

(i) Knowledge, skills, and experience in each of the selected areas of focus;

(ii) Methods, frequency, and duration of the activities;

(iii) Proposed methodology for determining selected areas of focus; and

(iv) How follow-up will be provided to State VR agencies to support the sustainability of cultural competency practices within the selected areas of focus; and

(8) Describe how the proposed project will use accessible technology to achieve the intended project outcomes.

(c) Demonstrate, in the narrative section of the application under ''Adequacy of Project Resources,'' how the proposed costs are reasonable in relation to the anticipated results and benefits. In order to meet this requirement, applicants must—

(1) Describe any proposed consultants or contractors named in the application, their areas of expertise, and provide rationale to demonstrate the need;

(2) Describe costs associated with technology, including, but not limited to, maintaining an online learning platform, state-of-the-art archiving and dissemination platform, and communication tools (*i.e.,* Microsoft Teams, Zoom, Google, Amazon Chime, Skype, etc.) ensuring all products and services are accessible to individuals with disabilities in accordance with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, as applicable;

(3) Designate funds to travel to Washington, DC, or for virtual conferences and meetings when the in-person meetings are not possible due to health and safety concerns, in the beginning of the second year of the project for a one and one half day meeting to present an analysis of the pilots, training curricula, delivering additional activities in the selected focus areas, and plans for outreach, dissemination, and evaluation of the project; and

(4) Designate funds to travel to Washington, DC, or virtual conferences and meetings when in-person meetings are not possible due to health and safety concerns, in the final year of the project for a one and one half day meeting to present an analysis of data collected, outcomes, results of the evaluation, evidence-based and promising practices, and lessons learned;

(d) Demonstrate, in the narrative section of the application under ''Quality of Project Personnel,'' how—

(1) The proposed project will encourage applications for employment from persons who are members of groups that have historically been underrepresented based on race, color, national origin, gender, age, or disability, as appropriate;

(2) The proposed key project personnel will demonstrate the qualifications and experience to provide the training required under this priority and to achieve the project's intended outcomes, including how the proposed project personnel have a degree of knowledge and understanding of cultural factors sufficient to ensure the delivery of training in a culturally appropriate manner; and

(3) The proposed project personnel will demonstrate knowledge and experience working with the VR profession, especially in the provision of services to individuals from minority backgrounds and in working with VR counselors, paraprofessionals, human resource and professional development specialists, and State VR agencies;

(e) Demonstrate, in the narrative section of the application under ''Quality of the Management Plan,'' how the applicant will ensure that—

(1) The project's intended outcomes, including the evaluation, will be achieved on time and within budget, through—

(i) Clearly defined responsibilities of key project personnel, consultants, and contractors, as applicable;

(ii) Procedures to track and ensure completion of the action steps, timelines, and milestones established for key project activities, requirements, and deliverables;

(iii) Internal monitoring processes to ensure that the project is being implemented in accordance with the established application, cooperative agreement, once developed, and project plan; and

(iv) Internal financial management controls to ensure accurate and timely obligations, drawdowns, and reporting of grant funds, as well as monitoring contracts, in accordance with the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 CFR part 200 and the terms and conditions of the Federal award;

(2) The allocation of key project personnel, consultants, and contractors, as applicable, including levels of effort of key personnel that are appropriate and adequate to achieve the project's intended outcomes, including an assurance that key personnel will have enough availability to ensure timely communications with stakeholders and RSA;

(3) The products and services are of high quality, relevance, and usefulness, in both content and delivery; and

(4) The proposed project will benefit from a diversity of perspectives, including those of State and local personnel, individuals with disabilities from minority backgrounds, providers, researchers, and policy makers, among others, in its development and operation.

This document does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This document does *not* solicit applications. In any year in which we choose to use one or more of these priorities and requirements we invite applications through a notice in the **Federal Register**.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, OMB must determine whether this regulatory

action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

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

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

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

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed this final regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing this final priority and requirements only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with these Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities. The costs also include the time and effort in responding to the priority and requirements for entities that choose to respond.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance. The Executive order does not apply to Indian Tribes.

This document provides early notification of our specific plans and actions for this program.

Regulatory Flexibility Act Certification: The Secretary certifies that this final regulatory action would not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration Size Standards define ''small entities'' as for-profit or nonprofit institutions with total annual revenue below $7,000,000 or, if they are institutions controlled by small governmental jurisdictions (that are comprised of cities, counties, towns, townships, villages, school districts, or special districts), with a population of less than 50,000.

The small entities that this final regulatory action will affect are minority entities and Indian Tribes, which are the eligible applicants for this program. We believe that the costs imposed on an applicant by the final priority and requirements would be limited to paperwork burden related to preparing an application and that the benefits of the final priority and requirements would outweigh any costs incurred by the applicant. There are very few entities that could provide the type of technical assistance required under the final priority and requirements. For these reasons, the final priority and requirements would not impose a burden on a significant number of small entities.

Paperwork Reduction Act of 1995: The priority and requirements contain information collection requirements that are approved by OMB under OMB control number 1820–0018; the priority and requirements do not affect the currently approved data collection.

Accessible Format: On request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, Braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit

your search to documents published by the Department.

David Cantrell,

Deputy Director, Office of Special Education Programs. Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2021–07524 Filed 4–9–21; 4:15 pm]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2019–0639; FRL–10020–79]

MCPA; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of MCPA in or on tea and intermediate wheatgrass forage, grain, hay, and straw. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective April 13, 2021. Objections and requests for hearings must be received on or before June 14, 2021, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2019–0639, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Marietta Echeverria, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Publishing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2019–0639 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before June 14, 2021. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2019–0639, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of April 15, 2020 (85 FR 20910) (FRL–10006–54), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E8797) by IR–4, Rutgers, The State University of New Jersey, 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.339 be amended by establishing tolerances for residues of the herbicide MCPA ((4-chloro-2-methylphenoxy) acetic acid), both free and conjugated, resulting from the direct application of MCPA or its sodium or dimethylamine salts, or its 2-ethylhexyl ester in or on the following agricultural commodities: Tea, plucked leaves at 0.3 parts per million (ppm); Wheatgrass, intermediate, forage at 20 ppm; Wheatgrass, intermediate, grain at 1 ppm; Wheatgrass, intermediate, hay at 115 ppm; and Wheatgrass, intermediate, straw at 25 ppm. That document referenced a summary of the petition prepared by Nufarm, the registrant, which is available in the docket, *http://www.regulations.gov.* A comment was received on the notice of filing but was unrelated to the chemical MCPA, this action, or pesticides in general.

Based upon review of the data supporting the petition, EPA has modified the levels at which the wheatgrass tolerances are being established as well as the commodity

definition for tea. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for MCPA including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with MCPA follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The kidney is the major target organ following MCPA exposure. In the subchronic inhalation toxicity study, respiratory tract effects were observed following repeat inhalation exposure. Additional toxic effects include neurotoxicity, which was observed in the acute and subchronic neurotoxicity (ACN/SCN) studies and in a rat developmental toxicity study. The developmental neurotoxicity study (DNT) did not identify developmental neurotoxicity.

Quantitative susceptibility was observed in the rat developmental toxicity study with MCPA acid based on increased incidence of skeletal retardation and decreased fetal body weight at a dose that was a maternal no observed adverse effect level (NOAEL). There was also quantitative susceptibility in the 2-generation rat reproductive toxicity study with MCPA acid as evidenced by decreased lactational pup body weight at an offspring lowest observed adverse effect level (LOAEL) corresponding to a parental NOAEL. Qualitative susceptibility was noted in the DNT study based on increased pup mortality and decreased body weights at the same LOAEL as the maternal LOAEL (decreased body weight and food consumptions).

MCPA is classified as ''Not Likely to Be Carcinogenic to Humans'', based on long-term studies in rats and mice, and there are low mutagenicity concerns. There is no concern for immunotoxicity.

Additional information on the toxicological profile can be found at *http://www.regulations.gov* in the document titled ''MCPA. Human Health Risk Assessment to Support a New Use on Intermediate Wheatgrass and the Establishment of a Tolerance without a U.S. Registration for Tea'' (hereinafter ''MCPA Human Health Risk Assessment'') in docket ID number EPA–HQ–OPP–2019–0639.

B. Toxicological Points of Departure/ Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/ safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticide.*

A summary of the toxicological endpoints for MCPA used for human risk assessment can be found in the MCPA Human Health Risk Assessment.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to MCPA, EPA considered exposure under the petitioned-for tolerances as well as all existing MCPA tolerances in 40 CFR 180.339. EPA assessed dietary exposures from MCPA in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for MCPA.

In conducting the acute dietary exposure assessment, EPA used the 2003–2008 food consumption data from the U.S. Department of Agriculture's (USDA) National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). The acute dietary exposure assessment is unrefined and is based on tolerance-level residues and 100 percent crop treated (PCT).

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used the 2003–2008 food consumption data from the USDA's NHANES/WWEIA. The chronic dietary exposure assessment is unrefined and is based on tolerance-level residues and 100 PCT.

iii. *Cancer.* MCPA is classified as ''Not Likely to Be Carcinogenic to Humans'' therefore, a cancer assessment is not needed.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue or PCT information in the dietary assessment for MCPA. Tolerance level residues and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for MCPA in drinking water. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide.*

Based on the Pesticide in Water Calculator (PWC), for the acute dietary risk assessment, EPA used an estimated drinking water concentration (EDWC) of 236 ppb into the DEEM–FCID Model. For the chronic exposure assessment, EPA used a value of 208 ppb.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

MCPA is currently registered for uses that may result in residential handler and post-application exposures, including commercial and residential use on lawns, as well as commercial use on ornamental turf and trees, golf courses, and parks.

For the residential exposure scenarios, the most conservative, or worst case, residential adult and child scenarios have been selected to be included in the aggregate risk assessment. The scenarios are as follows:

Adult aggregate assessment: Granular formulations: dermal post-application exposure from high contact activities on treated lawns (Day 0 turf transferable residue (TTR)) at both the 1.85 lb acid equivalent (ae)/A and 1.5 lb ae/A rate.

Liquid formulations: dermal post-application exposure from high contact activities on treated lawns (average TTR) at both the 1.5 lb ae/A and 1.25 lb ae/A rate.

Children 11 to <16 years old and children 6 to <11 years old aggregate assessments: Liquid formulations: dermal post-application exposures from golfing (Day 0 TTR) on treated turf.

Children 1 to <2 years old aggregate assessment: Granular formulations: combined (dermal plus incidental oral) post-application exposures from high contact activities on treated lawns (Day 0 TTR) at both the 1.85 lb ae/A and 1.5 lb ae/A rate.

Liquid formulations: combined (dermal plus incidental oral) post-application exposures from high contact activities on treated lawns (average TTR) at both the 1.5 lb ae/A and 1.25 lb ae/A rate.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/standard-operating-procedures-residential-pesticide.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to MCPA and any other substances and MCPA does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that MCPA has a common mechanism of toxicity with other substances.

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* In the developmental rat study with MCPA acid, quantitative susceptibility was demonstrated based on increased incidence of skeletal retardation and decreased fetal body weight at a dose that was a maternal NOAEL. MCPA acid, however, did not produce developmental toxicity in rabbits. Quantitative susceptibility was also evident in the 2-generation reproduction study in rats with MCPA acid, in which lactational pup body weight decrements were noted at a dose in offspring that was a parental NOAEL. Qualitative susceptibility was noted in the developmental neurotoxicity (DNT) study with MCPA acid based on increased pup mortality and body weights at the same LOAEL as the maternal LOAEL (decreased body weight and food consumptions). There was no evidence of quantitative or qualitative susceptibility in the developmental rat studies with MCPA dimethylamine (DMA) salt and MCPA ester forms.

Considering the overall toxicity profile and the doses and endpoints selected for risk assessment, the degree of concern for the effects observed in the studies are low because the developmental/offspring effects observed in the studies are well characterized and clear NOAELs/LOAELs have been identified in the studies for the effects of concern. Additionally, the endpoints and PODs selected for risk assessment are protective of potential developmental/reproductive effects.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X, except for acute dietary (general population) and inhalation scenarios where a 10X SF is retained for extrapolation of a LOAEL to a NOAEL. That decision is based on the following findings:

i. The toxicity database for MCPA is complete.

ii. Evidence of neurotoxicity was observed in the acute and subchronic neurotoxicity studies in rats, as indicated by various clinical signs of neurotoxicity. There were no developmental neurotoxic effects in the rat DNT study. There is a low degree of concern for the potential neurotoxic effects of MCPA since clear NOAELs were identified for the effects described above, there were no adverse neuropathological effects, and the endpoints chosen for risk assessment are protective of any potential neurotoxicity.

iii. As noted above, quantitative susceptibility was demonstrated in the developmental rat study, but not in rabbits. Quantitative susceptibility was also evident in the 2-generation reproduction study in rats. However, the degree of concern for the effects observed in the studies is low for the reasons summarized in Unit III.D.3.ii.

iv. There are no residual uncertainties identified in the exposure databases. The Agency has used high-end assumptions in the dietary exposure assessment, including the use of 100 PCT and tolerance-level residues, and upper-bound estimates of potential exposure through drinking water. In addition, the residential exposure assessment was conducted using chemical-specific data (where available) and the Agency's 2012 Residential SOPs; as such, residential exposures are unlikely to be underestimated.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and

chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. Using the exposure assumptions described in this unit for acute exposure, EPA has concluded that acute exposure to MCPA from food and water will utilize 29% of the aPAD for all infants less than 1 year old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to MCPA from food and water will utilize 28% of the cPAD for all infants less than 1 year old, the population group receiving the greatest exposure.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). MCPA is registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to MCPA.

For the granular formulation exposure scenarios, the short-term aggregate MOEs using Day 0 residues for adults and children 1 to less than 2 years old are not of concern, at 230 and 120, respectively.

Some residential exposure scenarios on treated turf (liquid formulations) resulted in risk estimates of concern for adults and children when using the day of application (Day 0; screening level) residues from the chemical specific turf transferable residue (TTR) data. For these scenarios, aggregate assessments using risk estimates resulting from refinement of the TTR values (*i.e.,* using average modeled TTR values) were conducted.

For the liquid formulation scenarios using Day 0 residues, the short-term aggregate MOEs are as follows: for children 6 to <11 years old the MOE = 330, and for children 11 to <16 years old, the MOE = 390. These MOEs are equal to or above the LOC (100) and are therefore not of concern. For the liquid formulation scenarios using average TTR (a refinement in the risk assessment), the short-term aggregate MOEs are not of concern for adults (MOE = 210) and for children 1 to <2 years old (MOE = 100) using 11-day average TTR. As noted above, a MOE equal to or greater than 100 is not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, MCPA is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for MCPA.

5. *Aggregate cancer risk for U.S. population.* MCPA is classified as ''Not Likely to Be Carcinogenic to Humans''; therefore, EPA does not expect MCPA exposures to pose an aggregate cancer risk.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to MCPA residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

For enforcement of tolerances for residues of MCPA, Pesticide Analytical Manual (PAM) Vol. II lists PAM Vol. I Sections 221.1, 421, and 422. No limit of quantitation is specified. It is noted that Section 221.1 has now become Section 402 (gas chromatography (GC) method for acids and phenols) and Sections 421 and 422 (thin-layer chromatography (TLC) methods) no longer exist. The Residue Chemistry Chapter of the Registration Standard dated 8/31/1981 noted that the PAM Vol. I method is adequate for enforcement of tolerances for residues of MCPA in livestock commodities as-is, but recommended that the method be modified with a hydrolysis step for enforcement of MCPA tolerances for plant commodities. The current PAM Vol II methods are adequate for the enforcement of MCPA on plants and livestock commodities and no further modifications are required at this time

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4).

There are no Codex MRLs for MCPA in or on tea or intermediate wheatgrass.

C. Revisions to Petitioned-For Tolerances

EPA is establishing the tolerance on ''tea, dried'' rather than ''tea, plucked leaves'' to be consistent with Agency nomenclature.

The petitioner proposed tolerance levels for wheatgrass commodities based on the current tolerance levels for wheat commodities in 40 CFR 180.339. While EPA agrees that it is appropriate to base the tolerance levels for wheatgrass commodities on the tolerance levels for wheat commodities, given the similarities in crops, the Agency has reviewed the tolerances for wheat, grain and wheat, hay and determined that the current tolerances are too high. Upon review, crop field trial studies reflecting the use of MCPA showed residue levels that were lower than current tolerances. The OECD calculation procedure recommended tolerance levels of 0.2 ppm for wheat, grain and 40 ppm for wheat, hay. This discrepancy was identified during Registration Review; see ''MCPA. Second Revision: Draft Human Health Risk Assessment in Support of Registration Review'', which is available in docket ID EPA–HQ–OPP–2014–0180. Moreover, the current Codex MRLs for wheat, forage, hay and straw are set at 50 ppm. Therefore, EPA intends to revise the existing wheat tolerances to reflect this analysis and to harmonize with Codex MRLs when updating the MCPA tolerances as part of Registration Review. Applying the same logic to the wheatgrass commodities, EPA is establishing those tolerances at 0.2 ppm for intermediate wheatgrass, grain and at 50 ppm for intermediate wheatgrass, forage, hay, and straw.

V. Conclusion

Therefore, tolerances are established for residues of MCPA in or on Tea, dried at 0.3 ppm; Wheatgrass, intermediate, forage at 50 ppm; Wheatgrass,

intermediate, grain at 0.2 ppm; Wheatgrass, intermediate, hay at 50 ppm; and Wheatgrass, intermediate, straw at 50 ppm.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 7, 2021.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.339, amend paragraph (a)(1) by designating the table as Table 1 to paragraph (a)(1) and adding in alphabetical order to newly designated Table 1 to paragraph (a)(1) entries for ''Tea, dried''; ''Wheatgrass, intermediate, forage''; ''Wheatgrass, intermediate, grain''; ''Wheatgrass, intermediate, hay'' and ''Wheatgrass, intermediate, straw'' to read as follows:

§ 180.339 MCPA; tolerances for residues.

(a) * * *

(1) * * *

TABLE 1 TO PARAGRAPH (a)(1)

Commodity	Parts per million
* * * * *	
Tea, dried	0.3
* * * * *	
Wheatgrass, intermediate, forage	50
Wheatgrass, intermediate, grain	0.2
Wheatgrass, intermediate, hay	50
Wheatgrass, intermediate, straw	50

* * * * *

[FR Doc. 2021–07517 Filed 4–12–21; 8:45 am]

BILLING CODE 6560–50–P

COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Part 1519

RIN 0331–AA04

Guidance Document Procedures Rescission

AGENCY: Council on Environmental Quality.

ACTION: Final rule.

SUMMARY: On January 8, 2021, the Council on Environmental Quality (CEQ) issued a final rule to implement Executive Order (E.O.) 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' In accordance with E.O. 13992, ''Revocation of Certain Executive Orders Concerning Federal Regulation,'' this final rule rescinds CEQ's rule on guidance document procedures.

DATES: This final rule is effective April 13, 2021.

FOR FURTHER INFORMATION CONTACT: Amy B. Coyle, Deputy General Counsel, Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503, (202) 395–5750, *amy.b.coyle@ceq.eop.gov.*

SUPPLEMENTARY INFORMATION: E.O. 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' addressed the development, use, and public availability of agency guidance documents and required agencies to promulgate or update existing regulations setting forth their procedures for issuing guidance documents. 84 FR 55235 (Oct. 15, 2019). On January 8, 2021, CEQ issued a final rule, ''Guidance Document Procedures'' to implement E.O. 13891. 86 FR 1279. The final rule established 40 CFR part 1519 to establish guidance document procedures, procedures for the public to request withdrawal or modification of a

guidance document, and procedures for significant guidance documents.

On January 20, 2021, President Biden issued E.O. 13992, ''Revocation of Certain Executive Orders Concerning Federal Regulation,'' to revoke a number of Executive orders, including E.O. 13891, with harmful policies and directives that threaten to frustrate the Federal Government's ability to confront the urgent challenges facing the Nation, including the coronavirus disease 2019 (COVID–19) pandemic, economic recovery, racial justice, and climate change and to empower agencies to use appropriate regulatory tools to address these issues. 86 FR 7049 (Jan. 25, 2021). E.O. 13992 provides that ''[t]o tackle these challenges effectively, [agencies] must be equipped with the flexibility to use robust regulatory action to address national priorities.'' Section 3 of E.O. 13992 directs agencies to take steps to rescind any orders, rules, regulations, guidelines or policies, or portions thereof, implementing or enforcing the revoked Executive orders.

After review and consideration, CEQ has concluded that its rule on guidance documents deprives CEQ of necessary flexibility in determining when and how best to issue guidance based on particular facts and circumstances consistent with the policy directive in E.O. 13992. Therefore, CEQ is issuing this final rule to rescind its regulations at 40 CFR part 1519. As has been CEQ's practice predating the part 1519 regulations, CEQ will continue to make guidance available to the public on its websites, including *www.nepa.gov* and *www.sustainability.gov.* Additionally, in accordance with M–09–13, ''Guidance for Regulatory Review,'' [1] the Office of Management and Budget will continue to review all CEQ actions and documents subject to the Office of Information and Regulatory Affairs review under E.O. 12866. These reviews include policy and guidance documents that OMB determines are significant.

Rulemaking Analyses and Notices

A. Regulatory Procedures

Under the Administrative Procedure Act, an agency may waive notice and comment procedures if an action is an interpretative rule, a general statement of policy, or a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b)(A). CEQ has determined this rule is a rule of ''agency organization, procedure, or practice'' and, therefore, CEQ is not required to engage in a notice and comment rulemaking process. Furthermore, because the rule is a procedural rule, rather than a substantive rule, it may be made effective immediately upon publication. *See* 5 U.S.C. 553(d).

B. Regulatory Planning and Review (E.O. 12866 and E.O. 13563)

E.O. 12866 provides that OIRA will review all significant rules. E.O. 13563 reaffirms the principles of E.O. 12866, calling for improvements in the Federal Government's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory objectives. OMB determined that this final rule does not meet the requirements for a significant regulatory action under E.O. 12866, as supplemented by E.O. 13563, and therefore it was not subject to review.

C. National Environmental Policy Act

The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.,* (NEPA) requires Federal agencies in their decision-making processes to consider the environmental effects of their proposed actions, disclose those impacts, and involve the public. The Council on Environmental Quality (CEQ) oversees the implementation of NEPA, 42 U.S.C. 4342, and issued NEPA implementing regulations at 40 CFR parts 1500 through 1508, which set forth the procedures for agencies to comply with NEPA.

The CEQ regulations provide for three levels of NEPA review. For actions that are likely to have significant environmental effects, agencies must prepare an environmental impact statement (EIS). *See* 40 CFR part 1502. Agencies also can identify in their agency NEPA procedures categories of actions that normally do not have significant environmental effects, and then apply these categorical exclusions (CEs) to individual actions after considering whether there are extraordinary circumstances present that preclude the application of the CE. *See* 40 CFR 1501.4. Finally, for those actions that are not likely to have significant environmental effects and where the agency does not have an established CE, or for actions where the significance of the effects is unknown, agencies prepare an environmental assessment (EA) to comply with NEPA. *See* 40 CFR 1501.5. Because CEQ has not established CEs for its actions, it has prepared this EA to comply with NEPA for this rulemaking.

Purpose and Need

As set forth in the supplemental information section of this final rule, the purpose and need is to take action to comply with E.O. 13992, which revoked E.O. 13891 and directed agencies to take steps to rescind any regulations implementing the E.O.

Proposed Action and Alternatives

The proposed action is to revoke 40 CFR part 1519, which CEQ promulgated to implement E.O. 13891. The no action alternative is to retain part 1519, which sets forth CEQ's procedures for the development and issuance of guidance documents consistent with the direction in E.O. 13891 and the Office of Management and Budget memorandum M–20–02, ''Guidance Implementing Executive Order 13891, Titled 'Promoting the Rule of Law Through Improved Agency Guidance Documents.' '' [2] These procedures define ''guidance document'' and required elements, including a title, document identification number, and date. Part 1519 also requires that all guidance documents contain a legal disclaimer, identification of any guidance document it revises or replaces, a summary of the guidance subject matter, identification of the activities to which and the persons to whom the guidance applies, and citations to relevant statutory and regulatory provisions. The procedures also require review by CEQ's Office of the General Counsel and posting of documents on CEQ's website. Finally, the regulations provide a procedure for the public to request withdrawal or modification of a guidance document.

Environmental Effects

Both the proposed action and the no action alterative likely would result in minimal environmental effects. CEQ issues guidance electronically by posting the documents online and emailing it to Federal agency contacts; therefore, to the extent this rulemaking would have any environmental effects, they would be on energy use by CEQ's IT systems. However, this rulemaking neither increases or decreases the volume of CEQ's guidance, but rather specifies the content and format of certain guidance documents. The proposed action gives CEQ increased flexibility in determining when and how best to issue guidance based on particular facts and circumstances consistent with the policy directive in E.O. 13992. Further, as noted in the final rule, CEQ will continue to make

[1] *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2009/m09-13.pdf.*

[2] *https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf.*

guidance available to Federal agencies and the public through its websites.

CEQ does not anticipate the proposed action or no action alternative would have any impact on threatened or endangered species, land or water use, climate change, environmental justice communities, cultural resources, including historic properties, or any other resource category.

List of Agencies and Persons Consulted

CEQ consulted with its internal experts, but did not consult with other agencies or persons.

Conclusion and Finding

Based on this environmental assessment, CEQ finds that the proposed action will not have a significant effect on the environment.

List of Subjects in 40 CFR Part 1519

Administrative practice and procedure, Guidance.

Matthew Lee-Ashley,

Chief of Staff.

PART 1519—[REMOVED AND RESERVED]

■ For the reasons stated in the preamble and under the authority of 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; E.O. 13992, the Council on Environmental Quality amends subchapter B of chapter V in title 40 of the Code of Federal Regulations by removing and reserving part 1519.

[FR Doc. 2021–07398 Filed 4–12–21; 8:45 am]

BILLING CODE 3225–F1–P

Proposed Rules

Federal Register
Vol. 86, No. 69
Tuesday, April 13, 2021

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 986

[Doc. No. AMS–SC–20–0081; SC20–986–2 CR]

Pecans Grown in the States of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas; Continuance Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Referendum order.

SUMMARY: This document directs that a referendum be conducted among eligible growers of pecans grown in the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas to determine whether they favor continuance of the marketing order regulating the handling of pecans produced in the production area.

DATES: The referendum will be conducted from June 7 through June 28, 2021. Only current pecan growers within the production area that produced a minimum average of 50,000 pounds of inshell pecans over the four years from October 1, 2016, to September 30, 2020, or own a minimum of 30 pecan acres are eligible to vote in this referendum.

ADDRESSES: Copies of the marketing order may be obtained from the Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1124 First Street South, Winter Haven, FL 33880; Telephone: (863) 324–3375; or from the Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491; or on the internet: *https://www.ecfr.gov/cgi-bin/ECFR?page=browse.*

FOR FURTHER INFORMATION CONTACT: Abigail Campos, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1124 First Street South, Winter Haven, FL 33880; Telephone: (863) 324–3375, Fax: (863) 291–8614, or Email: *Abigail.Campos@usda.gov* or *Christian.Nissen@usda.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Marketing Agreement and Order No. 986, as amended (7 CFR part 986), hereinafter referred to as the ''Order,'' and the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act,'' it is hereby directed that a referendum be conducted to ascertain whether continuance of the Order is favored by growers. The referendum shall be conducted from June 7 through June 28, 2021, among pecan growers in the fifteen-state production area. To be eligible to participate in the continuance referendum, a grower must have produced a minimum average of 50,000 pounds of inshell pecans during the four-year period from October 1, 2016, to September 30, 2020, or must own a minimum of 30 pecan acres.

USDA has determined continuance referenda are an effective means for determining whether growers favor the continuation of marketing order programs. The Order will continue in effect if two-thirds of the growers that cast votes, or growers representing two-thirds of the volume of pecans voted in the referendum, cast ballots in favor of continuance. In evaluating the merits of continuance versus termination of the order, USDA will not exclusively consider the results of the continuance referendum. USDA will also consider all other relevant information regarding the operation of the Order and relative benefits and disadvantages to growers, handlers, and consumers in determining whether continued operation of the Order would tend to effectuate the declared policy of the Act.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the ballots used in the referendum have been approved by the Office of Management and Budget (OMB) and have been assigned OMB No. 0581–0291, Federal Marketing Order for Pecans. It has been estimated it will take an average of 20 minutes for each of the approximately 4,267 growers of pecans to cast a ballot. Participation is voluntary. Ballots postmarked after June 28, 2021, will not be included in the vote tabulation.

Abigail Campos, Dolores Lowenstine, and Christian D. Nissen of the Southeast Marketing Field Office, Specialty Crops Program, AMS, USDA, are hereby designated as the referendum agents for the Secretary of Agriculture to conduct this referendum. The procedure applicable to the referendum shall be the ''Procedure for the Conduct of Referenda in Connection with Marketing Orders for Fruits, Vegetables, and Nuts Pursuant to the Agricultural Marketing Agreement Act of 1937, as Amended'' (7 CFR 900.400 *et seq.*).

Ballots will be mailed to all growers of record and may also be obtained from the referendum agents or their appointees.

List of Subjects in 7 CFR Part 986

Marketing agreements, Pecans, Reporting and recordkeeping requirements.

Authority: 7 U.S.C. 601–674.

Bruce Summers,
Administrator, Agricultural Marketing Service.

[FR Doc. 2021–07516 Filed 4–12–21; 8:45 am]
BILLING CODE P

FEDERAL RESERVE SYSTEM

12 CFR Part 209

[Regulation I; Docket No. R–1745]

RIN 7100–AG13

Federal Reserve Bank Capital Stock

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The Board of Governors (Board) invites public comment on a proposal to automate non-merger-related adjustments to member banks' subscriptions to Federal Reserve Bank (Reserve Bank) capital stock. The Board is also proposing certain technical amendments to Regulation I and

conforming revisions to the FR 2056 reporting form.

DATES: Comments on the proposed rule must be received on or before June 14, 2021.

ADDRESSES: When submitting comments, please consider submitting your comments by email or fax because paper mail in the Washington, DC area and at the Board may be subject to delay. You may submit comments, identified by Docket No. R–1745, RIN 7100–AG13, by any of the following methods:

- *Agency Website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Email: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. You may make an appointment to inspect comments by calling (202) 452–3684.

FOR FURTHER INFORMATION CONTACT: Evan Winerman, Senior Counsel (202–872–7578), Legal Division; or Kimberly Zaikov, Manager (202–452–2256), Reserve Bank Operations and Payments Systems Division. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

Regulation I governs the issuance and cancellation of capital stock by the Reserve Banks. Under section 5 of the Federal Reserve Act and Regulation I, a member bank (other than a mutual savings bank) must subscribe to capital stock of the Reserve Bank of its district in an amount equal to 6 percent of the member bank's capital and surplus.[1] Similarly, under section 9 of the Federal Reserve Act and Regulation I, a member bank that is a mutual savings bank must subscribe to capital stock of the Reserve Bank of its district in an amount equal to six-tenths of 1 percent of its total deposit liabilities.[2] The member bank must pay for one-half of this subscription on the date that the Reserve Bank approves its application for capital stock, while the remaining half of the subscription shall be subject to call by the Board.[3]

Under section 7 of the Federal Reserve Act and Regulation I, smaller member banks (currently those with $10.785 billion or less in total consolidated assets) receive a 6 percent annual dividend on their Reserve Bank stock.[4] Other member banks receive a dividend at the lesser of (i) the annual rate equal to the high yield of the 10-year Treasury note auctioned at the last auction held prior to the payment of such dividend and (ii) an annual rate of 6 percent.[5]

A. Non-Merger-Related Adjustments to Reserve Bank Stock Subscriptions

Regulation I requires that a member bank apply to adjust its stock subscription ''promptly after filing'' its December 31 report of condition (Call Report).[6] Additionally, a member bank must apply to adjust its stock subscription promptly after filing any other quarterly Call Report showing that the member bank has experienced an increase or decrease to its capital and surplus (or its total deposit liabilities for a mutual savings bank) requiring a change in excess of the lesser of 15 percent or 100 shares of Reserve Bank capital stock.[7] Member banks use the FR 2056 reporting form to apply for adjustments to their stock subscriptions.[8]

B. Merger-Related Adjustments to Reserve Bank Stock Subscriptions

Regulation I provides that, when two member banks merge or consolidate, the appropriate Reserve Banks shall cancel shares of the nonsurviving bank and credit shares to the surviving bank.[9] In order to effectuate this requirement, the Reserve Banks direct surviving member banks to apply to adjust their stock subscriptions before they merge or consolidate with other member banks. Similarly, the Reserve Banks direct nonsurviving member banks to apply to cancel their stock subscriptions before they merge or consolidate with other member banks.[10]

Regulation I does not expressly require that a surviving member bank apply to adjust its stock subscription before it merges or consolidates with a nonmember bank. In practice, however, the Reserve Banks request that surviving member banks apply to adjust their stock subscriptions before they merge or consolidate with nonmember banks.[11] This practice allows the Reserve Banks to make timely changes to the stock subscriptions of surviving member banks that merge or consolidate with nonmember banks.

When a surviving member bank applies to adjust its stock subscription, it must state whether its total consolidated assets exceed $10.785 billion.[12] This requirement ensures that a Reserve Bank receives timely and accurate notice of whether a merger has caused a surviving member bank's total consolidated assets to exceed $10.785 billion, which (as noted above) determines the dividend rate to which the member bank is entitled.

II. Description of the Proposed Rule

The Board is proposing to automate non-merger-related adjustments to member banks' subscriptions to Reserve Bank capital stock. The Board is also proposing to clarify that a surviving member bank must apply to adjust its stock subscription before merging or consolidating with another bank.

[1] 12 U.S.C. 287 and 12 CFR 209.4(a).

[2] 12 U.S.C. 333 and 12 CFR 209.4(b). The Federal Reserve Act and Regulation I allow a mutual savings bank to maintain a temporary ''deposit'' with a Reserve Bank in lieu of obtaining capital stock if the mutual savings bank is not permitted to purchase Reserve Bank stock under state law. However, if the relevant state law is not amended at the first session of the legislature after the bank is admitted to authorize the purchase of Reserve Bank stock, or if the bank fails to purchase the stock within six months of such amendment, the Reserve Bank will terminate the membership of the mutual savings bank. 12 U.S.C. 333; 12 CFR 209.2(a) and 208.3(a)(1).

[3] 12 U.S.C. 287 and 12 CFR 209.4(c)(2).

[4] 12 U.S.C. 289 and 12 CFR 209.4(e). Regulation I generally defines total consolidated assets by reference to the total assets reported on a member bank's most recent December 31 Call Report. 12 CFR 209.1(d)(3).

[5] *Id.*

[6] 12 CFR 209.4(a) and (b).

[7] *Id.*

[8] *See https://www.federalreserve.gov/reportforms/forms/FR_205620200115_f.pdf.*

[9] 12 CFR 209.3(d)(1) and (2). If the surviving or nonsurviving bank is a mutual savings bank that is not permitted to purchase Reserve Bank stock under state law, Regulation I instead directs the Reserve Bank to transfer or increase the member bank's deposit obligation. *Id.*

[10] Nonsurviving member banks use the FR 2086a reporting form to apply to cancel their stock subscriptions. *https://www.federalreserve.gov/reportforms/forms/FR_2086a20200115_f.pdf.*

[11] The surviving bank applies to adjust its stock subscription based on its anticipated post-merger capital and surplus or, in the case of a member bank that is a mutual savings bank, its anticipated post-merger total deposit liabilities.

[12] 12 CFR 209.1(d)(3) and 209.3(d)(3).

Finally, the Board is proposing two technical amendments to Regulation I.

A. Automation of Non-Merger-Related Stock Adjustments

As noted above, Regulation I currently requires that a member bank apply to adjust its stock subscription at least annually and sometimes quarterly. A member bank determines its required stock subscription based on its capital and surplus (or total deposit liabilities for a mutual savings bank) as reported in the member bank's most recent Call Report.

The Reserve Banks are developing software that will automatically pull the information needed to calculate member banks' required stock subscriptions from Call Reports. The Board is therefore proposing amendments to section 209.4 that would automate the stock adjustment process. Specifically, the Board proposes that a Reserve Bank would adjust a member bank's stock subscription each time the member bank files a Call Report.[13] This automated process would eliminate the need for member banks to file applications to adjust their stock subscriptions (except in the context of mergers, as described *infra*).

The Board also proposes to clarify that, when a Reserve Bank issues stock to a member bank, the Reserve Bank would obtain payment for that stock by debit to an account on the Reserve Bank's books or by other form of settlement to which the Reserve Bank agrees.

B. Merger-Related Stock Adjustments

As noted above, before two member banks merge or consolidate, the Reserve Banks direct the surviving member bank to apply to adjust its stock subscription and the nonsurviving member bank to apply to cancel its stock subscription. Similarly, before a member bank merges or consolidates with a nonmember bank, the Reserve Banks request that the surviving member bank apply to adjust its stock subscription.

The Board is proposing amendments to section 209.3 that would codify the Reserve Banks' current practice of requesting pre-merger stock adjustment applications. The amendments would expressly require a surviving member bank to apply to adjust its stock subscription before merging or consolidating with another (member or nonmember) bank.[14] [15] These proposed amendments would ensure that the Reserve Banks make timely changes to the stock subscriptions of surviving member banks that merge or consolidate with other banks.

Relatedly, the Board proposes to make conforming amendments to two provisions of Regulation I (current 12 CFR 209.1(d)(3) and 209.3(d)(3)) to clarify that, consistent with the existing text of Regulation I, a surviving member bank must state in its stock adjustment application whether its total consolidated assets exceed $10.785 billion.

C. Technical Amendments

The Board is also proposing two technical amendments to Regulation I. Section 209.1(c) recognizes that a bank located in a United States dependency or possession may apply for membership, and a footnote in § 209.1(c) explains that such a bank ''should communicate with the Federal Reserve Bank with which it desires to do business.'' The Board is proposing to amend this footnote to clarify that a bank located in the Virgin Islands or Puerto Rico should communicate with the Federal Reserve Bank of New York, while a bank located in Guam, American Samoa, or the Northern Mariana Islands should communicate with the Federal Reserve Bank of San Francisco. The proposed amendment would make this footnote in Regulation I consistent with a provision in the Board's Regulation J that clarifies the Federal Reserve Districts in which banks from United States dependencies and possessions are deemed to be located.[16]

Section 209.3(a) requires that any bank that desires to withdraw from membership in the Federal Reserve System promptly file with its Reserve Bank an application for cancellation of all its Reserve Bank stock. The Board is proposing to amend section 209.3(a) to clarify that, consistent with the Board's current understanding, this requirement applies to any national bank that wants to convert into a state nonmember bank.

III. Solicitation of Comments

The Board invites comments on all aspects of this rulemaking, including the following questions.

1. If the Reserve Banks automate non-merger-related stock adjustments, would member banks experience any challenges in managing balances in their Reserve Bank accounts? If so, what steps could the Reserve Banks take to mitigate those challenges?

2. Under the proposal, a Reserve Bank would adjust a member bank's stock subscription each time the member bank files a Call Report. Should a Reserve Banks adjust a member bank's stock subscription if the member bank refiles a quarterly Call Report after identifying an error?

IV. Regulatory Analysis

A. Regulatory Flexibility Act

In accordance with section 4 of the Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* the Board is publishing an initial regulatory flexibility analysis for the proposed rule. The RFA generally requires an agency to assess the impact a rule is expected to have on small entities.[17] The RFA requires an agency either to provide a regulatory flexibility analysis or to certify that the proposed will not have a significant economic impact on a substantial number of small entities.

Two of the requirements of an initial regulatory flexibility analysis [18]—a description of the reasons why the action is being considered and a statement of the objectives of, and legal basis for, the proposed rule—are contained in the information above. There are no reporting provisions or relevant federal rules that duplicate, overlap, or conflict with the proposed rule.

Another requirement for the initial regulatory flexibility analysis is a description of, and where feasible, an estimate of, the number of small entities to which the proposed rule will apply. The proposed rule would apply to all member banks, of which 991 are small entities.[19]

[13] Similarly, the Board is proposing to automate the process for adjusting the deposit obligation of a mutual savings bank that has a deposit with the appropriate Reserve Bank in lieu of Reserve Bank capital stock.

[14] Similarly, if a surviving bank is a mutual savings bank that is not permitted to purchase Reserve Bank stock under state law, the proposed amendments would require the surviving bank to apply to adjust its deposit obligation.

[15] Regulation I expressly requires that a nonsurviving member bank apply to cancel its stock subscription when it ''is merged or consolidated into a nonmember bank.'' 12 CFR 209.3(a). The proposed amendments would also expressly require that a nonsurviving member bank apply to cancel its stock subscription (or, in the case of a mutual savings bank that is not permitted to purchase Reserve Bank stock, transfer its deposit obligation) before merging or consolidating with another member bank. This amendment would be consistent with the existing requirement in Regulation I that a member bank apply to cancel its stock subscription when it ''desires to withdraw from membership'' or ''voluntarily . . . ceases business.'' 12 CFR 209.3(a).

[16] *See* 12 CFR 210.2(i)(1)(A).

[17] Under size standards established by the Small Business Administration, banks and other depository institutions are considered ''small'' if they have less than $600 million in assets. 13 CFR 121.201.

[18] 5 U.S.C. 603(b).

[19] 991 member banks have less than $600 million in assets based on data reported in December 31, 2020 Call Reports.

Finally, an initial regulatory flexibility analysis must include a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule. As described in the information above, the proposed rule would reduce reporting requirements for member banks by automating non-merger-related stock adjustments. However, the proposed rule would expressly require that a surviving stockholder apply to adjust its stock subscription before merging or consolidating with another bank.[20] There are approximately 50 mergers each year in which the surviving stockholder is a member bank.

B. Paperwork Reduction Act

Certain provisions of the proposed rule contain ''collections of information'' within the meaning of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). The Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Board reviewed the proposed rule under the authority delegated to the Board by OMB.

The proposed rule contains revisions to sections 209.3 and 209.4 that would automate non-merger-related adjustments to member banks' subscriptions to Reserve Bank capital stock. Automating the adjustment process would reduce the frequency of reporting. To implement this requirement, the Board proposes to extend for three years, with revision, the Federal Reserve Bank Stock Applications (FR 2030, FR 2030a, FR 2056, FR 2086, FR2086a, 2087; OMB No. 7100–0042). The revisions would affect only the FR 2056.

Comments are invited on:

(a) Whether the proposed collections of information are necessary for the proper performance of the Board's functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the proposed information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Proposed Revision, With Extension, of the Following Information Collection

Report title: Federal Reserve Bank Stock Applications.

Agency form numbers: FR 2030; FR 2030a; FR 2056; FR 2086; FR 2086a; FR 2087.

OMB control number: 7100–0042.

Frequency: On occasion.

Respondents: New national banks, non-member state banks converting into national banks, member banks, and member banks converting into or merging into member or nonmember banks.

Estimated number of respondents: FR 2030, 4; FR 2030a, 7; FR 2056, 50; FR 2086, 10; FR 2086a, 86; FR 2087, 1.

Estimated average hours per response: 0.5.

Estimated annual burden hours: FR 2030, 2; FR 2030a, 3.5; FR 2056, 25; FR 2086, 5; FR 2086a, 43; FR 2087, 0.5.

General description of report: Any national bank wanting to purchase stock in the Federal Reserve System, any member bank wanting to increase or decrease its Federal Reserve Bank stock holdings, or any bank wanting to cancel its stock holdings must file an application with the appropriate Federal Reserve Bank. The application forms for the initial subscription of Federal Reserve Bank stock filed by organizing national banks and nonmember state banks converting to national banks (FR 2030 and 2030a, respectively) and the application forms for the cancellation of Federal Reserve Bank stock filed by liquidating member banks, member banks merging or consolidating with nonmember banks, and insolvent member banks (FR 2086, FR 2086a, and FR 2087, respectively) require one or more of the following: A resolution by the applying bank's board of directors authorizing the transaction, an indication of the capital and surplus of the bank as of the date of application, a certification (by official signatures) of the resolution, and/or an indication of the number of shares and dollar amount of the Federal Reserve Bank stock to be purchased or cancelled.

The application form for an interim adjustment in a member bank's holdings of Federal Reserve Bank stock (FR 2056) requires an indication of the capital and surplus of the bank (or total deposit liabilities for a mutual savings bank) as of the date of application and an indication of the number of shares held and the number of shares to be acquired or canceled. A member bank must submit a completed FR 2056 form to correct a discrepancy between the amount of Federal Reserve Bank stock required to be held and the amount actually held by the member bank. The latter is determined through information that the member bank reports quarterly on the Consolidated Reports of Condition and Income (Call Report) (FFIEC 031, FFIEC 041, and FFIEC 051; OMB No. 7100–0036).

Legal authorization and confidentiality: The Federal Reserve Membership Application is authorized by section 9 of the FRA (12 U.S.C. 321, 322, 323, 329, and 333). The Federal Reserve Bank Stock Applications are authorized pursuant to sections 9 and 11(a) of the FRA (12 U.S.C. 321 and 248(a)). Additionally, the FR 2030 and FR 2030a are specifically authorized by section 2 of the FRA (12 U.S.C. 222 and 282), the FR 2056, FR 2086, and FR 2086a are authorized by section 5 of the FRA (12 U.S.C. 287), and the FR 2087 is authorized by section 6 of the FRA (12 U.S.C. 288). The FR 2083 is required to obtain a benefit, while the FR 2030, FR 2030a, FR 2056, FR 2086, FR 2086a, and FR 2087 are mandatory.

Individual respondents may request that information submitted to the Board in these applications be kept confidential on a case-by-case basis. Such applications may contain information related the business plans of the respondent. Under certain circumstances, this information may be withheld under exemption 4 of the Freedom of Information Act (FOIA), which protects privileged or confidential commercial or financial information (5 U.S.C. 552(b)(4)). These applications may also contain information of a personal nature the disclosure of which would result in a clearly unwarranted invasion of personal privacy, which may be protected under exemption 6 of the FOIA (5 U.S.C. 552(b)(6)). Additionally, exemption 8 of the FOIA (5 U.S.C. 552(b)(8)) may apply to the extent the reported information is contained in or related to examination reports.

Current Actions: The Board is proposing to automate non-merger-related adjustments to member banks' subscriptions to Reserve Bank capital stock. The Board is also proposing two technical amendments to Regulation I.

Regulation I currently requires that a member bank apply to adjust its stock subscription at least annually and

[20] Consistent with the current text of Regulation I, a surviving member bank would need to report in its stock adjustment application whether its total consolidated assets exceed $10.785 billion. *See* n. 12, *supra.* Additionally, consistent with the current text of Regulation I, a nonsurviving member bank would need to apply to cancel its stock before merging or consolidating with another bank. *See* n. 15, *supra.*

sometimes quarterly. A member bank determines its required stock subscription based on its capital and surplus (or total deposit liabilities for a mutual savings bank) as reported in the member bank's most recent Call Report.

The Reserve Banks are developing software that will automatically pull the information needed to calculate member banks' required stock subscriptions from Call Reports. Accordingly, the Board is proposing amendments to section 209.4 that would automate non-merger-related stock adjustments. The Board is also proposing amendments to § 209.3(d) that would require a surviving stockholder to apply to adjust its stock subscription before merging with another bank. Consistent with these proposed changes to Regulation I, the Board is proposing to eliminate the requirement that member banks routinely submit FR 2056 reporting forms to adjust their stock subscriptions. The Board is proposing to amend the FR 2056 reporting form to clarify that the form should be filed only by a surviving member bank that merges or consolidates with another bank.

C. Plain Language

Section 722 of the Gramm-Leach Bliley Act requires the Board to use plain language in all proposed and final rules published after January 1, 2000. The Board invites your comments on how to make this proposed rule easier to understand. For example:

- Has the Board organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed rule clearly stated? If not, how could the proposed rule be more clearly stated?
- Does the proposed rule contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the proposed rule easier to understand? If so, what changes to the format would make the proposed rule easier to understand?
- What else could the Board do to make the regulation easier to understand?

List of Subjects in 12 CFR Part 209

Banks and banking, Federal Reserve System, Reporting and recordkeeping requirements, Securities.

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend Regulation I, 12 CFR part 209, as follows:

PART 209—FEDERAL RESERVE BANK CAPITAL STOCK (REGULATION I)

■ 1. The authority citation for part 209 continues to read as follows:

Authority: 12 U.S.C. 12 U.S.C. 222, 248, 282, 286–288, 289, 321, 323, 327–328, and 466.

■ 2. Revise the heading to part 209 as shown above.

■ 3. Amend § 209.1 by revising paragraphs (c) and (d)(3) to read as follows.

§ 209.1 Authority, purpose, scope, and definitions.

* * * * *

(c) *Scope.* This part applies to member banks of the Federal Reserve System, to national banks in process of organization, and to state banks applying for membership. National banks and locally-incorporated banks located in United States dependencies and possessions are eligible (with the consent of the Board) but not required to apply for membership under section 19(h) of the Federal Reserve Act, 12 U.S.C. 466.[1]

[1] A bank located in the Virgin Islands or Puerto Rico should communicate with the Federal Reserve Bank of New York regarding applications for membership under the provisions of § 19(h) of the Federal Reserve Act. A bank located in Guam, American Samoa, or the Northern Mariana Islands should communicate with the Federal Reserve Bank of San Francisco regarding applications for membership under the provisions of § 19(h) of the Federal Reserve Act.

(d) * * *

(3) *Total consolidated assets* means the total assets on the stockholder's balance sheet as reported by the stockholder on its Consolidated Report of Condition and Income (Call Report) as of the most recent December 31, except in the case of (i) a new member ''total consolidated assets'' means (until the next December 31 Call Report becomes available) the total consolidated assets of the new member at the time of its application for capital stock and (ii) a surviving stockholder after a merger ''total consolidated assets'' means (until the next December 31 Call Report becomes available) the total consolidated assets reported by that stockholder pursuant to § 209.3(d)(5) of this part.

■ 4. Amend § 209.3 by:

■ a. Revising the section heading;

■ b. Revising paragraph (a);

■ c. Revising the introductory text of paragraph (d), redesignating paragraphs (d)(1), (2) and (3) as paragraphs (d)(2), (3), and (5), adding new paragraphs (d)(1) and (4), and revising paragraph (d)(5).

The revisions and additions to read as follows:

§ 209.3 Cancellation of Reserve Bank stock; mergers involving member banks.

(a) *Application for cancellation.* Any bank that desires to withdraw from membership in the Federal Reserve System (including a national bank that wants to convert into a State nonmember bank), voluntarily liquidates or ceases business, is merged or consolidated into a nonmember bank, or is involuntarily liquidated by a receiver or conservator or otherwise, shall promptly file with its Reserve Bank an application for cancellation of all its Reserve Bank stock (or withdrawal of its deposit, as the case may be) and payment therefor in accordance with § 209.4.

* * * * *

(d) *Exchange of stock on merger or change in location; stock adjustment upon merger with a nonmember bank; reporting of total consolidated assets following merger.*

(1) *Applications.*

(i) Before a merger or consolidation of member banks, the nonsurviving member bank shall file an application with the appropriate Reserve Bank to cancel its shares of Reserve Bank stock (or in the case of a mutual savings bank not authorized to purchase Reserve Bank stock, shall file an application to transfer its deposit to the account of the surviving bank) and the surviving member bank shall file an application with the appropriate Reserve Bank for issue of a corresponding number of shares of Reserve Bank stock (or in the case of a mutual savings bank not authorized to purchase Reserve Bank stock, shall file an application to increase its deposit obligation).

(ii) Before a merger or consolidation of a member bank and a nonmember bank, a surviving member bank shall file an application with the appropriate Reserve Bank to adjust its Reserve Bank capital stock subscription to equal six percent of the member bank's anticipated post-merger capital and surplus, or, in the case of member bank that is a mutual savings bank, six-tenths of 1 percent of the member bank's anticipated post-merger total deposit liabilities. A mutual savings bank not authorized to purchase Reserve Bank stock shall file an application to adjust its deposit obligation in a like manner.

* * * * *

(4) *Merger with a nonmember bank.* Upon a merger or consolidation of a member bank and a nonmember bank, the Reserve Bank will adjust the

surviving member bank's stock subscription to equal six percent of the member bank's capital and surplus, or, in the case of a member bank that is a mutual savings bank, six-tenths of 1 percent of the member bank's total deposit liabilities. If a mutual savings bank has a deposit with the appropriate Reserve Bank in lieu of Reserve Bank capital stock, its deposit obligation shall be adjusted in a like manner.

(5) *Statement of total consolidated assets.* When a member bank merges or consolidates with another bank and the surviving bank remains a Reserve Bank stockholder, the surviving stockholder must report whether its total consolidated assets exceed $10,785,000,000 in the application described in paragraph (d)(1) of this section.

* * * * *

■ 5. Amend § 209.4 by:

■ a. Revising paragraphs (a) and (b);

■ b. Revising the introductory text of paragraph (c)(1), redesignating paragraphs (c)(2) and (3) as paragraphs (c)(3) and (4), and adding a new paragraph (c)(2); and

■ c. Revising the introductory text of paragraph (d)(1).

The revisions and addition read as follows:

§ 209.4 Amounts and payments for subscriptions and cancellations; timing and rate of dividends.

(a) *Amount of subscription.* The total subscription of a member bank (other than a mutual savings bank) shall equal six percent of its capital and surplus as shown on its most recent Call Report. After a member bank files a Call Report, the appropriate Reserve Bank will adjust the member bank's Reserve Bank capital stock subscription to equal six percent of the member bank's capital and surplus.

(b) *Mutual savings banks.* The total subscription of a member bank that is a mutual savings bank shall equal six-tenths of 1 percent of its total deposit liabilities as shown on its most recent Call Report. After a member bank that is a mutual savings bank files a Call Report, the appropriate Reserve Bank will adjust the member bank's Reserve Bank capital stock subscription to equal six-tenths of 1 percent of the member bank's total deposit liabilities. If a mutual savings bank has a deposit with the appropriate Reserve Bank in lieu of Reserve Bank capital stock, its deposit obligation shall be adjusted in a like manner.

(c) *Payment for subscriptions.* (1) When a Reserve Bank issues capital stock to a member bank (or accepts a deposit in lieu thereof), the member bank shall pay the Reserve Bank—

* * * * *

(2) A Reserve Bank shall obtain settlement for the payment described in paragraph (c)(1) of this section by debit to an account on the Reserve Bank's books or other form of settlement to which the Reserve Bank agrees.

* * * * *

(d) *Payment for cancellations.* (1) When a Reserve Bank cancels Reserve Bank capital stock of a member bank, or (in the case of involuntary termination of membership) upon the effective date of cancellation specified in § 209.3(c)(3), the Reserve Bank shall—

* * * * *

By order of the Board of Governors of the Federal Reserve System.

Ann Misback,

Secretary of the Board.

[FR Doc. 2021–07477 Filed 4–12–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0297; Project Identifier 2019–SW–062–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Airbus Helicopters Model SA330J helicopters, all serial numbers. This proposed AD was prompted by reports of the failure of the lower bearing cage of the main rotor hub (MRH) flapping hinges and of the presence of metallic particles at the bottom of a drag hinge. This proposed AD would require repetitive inspections of the MRH chip detectors, or for helicopters not equipped with chip detectors, repetitive inspections of the oil for contamination by metallic particles, and corrective actions if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by May 28, 2021.

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

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

For material that is proposed for IBR in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* internet: *www.easa.europa.eu.* You may find this material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0297.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0297; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Mahmood G. Shah, Aviation Safety Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: 817–222–5538; email: *mahmood.g.shah@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2021–0297; Project Identifier 2019–SW–062–AD'' at the beginning of your comments. The most helpful comments reference a specific portion of

the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Mahmood G. Shah, Aviation Safety Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: 817–222–5538; email: *mahmood.g.shah@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0157, dated July 3, 2019 (EASA AD 2019–0157) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for Airbus Helicopters Model SA330J helicopters, all serial numbers.

This proposed AD was prompted by reports of failure of the lower bearing cage of the MRH flapping hinges and presence of metallic particles at the bottom of a drag hinge. The FAA is proposing this AD to address failure of the lower bearing cage of the MRH flapping hinges and presence of metallic particles at the bottom of a drag hinge, which could lead to loss of flapping hinge function, resulting in MRH unbalance and loss of control of the helicopter. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2019–0157 describes procedures for repetitive inspections of the MRH chip detectors, or for helicopters not equipped with chip detectors, repetitive inspections of the oil for contamination by metallic particles, and corrective actions if necessary. Corrective actions include replacement of the incidence hinge bearings, replacement of the flapping bearing race and bearing or if there is no degradation reinstallation of the bearing race and bearing 180° from the marked position during removal, and replacement of the drag lower bearing race and bearing. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD after evaluating all the relevant information and determining the unsafe condition described previously is likely to exist or develop in other products of the same type designs.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2019–0157, described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2019–0157 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2019–0157 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2019–0157 that is required for compliance with EASA AD 2019–0157 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0297 after the FAA final rule is published.

Interim Action

The FAA considers this proposed AD interim action. The investigation to detect the root cause of the reported failures of the lower bearing cage of the MRH flapping hinges and presence of metallic particles at the bottom of the drag hinge is on-going.

Costs of Compliance

The FAA estimates that this proposed AD affects 4 helicopters of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
4 work-hours × $85 per hour = $340	$0	$340	$1,360

The FAA estimates the following costs to do any necessary on-condition replacements that would be required based on the results of any required actions. The FAA has no way of determining the number of helicopters that might need these on-condition replacements:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
24 work-hours × $85 per hour = $2,040	$53,025.29	$55,065.29

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Helicopters: Docket No. FAA–2021–0297; Project Identifier 2019–SW–062–AD.

(a) Comments Due Date

The FAA must receive comments by May 28, 2021.

(b) Affected Airworthiness Directives (ADs)

None.

(c) Applicability

This AD applies to Airbus Helicopters Model SA330J helicopters, certificated in any category, all serial numbers.

(d) Subject

Joint Aircraft System Component (JASC) Code 6200, Main Rotor System.

(e) Reason

This AD was prompted by reports of the failure of the lower bearing cage of the main rotor hub (MRH) flapping hinges and of the presence of metallic particles at the bottom of a drag hinge. The FAA is issuing this AD to address failure of the lower bearing cage of the MRH flapping hinges and presence of metallic particles at the bottom of a drag hinge, which could lead to loss of flapping hinge function, resulting in MRH unbalance and loss of control of the helicopter.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2019–0157, dated July 3, 2019 (EASA AD 2019–0157).

(h) Exceptions to EASA AD 2019–0157

(1) Where EASA AD 2019–0157 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2019–0157 does not apply to this AD.

(3) Where EASA AD 2019–0157 refers to flight hours (FH), this AD requires using hours time-in-service.

(4) Although the service information referenced in EASA AD 2019–0157 specifies to discard certain parts, this AD requires removing those parts from service.

(i) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the helicopter can be modified (if the operator elects to do so), provided the helicopter is operated during the day under visual flight rules with no passengers are onboard.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, send it to the attention of the person identified in paragraph (k)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

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

(k) Related Information

(1) For EASA AD 2019–0157, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* internet: *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0297.

(2) For more information about this AD, contact Mahmood G. Shah, Aviation Safety

Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: 817–222–5538; email: *mahmood.g.shah@faa.gov.*

Issued on April 7, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–07483 Filed 4–12–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0258; Project Identifier AD–2020–01565–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 747–400, 747–400D, and 747–400F series airplanes. This proposed AD was prompted by reports of burned Boeing Material Specification (BMS) 8–39 urethane foam found in certain locations on the airplane; investigation revealed that the fire-retardant properties degrade with age. This proposed AD would require inspecting the insulation blankets in certain areas of the forward cargo compartment for exposed BMS 8–39 urethane foam, not encapsulated by a protective fire resistant barrier, and for seal integrity, and replacing the BMS 8–39 urethane foam and seal if necessary. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by May 28, 2021.

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

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

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0258.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0258; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Julie Linn, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3584; email: *Julie.Linn@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2021–0258; Project Identifier AD–2020–01565–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Julie Linn, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3584; email: *Julie.Linn@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA has received reports of burned BMS 8–39 urethane foam, a material with fire-retardant properties. Investigation revealed that the fire-retardant properties degrade after five to ten years, and degraded BMS 8–39 urethane foam can be a fuel source for a fire if exposed to an ignition source. Foam and tape are used to make a seal at penetrations that go through the insulation blankets. The type of foam that is used, how that foam is installed, and how it is taped are all equally important for the integrity of the seal. Previously issued service information provided procedures for replacing the BMS 8–39 urethane foam in most areas, but it did not include an area between body station (STA) 960 and STA 1000 on the left and right sides of the forward cargo compartment. Degraded BMS 8–39 urethane foam used in seals may fail to maintain sufficient halon concentrations in the cargo compartments to extinguish or contain fire or smoke, and may fail to prevent penetration of fire or smoke in areas of the airplane that are difficult to access for fire and smoke detection or suppression, which could result in loss of control of the airplane.

Related AD

The FAA issued AD 2013–11–04, Amendment 39–17464 (78 FR 33193,

June 4, 2013) (AD 2013–11–04), for certain The Boeing Company airplanes, including the same Model 747–400, 747–400D, and 747–400F series airplanes identified in this NPRM. AD 2013–11–04 resulted from a report from Boeing indicating that various areas of the airplane (including flight deck and cargo compartments) were assembled with seals made of BMS 8–39 urethane foam; operators subsequently reported finding burned BMS 8–39 urethane foam in those locations. AD 2013–11–04 requires replacing certain seals made of BMS 8–39 urethane foam. AD 2013–11–04 resulted from operator or in-service reports of burned BMS 8–39 urethane foam, and a report from the airplane manufacturer indicating that airplanes were assembled, throughout various areas of the airplane (including flight deck and cargo compartments), with seals made of BMS 8–39 urethane foam. The FAA issued AD 2013–11–04 to address the failure of urethane seals to maintain sufficient halon concentrations in the cargo compartments to extinguish or contain fire or smoke, and to prevent penetration of fire or smoke in areas of the airplane that are difficult to access for fire and smoke detection or suppression.

This NPRM does not propose to supersede AD 2013–11–04. Rather, the FAA has determined that a stand-alone AD would be more appropriate because the expanded inspection area applies only to Model 747–400, 747–400D, and 747–400F series airplanes, a small subset of the applicability of AD 2013–11–04.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Requirements Bulletin 747–25–3725 RB, dated October 27, 2020. The service information describes procedures for doing a general visual inspection of the insulation blankets in the area between STA 960 and STA 1000 on the left and right sides of the forward cargo compartment for exposed BMS 8–39 urethane foam, not encapsulated by a protective fire resistant barrier, and seal integrity, and replacing any BMS 8–39 urethane foam that is found exposed and any seal that does not have acceptable integrity for a smoke barrier. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

The FAA is proposing this AD because the agency evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishment of the actions identified in Boeing Requirements Bulletin 747–25–3725 RB, described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

For information on the procedures and compliance times, see this service information at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0258.

Explanation of Requirements Bulletin

The FAA worked in conjunction with industry, under the Airworthiness Directive Implementation Aviation Rulemaking Committee (AD ARC), to enhance the AD system. One enhancement is a process for annotating which steps in the service information are ''required for compliance'' (RC) with an AD. Boeing has implemented this RC concept into Boeing service bulletins.

In an effort to further improve the quality of ADs and AD-related Boeing service information, a joint process improvement initiative was worked between the FAA and Boeing. The initiative resulted in the development of a new process in which the service information more clearly identifies the actions needed to address the unsafe condition in the ''Accomplishment Instructions.'' The new process results in a Boeing Requirements Bulletin, which contains only the actions needed to address the unsafe condition (*i.e.,* only the RC actions).

Costs of Compliance

The FAA estimates that this proposed AD affects 109 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	3 work-hours × $85 per hour = $255	$0	$255	$27,795

The FAA estimates the following costs to do any necessary on-condition actions that would be required. The FAA has no way of determining the number of aircraft that might need these on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
1 work-hour × $85 per hour = $85 per finding	Minimal	$85 per finding.

Authority for This Rulemaking

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

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

develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2021–0258; Project Identifier AD–2020–01565–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) action by May 28, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 747–400, 747–400D, and 747–400F series airplanes, certificated in any category, as identified in Boeing Requirements Bulletin 747–25–3725 RB, dated October 27, 2020.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/furnishings.

(e) Unsafe Condition

This AD was prompted by reports of burned Boeing Material Specification (BMS) 8–39 urethane foam found in certain locations on the airplane; investigation revealed that the fire-retardant properties degrade with age. The FAA is issuing this AD to address degraded BMS 8–39 urethane foam used in seals, which may fail to maintain sufficient halon concentrations in the cargo compartments to extinguish or contain fire or smoke, and may fail to prevent penetration of fire or smoke in areas of the airplane that are difficult to access for fire and smoke detection or suppression, which could result in loss of control of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Requirements Bulletin 747–25–3725 RB, dated October 27, 2020, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Requirements Bulletin 747–25–3725 RB, dated October 27, 2020.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Service Bulletin 747–25–3725, dated October 27, 2020, which is referred to in Boeing Requirements Bulletin 747–25–3725 RB, dated October 27, 2020.

(h) Exception to Service Information Specifications

Where Boeing Requirements Bulletin 747–25–3725 RB, dated October 27, 2020, uses the phrase ''after the Original Issue date of Requirements Bulletin 747–25–3725 RB,'' this AD requires using ''the effective date of this AD.''

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Julie Linn, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3584; email: *Julie.Linn@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued on March 30, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–07544 Filed 4–12–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 1187

[212A2100DD/AAKC001030/A0A501010.999900]

RIN 1076–AF63

Indian Business Incubators Program

AGENCY: Office of the Assistant Secretary, Indian Affairs, Interior.

ACTION: Proposed rule.

SUMMARY: The Office of Indian Energy and Economic Development (IEED) proposes a new regulation to implement the recently enacted Native American Business Incubators Program Act. The Indian Business Incubators Program (IBIP), also known as the Native American Business Incubators Program, is a program in which IEED provides competitive grants to eligible applicants to establish and operate business incubators that serve Tribal reservation communities. These regulations establish who is eligible for the program, how to apply, how IEED will evaluate applications and make awards, and how IEED will administer the program.

DATES: Please submit your comments by June 14, 2021. Tribal consultation sessions to discuss this rule will be held on May 12 and 13, 2021, at 1 p.m. ET.

Please register in advance using the links provided in the **SUPPLEMENTARY INFORMATION** section of this document.

ADDRESSES: You may submit comments, identified by the number 1076–AF63, by any of the following methods:

- *Federal rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: consultation@bia.gov.* Include the number 1076–AF63 in the subject line of the message.
- *Mail or courier:* Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, Office of the Assistant Secretary—Indian Affairs, U.S. Department of the Interior, 1849 C Street NW, Mail Stop 4660, Washington, DC 20240.

We cannot ensure that comments received after the close of the comment period (see **DATES**) will be included in the docket for this rulemaking and considered. Comments sent to an address other than those listed above will not be included in the docket for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Comments on the Paperwork Reduction Act information collections contained in this rule are separate from comments on the substance of the rule. Send your comments and suggestions on the information collection requirements to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or *OIRA_Submission@omb.eop.gov* (email). Please provide a copy of your comments to *consultation@bia.gov.*

FOR FURTHER INFORMATION CONTACT: Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, telephone (202) 273–4680, *elizabeth.appel@bia.gov.*

SUPPLEMENTARY INFORMATION:

I. Statutory Authority
II. Need for This Proposed Rulemaking
III. Overview of Proposed Rule
IV. Procedural Requirements
A. Regulatory Planning and Review (E.O. 12866, 13563, and 13771)
B. Regulatory Flexibility Act
C. Small Business Regulatory Enforcement and Fairness Act
D. Unfunded Mandates Reform Act of 1995
E. Takings (E.O. 12630)
F. Federalism (E.O. 13132)
G. Civil Justice Reform (E.O. 12988)
H. Paperwork Reduction Act
I. National Environmental Policy Act (NEPA)
J. Consultation With Indian Tribes (E.O. 13175)
K. Energy Effects (E.O. 13211)
L. Clarity of This Regulation
M. Public Availability of Comments

I. Statutory Authority

IEED is proposing this rule under the authority of the Native American Business Incubators Program Act, Public Law 116–174.

II. Need for This Proposed Rulemaking

On October 20, 2020, Congress enacted the Native American Business Incubators Program Act, Public Law 116–174, which will be codified at 25 U.S.C. 5801 *et seq.* In the Act, Congress establishes the Native American Business Incubators Program. Congress found that, in addition to the challenges all entrepreneurs face when transforming ideas into profitable business enterprises, entrepreneurs face an additional set of challenges that requires special knowledge when they want to provide products and services in Tribal reservation communities. Congress further found that the business incubator model is suited to accelerating entrepreneurship in Tribal reservation communities, promoting collaboration to address challenges and providing individually tailored services to overcome the obstacles that are unique to each participating business, ultimately stimulating economic development in reservation communities. Business incubators accelerate the creation and development of businesses by offering a range of services to business owners such as: mentorships, networking, technical assistance, and access to investors. In accordance with the Act's requirement for promulgation of regulations within 180 days of the Act's enactment (*i.e.,* by April 18, 2021), IEED is publishing today's proposed rule for notice and comment.

III. Overview of Proposed Rule

This proposed rule would establish the IBIP, in accordance with the Native American Business Incubators Program Act. Through the IBIP, IEED will provide competitive grants to eligible applicants to establish and operate business incubators that serve entrepreneurs (start-up and early stage businesses) who will provide products or services to Tribal reservation communities. A business incubator is an organization that assists entrepreneurs in becoming viable businesses by providing advice and services to entrepreneurs to navigate obstacles in transforming their innovative ideas into operational businesses. Examples of services that a business incubator may provide are workspace and facilities, advice on how to access capital, business education, counseling, and networking and mentorship opportunities. Indian Affairs does not currently have any regulations in place that provide for a grant program for Indian business incubators. These regulations are intended to provide the framework for operation of the grant program so that there is certainty as to who is eligible for a grant, how eligible applicants can apply for a grant, how IEED will evaluate, award, and administer the grants, and what terms and conditions will apply to the grants. The ultimate goal of providing this regulatory framework is to enable IEED to provide grants under these regulations that will stimulate economic development in reservation communities. IEED welcomes input on any proposed regulatory provision that may undermine this goal.

The proposed rule consists of six subparts, each of which is described below.

- *Subpart A—General Provisions and Eligibility:* Defines terms defined in the statute consistent with the statutory definitions, replacing citations with restatements of the provisions cited where appropriate, and adds a new term for ''IBIP'' in lieu of ''Native American Business Incubator Program (NABIP)'' to avoid confusion because the acronym ''NABIP'' is similar to other grant programs. This subpart also describes who is eligible to receive an IBIP grant, to include the following entities that meet certain additional requirements set out in § 1187.3:
  - Tribes;
  - Tribal colleges and universities;
  - Institutions of higher education; and
  - Tribal or private nonprofit organizations that provide business and financial technical assistance.
- *Subpart B—Applying for a Grant:* Describes how an eligible applicant applies for a grant, adding the specificity that applications must be submitted through *www.grants.gov.* This subpart also includes the statutory requirements for what must be included in an application and written site proposal, and how to submit a joint application. The regulations add that joint applications must identify which of the entities submitting the joint application will be the lead contact for the purposes of grant management.
- *Subpart C—Evaluation of Grant Applications:* Describes the criteria IEED will use to evaluate each IBIP grant application, adding the specific time period of three months to the statutory requirement that the applicant must commence services within a minimum period of time to be determined by the Secretary. This subpart also adds a new criterion to the

statutory criteria for evaluation: The extent to which a grant award will enable an entity that is already providing business incubation services to appreciably enhance those services. IEED added this criterion in order to ensure that the grant is funding new incubation services, such that there is a return for the investment made in the incubator, rather than merely paying existing incubators for services they would have otherwise provided.

• *Subpart D—Grant Awards:* Describes how IEED will disburse grant funds to awardees according to the statute. This subpart also includes the statutory prohibition on awarding an IBIP grant that duplicates other Federal funding, but adds a clarification that duplicative funding means any funding from other Federal grants that would overlap with the IBIP grant for the same activities described in the applicant's IBIP proposal.

• *Subpart E—Grant Term and Conditions:* Establishes an initial grant term of three years, with the opportunity to renew for one additional three-year term if certain conditions are met, in accordance with the statute. This subpart also lists the purposes for which awardees may use the grant funds, requires awardees to provide non-Federal contributions in an amount at least 25 percent of the grant unless the conditions for waiver of that requirement are met, lists the minimum requirements awardees must meet in providing incubation services, and requires the awardee to submit a report at the end of the grant year that provides, among other things, a detailed breakdown of the Native businesses and Native entrepreneurs the incubator helped establish or serve. These items are all statutory but are included in the regulation to assist readers in finding all relevant IBIP grant information in one location.

• *Subpart F—IEED Grant Administration:* Provides that IEED will conduct an annual evaluation of each IBIP awardee's success, facilitate relationships between awardees and educational institutions serving Native American communities, and collaborate with other Federal agencies that administer business and entrepreneurial programs. These items are also all statutory but are included in the regulation to assist readers in finding all relevant IBIP grant information in one location.

IEED seeks comment, particularly from Tribes and potentially eligible IBIP applicants, on any changes to the regulation within the bounds of the statute that could be incorporated to help ensure the success of this newly established program.

IV. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866, 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

B. The Regulatory Flexibility Act

The Department of the Interior certifies that this proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule establishes a program to provide grants for business incubators, some of which may be small entities, but the $5 million in total annual appropriations is not expected to reach the threshold of having a significant economic effect on a substantial number of small entities.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. Because this proposed rule establishes a program supported by $5 million in annual appropriations this rule:

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act of 1995

This proposed rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The proposed rule does not have a monetarily significant or unique effect on State, local, or Tribal governments or the private sector. This proposed rule would establish a program to provide grants to certain business incubators that will serve Tribal communities. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This proposed rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this proposed rule does not affect individual property rights protected by the Fifth Amendment or involve a compensable ''taking.'' A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this rule: (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has substantial direct effects on federally

recognized Indian Tribes because the rule requires early tribal involvement in the design of a process that will have significant impact on one or more recognized tribes.

Given the statutory deadline of April 2021 for promulgating a regulation, IEED did not have sufficient time to formally consult on the development of this proposed rule, but has scheduled the following Tribal consultation sessions by webinar to discuss this proposed rule:

- May 12, 2021, 1 p.m.–3 p.m. ET—please register for this session at: *https://doilearn2.webex.com/doilearn2/onstage/g.php?MTID=e77ad54c5178e4fcff380d118dcc83c2f.*
- May 13, 2021, 1 p.m.–3 p.m. ET—please register for this session at: *https://doilearn2.webex.com/doilearn2/onstage/g.php?MTID=e1e488228146c27c782cd83cb83b9478b.*

I. Paperwork Reduction Act

This proposed rule contains new information collections. All information collections require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The Department is seeking approval of a new information collection, as follows.

Brief Description of Collection: This information collection includes items that an applicant must include in an application for an Indian Business Incubator Program (IBIP) grant and that IBIP awardees must include in the annual report. Applicant contents include such items as a description of the reservation communities the incubator will serve, a three-year plan regarding the services to be offered to participating entrepreneurs, among other items, information regarding applicant's experience in conducting assistance programs, and a site description of the location at which the applicant will provide work space to participants, among other items. The annual report includes a detailed breakdown of the entrepreneurs the incubator has served for the year covered by the report.

Title: Indian Business Incubator Program (IBIP).

OMB Control Number: 1076–NEW.

Form Number: None.

Type of Review: New collection.

Respondents/Affected Public: Individuals, Private Sector, Government.

Total Estimated Number of Annual Respondents: 50.

Total Estimated Number of Annual Responses: 100.

Estimated Completion Time per Response: Ranges from 5 to 35 hours.

Total Estimated Number of Annual Burden Hours: 2,000 hours.

Respondents' Obligation: Required to obtain a benefit.

Frequency of Response: Occasionally.

Total Estimated Annual Non-Hour Burden Cost: $0.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to *consultation@bia.gov.* Please reference OMB Control Number 1076–NEW in the subject line of your comments.

J. National Environmental Policy Act

This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because this is an administrative and procedural regulation. (For further information see 43 CFR 46.210(i)). We have also determined that this proposed rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This proposed rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

L. Clarity of This Regulation

We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each proposed rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and,

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

M. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 25 CFR Part 1187

Indians—business and finance, Loan programs—business, Loan programs—Indians, Reporting and recordkeeping requirements.

For the reasons given in the preamble, the Department of the Interior proposes to amend Chapter VI of Title 25 of the Code of Federal Regulations by adding part 1187 to read as follows:

PART 1187—INDIAN BUSINESS INCUBATORS PROGRAM

Subpart A—General Provisions and Eligibility

Sec.

1187.1 What is the Indian Business Incubators Program (IBIP)?

1187.2 What terms do I need to know?
1187.3 Who is eligible to receive a grant under the IBIP?

Subpart B—Applying for a Grant

1187.10 How does an eligible applicant apply for a grant under the IBIP?
1187.11 What must an application include?
1187.12 What must an applicant include in a written site proposal?
1187.13 May applicants submit a joint application?
1187.14 What additional items must a joint application include?

Subpart C—Evaluation of Grant Applications

1187.20 How will IEED evaluate each application?
1187.21 How will IEED evaluate the proposed location of the business incubator?
1187.22 How will IEED conduct the site evaluation?

Subpart D—Grant Awards

1187.30 How will IEED disburse the grant funds to awardees?
1187.31 May IEED award a grant that is duplicative of Federal funding from another source?

Subpart E—Grant Term and Conditions

1187.40 How long is the grant term?
1187.41 May IEED renew a grant award?
1187.42 What may awardees use grant funds for?
1187.43 May IEED waive the requirement for the non-Federal contribution?
1187.44 What minimum requirements must awardees meet?
1187.45 What reports must the awardee submit?

Subpart F—IEED Grant Administration

1187.50 How will IEED evaluate awardees' performance?
1187.51 Will IEED facilitate relationships between awardees and educational institutions serving Native American communities?
1187.52 How will IEED coordinate with other Federal agencies?

Authority: 25 U.S.C. 2, 9; Pub. L. 116–174.

Subpart A—General Provisions and Eligibility

§ 1187.1 What is the Indian Business Incubators Program (IBIP)?

The Indian Business Incubators Program (IBIP) is a program under the Native American Business Incubators Program Act in which IEED provides competitive grants to eligible applicants to establish and operate business incubators that serve Tribal reservation communities. With these grants, business incubators will:

(a) Provide individually tailored business incubation and other business services to Native businesses and Native entrepreneurs to overcome the unique obstacles they confront; and

(b) Provide Native businesses and Native entrepreneurs with the tools necessary to start and grow businesses that offer products and services to reservation communities.

§ 1187.2 What terms do I need to know?

Awardee means an eligible applicant receiving a grant under the IBIP.

Business incubator means an organization that:

(1) Provides physical workspace and facilities resources to startups and established businesses; and

(2) Is designed to accelerate the growth and success of businesses through a variety of business support resources and services, including—

(i) Business education, counseling, and advice regarding access to capital;

(ii) Networking opportunities;

(iii) Mentorship opportunities; and

(iv) Other services intended to aid in developing a business.

Eligible applicant means an applicant eligible to apply for a grant under § 1187.3.

IBIP means the Indian Business Incubator Program (IBIP) under the Native American Business Incubator Program Act.

IEED means the Office of Indian Energy and Economic Development in the Office of the Assistant Secretary—Indian Affairs.

Indian Tribe has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).

Institution of higher education means an educational institution in any State that—

(1) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of 20 U.S.C. 1091(d);

(2) Is legally authorized within such State to provide a program of education beyond secondary education;

(3) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a two-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;

(4) Is a public or other nonprofit institution; and

(5) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted pre-accreditation status by such an agency or association that has been recognized by the Secretary for the granting of pre-accreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

Native American: Native means a person who is a member of an Indian Tribe, as defined in section 4(d) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304(d)).

Native business means a business concern that is at least 51-percent owned and controlled by 1 or more Native Americans.

Native entrepreneur means an entrepreneur who is a Native American.

Reservation means Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [43 U.S.C. 1601 *et seq.*].

Secretary means the Secretary of the Interior.

Tribal college or university means an institution that—

(1) Qualifies for funding under the Tribally Controlled Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*) or the Navajo Community College Act (25 U.S.C. 640a note); or

(2) Is cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note).

§ 1187.3 Who is eligible to receive a grant under the IBIP?

To be eligible to receive a grant under the IBIP, an applicant must:

(a) Be able to provide the physical workspace, equipment, and connectivity necessary for Native businesses and Native entrepreneurs to collaborate and conduct business on a local, regional, national, and international level; and

(b) Be one of the following entities:

(1) An Indian Tribe;

(2) A Tribal college or university that will have been operational for not less than one year before receiving a grant under the IBIP;

(3) An institution of higher education that will have been operational for not less than one year before receiving a grant under the IBIP; or

(4) A Tribal or private nonprofit organization that provides business and financial technical assistance and:

(i) Will have been operational for not less than one year before receiving a grant under the IBIP; and

(ii) Commits to serving one or more reservation communities.

Subpart B—Applying for a Grant

§ 1187.10 How does an eligible applicant apply for a grant under the IBIP?

Each eligible applicant desiring a grant under the IBIP must submit to the Secretary an application as described in the solicitation posted on *www.grants.gov.*

§ 1187.11 What must an application include?

An application for a grant under the IBIP must include:

(a) A certification that the applicant:

(1) Is an eligible applicant;

(2) Has or will designate an executive director or program manager to manage the business incubator; and

(3) Agrees to:

(i) A site evaluation by the Secretary as part of the final selection process;

(ii) An annual programmatic and financial examination for the duration of the grant; and

(iii) To the maximum extent practicable, to remedy any problems identified pursuant to the site evaluation and examination.

(b) A description of the one or more reservation communities to be served by the business incubator;

(c) A three-year plan that describes:

(1) The number of Native businesses and Native entrepreneurs to be participating in the business incubator;

(2) Whether the business incubator will focus on a particular type of business or industry;

(3) A detailed breakdown of the services to be offered to Native businesses and Native entrepreneurs participating in the business incubator; and

(4) A detailed breakdown of the services, if any, to be offered to Native businesses and Native entrepreneurs not participating in the business incubator;

(d) Information demonstrating the effectiveness and experience of the eligible applicant in:

(1) Conducting financial, management, and marketing assistance programs designed to educate or improve the business skills of current or prospective businesses;

(2) Working in and providing services to Native American communities;

(3) Providing assistance to entities conducting business in reservation communities;

(4) Providing technical assistance under Federal business and entrepreneurial development programs for which Native businesses and Native entrepreneurs are eligible; and

(5) Managing finances and staff effectively;

(e) A description of the applicant's non-Federal contributions, in an amount equal to not less than 25 percent of the grant amount requested; and

(f) A site description of the location at which the eligible applicant will provide physical workspace, including a description of the technologies, equipment, and other resources that will be available to Native businesses and Native entrepreneurs participating in the business incubator, if the applicant is in possession of the site, or a written site proposal containing the information in § 1187.12, if the applicant is not yet in possession of the site.

§ 1187.12 What must an applicant include in a written site proposal?

If the applicant is not yet in possession of the site, the applicant must submit a written site proposal with their application that contains:

(a) Sufficient detail for the Secretary to ensure, in the absence of a site visit or video submission, that the proposed site will permit the eligible applicant to meet the requirements of the IBIP; and

(b) A timeline describing when the eligible applicant will be:

(1) In possession of the proposed site; and

(2) Operating the business incubator at the proposed site.

§ 1187.13 May applicants submit a joint application?

Two or more eligible entities may submit a joint application for a project that combines the resources and expertise of those entities at a physical location dedicated to assisting Native businesses and Native entrepreneurs under the IBIP.

§ 1187.14 What additional items must a joint application include?

A joint application must:

(a) Contain a certification that each participant of the joint project is an eligible entity under § 1187.3;

(b) Demonstrate that together the participants meet the requirements of § 1187.13; and

(c) Identify which of the entities submitting the joint application will be the lead contact for the purposes of grant management.

Subpart C—Evaluation and Award of Grant Applications

§ 1187.20 How will IEED evaluate each application?

In evaluating each application, IEED will consider:

(a) The ability of the eligible applicant to:

(1) Operate a business incubator that effectively imparts entrepreneurship and business skills to Native businesses and Native entrepreneurs, as demonstrated by the experience and qualifications of the eligible applicant;

(2) Commence providing services within three months; and

(3) Provide quality incubation services to a significant number of Native businesses and Native entrepreneurs or provide such services at geographically remote locations where quality business guidance and counseling is difficult to obtain;

(b) The experience of the eligible applicant in providing services in Native American communities, including in the one or more reservation communities described in the application;

(c) The proposed location of the business incubator; and

(d) The extent to which a grant award will enable an entity that is already providing business incubation services to appreciably enhance those services.

§ 1187.21 How will IEED evaluate the proposed location of the business incubator?

In evaluating the proposed location of the business incubator, IEED will:

(a) Consider the program goal of achieving broad geographic distribution of business incubators; and

(b) Give priority to eligible applicants that will provide business incubation services on or near the reservation of the one or more communities that were described in the application, except that IEED may give priority to an eligible applicant that is not located on or near the reservation of the one or more communities that were described in the application if IEED determines that:

(1) The location of the business incubator will not prevent the eligible applicant from providing quality business incubation services to Native businesses and Native entrepreneurs from the one or more reservation communities to be served; and

(2) Siting the business incubator in the identified location will serve the interests of the one or more reservation communities to be served.

§ 1187.22 How will IEED conduct the site evaluation?

(a) Before awarding a grant to an eligible applicant, IEED will conduct an evaluation of the proposed site to verify that the applicant has (or will have) the physical workspace, equipment, and connectivity necessary for Native businesses and Native entrepreneurs to collaborate and conduct business on a local, regional, national, and/or international level.

(b) To determine whether the site meets the requirements of paragraph (a) of this section:

(1) If the applicant is in possession of the proposed site, IEED will conduct an on-site visit or review a video submission before awarding the grant.

(2) If the applicant is not yet in possession of the proposed site and has submitted a written site proposal, IEED will review the written site proposal before awarding the grant and will conduct an on-site visit or review a video submission to ensure the site is consistent with the written site proposal no later than one year after awarding the grant. If IEED determines the site is not consistent with the written site proposal, IEED will use that information in determining the ongoing eligibility of the applicant under § 1187.50.

Subpart D—Grant Awards

§ 1187.30 How will IEED disburse the grant funds to awardees?

IEED will disburse grant funds awarded to eligible applicants in annual installments except that, IEED may make disbursements more frequently, on request by the applicant, as long as disbursements are not made more frequently than quarterly.

§ 1187.31 May IEED award a grant that is duplicative of Federal funding from another source?

IEED may not award a grant under the IBIP that is duplicative of existing Federal funding from another source. Duplicative funding means any funding from other Federal grants that would overlap with the IBIP grant for the same activities described in the applicant's IBIP proposal.

Subpart E—Grant Term and Conditions

§ 1187.40 How long is the grant term?

Each grant awarded under the IBIP is for a term of three years.

§ 1187.41 May IEED renew a grant award?

(a) IEED may renew a grant award under the IBIP for one additional three-year term. In determining whether to renew a grant award, IEED will consider for the awardee:

(1) The results of the annual evaluation of the awardee conducted under § 1187.50;

(2) The performance of the awardee's business incubator, as compared to the performance of other business incubators receiving grants under the IBIP;

(3) Whether the awardee continues to be eligible for the IBIP; and

(4) The evaluation consideration for initial awards under § 1187.20.

(b) Awardees that receive a grant renewal must provide non-Federal contributions in an amount not less than 33 percent of the total amount of the grant. Failure to provide the non-Federal contribution will result in noncompliance and IEED withholding of funds, unless IEED waives the requirement under § 1187.43.

§ 1187.42 What may awardees use grant funds for?

An awardee may use grant amounts for any or all of the following purposes:

(a) To provide physical workspace and facilities for Native businesses and Native entrepreneurs participating in the business incubator;

(b) To establish partnerships with other institutions and entities to provide comprehensive business incubation services to Native businesses and Native entrepreneurs participating in the business incubator; and

(c) For any other uses typically associated with business incubators that IEED determines to be appropriate and consistent with the purposes of the IBIP.

§ 1187.43 May IEED waive the requirement for the non-Federal contribution?

IEED may waive the requirement for the non-Federal contribution, in whole or in part, for one or more years of the initial IBIP grant award if IEED determines that the waiver is appropriate based on:

(a) The awardee's ability to provide non-Federal contributions;

(b) The quality of business incubation services; and

(c) The likelihood that one or more reservation communities served by the awardee will not receive similar services elsewhere because of the remoteness or other reasons that inhibit the provision of business and entrepreneurial development services.

§ 1187.44 What minimum requirements must awardees meet?

(a) Each awardee must:

(1) Offer culturally tailored incubation services to Native businesses and Native entrepreneurs;

(2) Use a competitive process for selecting Native businesses and Native entrepreneurs to participate in the business incubator; however, awardees may still offer technical assistance and advice to Native businesses and Native entrepreneurs on a walk-in basis;

(3) Provide physical workspace that permits Native businesses and Native entrepreneurs to conduct business and collaborate with other Native businesses and Native entrepreneurs;

(4) Provide entrepreneurship and business skills training and education to Native businesses and Native entrepreneurs including:

(i) Financial education, including training and counseling in:

(A) Applying for and securing business credit and investment capital;

(B) Preparing and presenting financial statements; and

(C) Managing cash flow and other financial operations of a business;

(ii) Management education, including training and counseling in planning, organization, staffing, directing, and controlling each major activity or function of a business or startup; and

(iii) Marketing education, including training and counseling in:

(A) Identifying and segmenting domestic and international market opportunities;

(B) Preparing and executing marketing plans;

(C) Locating contract opportunities;

(D) Negotiating contracts; and

(E) Using varying public relations and advertising techniques.

(5) Provide direct mentorship or assistance finding mentors in the industry in which the Native business or Native entrepreneur operates or intends to operate; and

(6) Provide access to networks of potential investors, professionals in the same or similar fields, and other business owners with similar businesses.

(b) Each awardee must leverage technology to the maximum extent practicable to provide Native businesses and Native entrepreneurs with access to the connectivity tools needed to compete and thrive in 21st-century markets.

§ 1187.45 What reports must the awardee submit?

(a) Not later than one year after the date IEED awards the grant, and then annually for the duration of the grant, the awardee must submit to IEED a report describing the services the awardee provided under the IBIP during the preceding year, including:

(1) A detailed breakdown of the Native businesses and Native entrepreneurs receiving services from the business incubator, including, for the year covered by the report:

(i) The number of Native businesses and Native entrepreneurs participating in or receiving services from the business incubator and the types of services provided to those Native businesses and Native entrepreneurs;

(ii) The number of Native businesses and Native entrepreneurs established and jobs created or maintained; and

(iii) The performance of Native businesses and Native entrepreneurs while participating in the business incubator and after graduation or departure from the business incubator; and

(2) Any other information the Secretary may require to evaluate the performance of a business incubator to ensure appropriate implementation of the IBIP.

(b) To the maximum extent practicable, IEED will not require an awardee to report the information listed in paragraph (a) of this section that the awardee provides to IEED under another program.

(c) IEED will coordinate with the heads of other Federal agencies to ensure that, to the maximum extent practicable, the report content and form under paragraph (a) of this section are consistent with other reporting requirements for Federal programs that provide business and entrepreneurial assistance.

Subpart F—IEED Grant Administration

§ 1187.50 How will IEED evaluate awardees' performance?

Not later than one year after the date on which IEED awards a grant to an eligible applicant under the IBIP, and annually thereafter for the duration of the grant, IEED will conduct an evaluation of, and prepare a report on, the awardee, which will:

(a) Describe the performance of the eligible applicant; and

(b) Be used in determining the ongoing eligibility of the eligible applicant.

§ 1187.51 Will IEED facilitate relationships between awardees and educational institutions serving Native American communities?

IEED will facilitate the relationships between awardees and educational institutions serving Native American communities, including Tribal colleges and universities.

§ 1187.52 How will IEED coordinate with other Federal agencies?

IEED will coordinate with the Secretaries of Agriculture, Commerce, and Treasury, and the Administrator of the Small Business Administration to ensure, to the maximum extent practicable, that awardees have the information and materials they need to provide Native businesses and Native entrepreneurs with the information and assistance necessary to apply for business and entrepreneurial development programs administered by those agencies.

Bryan Newland,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2021–07175 Filed 4–12–21; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2021–0029]

RIN 1625–AA08

Special Local Regulations; Mystic Sharkfest Swim, Mystic River, Mystic, CT

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to issue special local regulations for an annual Mystic Sharkfest Swim event on the Mystic River. This proposed rule is intended to ensure the protection of the maritime public and event participants from the hazards associated with this marine event. When enforced, these special local regulations would restrict vessels from transiting the regulated area during this annually recurring events. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before May 13, 2021.

ADDRESSES: You may submit comments identified by docket number USCG–2021–0029 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Marine Science Technician 1st Class Chris Gibson, Waterways Management Division, Sector Long Island Sound; Tel: (203) 468–4565; Email: *chris.a.gibson@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

Many marine events are held on an annual recurring basis on the navigable waters within the Coast Guard Sector Long Island Sound Captain of the Port (COTP) Zone. The Coast Guard has established special local regulations for some of these annually recurring events to ensure the protection of the maritime public and event particpants from potential hazards.

Regulations establishing special local regulations to restrict vessel traffic are located in part 100 of Title 33 of the Code of Federal Regulations. Section 100.100 in part 100 establishes Special Local Regulations to ensure the safety and security of marine related events, participants, and spectators in Sector Long Island Sound's area of responsibility. The COTP Long Island Sound proposes to amend Table 1 of 33 CFR 100.100 Special Local Regulations; Regattas and Boat Races in the Coast Guard Sector Long Island Sound Captain of the Port Zone because adding this single reaccuring event will considerably reduce administrative overhead and provide the public with notice through publication in the **Federal Register** of the upcoming recurring special local regulation.

The Secretary of Homeland Security has delegated to the Coast Guard authority under section 70041 of Title 46 of the U.S. Code (46 U.S.C. 70041) to issue these regulations.

III. Discussion of Proposed Rule

The Coast Guard proposes to establish special local regulations for the annual Mystic Sharkfest Swim event by adding this event to Table 1 to 33 CFR 100.100. The event would occur on a day in July at a time to be determined each year. The regulated area would encompass all waters of the Mystic River in Mystic, CT from Mystic Seaport, down the Mystic River, under the Bascule Drawbridge, to the boat launch ramp at the north end of Seaport Marine. When enforced on the one day in July each year, these special local regulations would restrict vessels from transiting the regulated area. The specific proposed description of this proposed regulation appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a

''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, and duration and time-of-day of the special local regulation. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the special local regulation and the rule would allow vessels to seek permission to enter the area. Vessel traffic would also be able to request permission from the COTP or a designated representative to enter the restricted area.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit this proposed regulated area may be small entities, for the reasons stated in section IV.A above this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves adding an annually recurring marine event to the already listed Table in 33 CFR 100.100. Normally such actions are categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Public comments will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. Amend Table 1 in § 100.100 by adding item 7.8 in numerical order to read as follows:

§ 100.100 Special Local Regulations; Regattas and Boat Races in the Coast Guard Sector Long Island Sound Captain of the Port Zone.

* * * * *

TABLE 1 TO § 100.100

*	*	*
7	July	
*	*	*
7.8	Mystic Sharkfest Swim	• Date: A single day during July. • Time: To be determined annually. • Location: All waters of the Mystic River in Mystic, CT from Mystic Seaport, down the Mystic River, under the Bascule Drawbridge at 41°21′17.046″ N, 071°58′8.742″ W, to finish at the boat launch ramp at the north end of Seaport Marine.
*	*	*

Dated: April 8, 2021

E.J. Van Camp,

Captain, U.S. Coast Guard, Captain of the Port Long Island Sound.

[FR Doc. 2021–07650 Filed 4–12–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2021–0062]

RIN 1625–AA87

Security Zone: Electric Boat Shipyard, Groton, CT

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to modify the security zone boundaries surrounding the Electric Boat Shipyard in Groton, Connecticut. The proposed amendment to the Security Zone is due to the expanding operations at Electric Boat Shipyard. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before May 13, 2021.

ADDRESSES: You may submit comments identified by docket number USCG–2021–0062 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Marine Science Technician 3rd Class Ashley Dodd, Waterways Management Division, Sector Long Island Sound; Tel: (203) 468–4469; Email: *Ashley.M.Dodd@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

Electric Boat Shipyard has a history of constructing vessels for the United States Navy. For this reason a security zone is established to safeguard from destruction, loss, or injury from sabotage or other submersive acts, or other causes of a similar nature to its waterfront facility and its vessels that they construct. In order for Electric Boat Shipyard to assemble and launch the Columbia Class Submarine for the U.S. Navy they are building a new submarine construction facility and floating dry dock. Therefore, Electric Boat is requesting a modification to expand the currently existing security zone.

The purpose of this rulemaking is to modify the location of the existing security zone listed in 33 CFR 165.154(a)(2). Captain of the Port Long Island Sound proposes to add a new point in the definition of the security zone and replace two turning points. This would allow the zone to encompass the new building for construction of submarines and floating dry dock.

III. Discussion of Proposed Rule

Part 165 of 33 CFR contains specific regulated navigation areas and limited access areas to prescribe general regulations for different types of limited or controlled access areas and regulated navigation areas and list specific areas and their boundaries. Section 165.154 establishes Safety and Security Zones: Captain of the Port Long Island Sound Zone Safety and Security Zones.

The Coast Guard proposes to modify the location of the existing security zone listed in 33 CFR 165.154(a)(2)(i) Safety and Security Zones: Captain of the Port Zone Safety and Security Zones, to expand the zone, as indicate in the illustration below, to protect a new submarine construction facility and floating dry dock being built adjacent to the current facility.

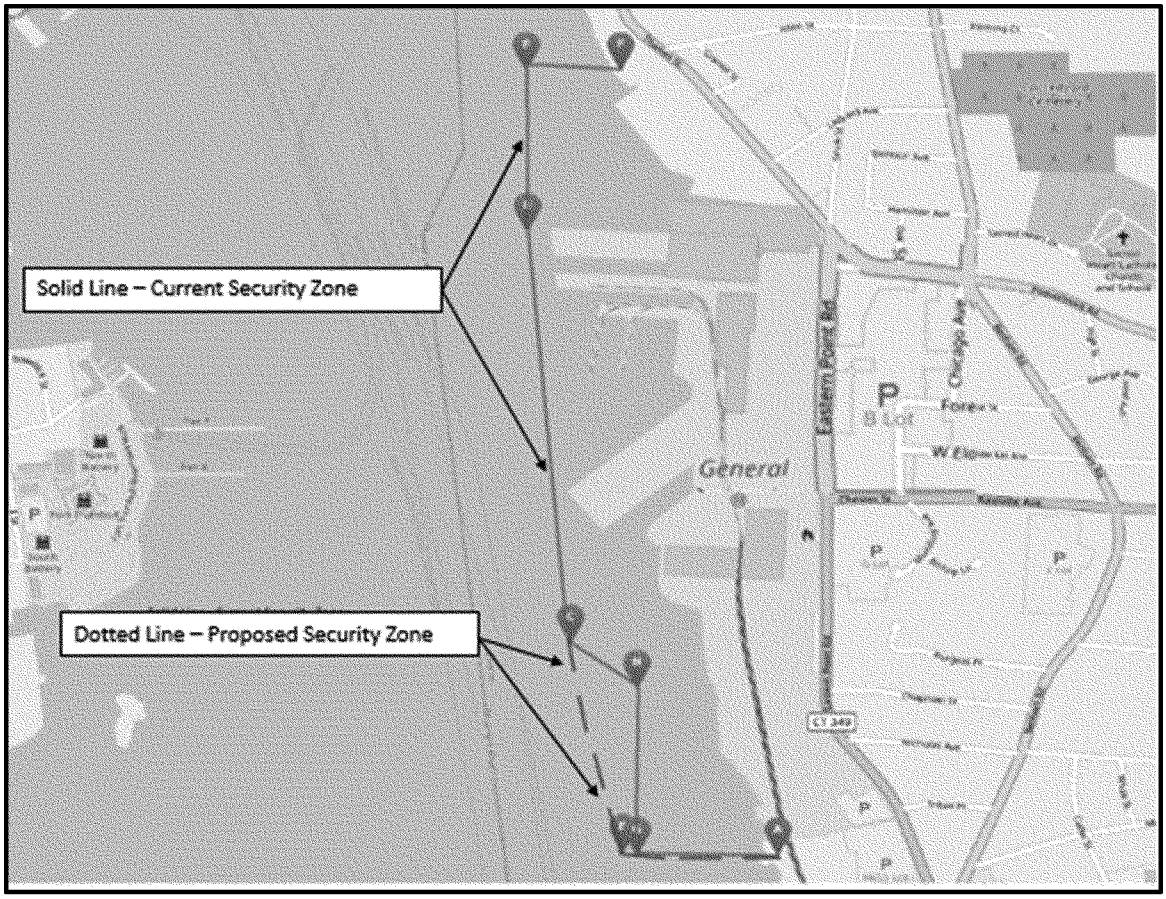

Illustration showing current and proposed security zone.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, and duration of the security zone. Vessel traffic would be able to safely transit around the security zone which would impact a small designated area of the Thames River.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the security zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the

relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a security zone to limit access near Electric Boat Shipyard. Normally such actions are categorically excluded from further review under paragraph L60a of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Documents mentioned in this NPRM as being available in the docket, and public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6 and 160.5; Departmemt of Homeland Security Delegation No. 0170.1

■ 2. In § 165.154, revise paragraphs (a)(2)(i) and (ii) to read as follows:

§ 165.154 Safety and Security Zones; Captain of the Port Long Island Sound Zone Safety and Security Zones.

* * * * *

(a) * * *

(2) * * *

(i) *Location.* All navigable waters of the Thames River, from surface to bottom, West of the Electric Boat Corportation Shipyard enclosed by a line beginning at a point on the shoreline 41°20′16″ N, 72°04′47″ W; then running West to 41°20′16.2″ N, 72°04′58.0″ W; then running North to 41°20′28.7″ N, 72°05′01.7″ W; then North-Northwest to 41°20′53.3″ N, 72°05′04.8″ W; then North-Northeast to 41°21′02.9″ N, 72°05′04.9″ W; then running to shoreline at 41°21′02.9″ N, 72°04′58.2″ W (NAD 83).

(ii) *Application.* Paragraphs (a), (e), (f) of § 165.33 do not apply to public vessels or to vessels owned by, under hire to, or performing work for the Electric Boat Division when operating in the security zone.

* * * * *

Dated: April 8, 2021

E.J. Van Vamp,

Captain, U.S. Coast Guard, Captain of the Port Long Island Sound.

[FR Doc. 2021–07651 Filed 4–12–21; 8:45 am]

BILLING CODE 9110–04–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3030

[Docket No. RM2021–2; Order No. 5862]

Market Dominant Products

AGENCY: Postal Regulatory Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Commission is initiating a review seeking input from the public about what additional regulations promulgated by the Commission may be necessary to achieve the objectives of the Postal Accountability and

Enhancement Act (PAEA) particularly related to maximizing incentives to increase efficiency and reduce costs, maintaining high-quality service standards, and assuring financial stability (including retained earnings). This advance notice informs the public of the docket's initiation, invites public comment, and takes other administrative steps.

DATES:

Comments are due: July 14, 2021.

Reply comments are due: August 13, 2021.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION: On January 15, 2021, the Commission established this proceeding to seek public input regarding any additional regulations that may be necessary to achieve the objectives of the Postal Accountability and Enhancement Act (PAEA) [1] over the longer-term, particularly for issues such as ''maximizing incentives to increase efficiency and reduce costs, maintaining high-quality service standards, and assuring financial stability (including retained earnings).'' [2] The Commission established April 15, 2021, and May 17, 2021, as the deadlines for filing comments and reply comments, respectively. Order No. 5816 at 15.

On March 23, 2021, the Postal Service published a ten-year plan announcing potential changes intended to achieve financial stability and service excellence.[3] On April 1, 2021, the National Association of Presort Mailers (NAPM) filed a request for an extension of the deadline for initial comments in this proceeding.[4] NAPM raises three reasons in support of its Request, which are generally premised on recent developments resulting from the potential changes announced in the Postal Service's Plan. *See* Request at 1–2. First, NAPM asserts that it would be premature to discuss the issues raised in this proceeding without a fuller understanding of the potential changes announced in the Postal Service's Plan. *See id.* Second, NAPM observes that commenters may face difficulties in providing effective comments on issues related to the maintenance of high-quality service standards by the established deadline because the Postal Service also recently announced plans to reduce service standards for First-Class Mail and Periodicals.[5] Third, noting that the Postal Service has recently initiated five proceedings in which mailing association stakeholders intend to participate,[6] NAPM requests that the Commission consider how the resources of commenters affect their ability to meaningfully respond to multiple filing deadlines. *See* Request at 2.

The Association of Postal Commerce (PostCom) and the Public Representative support this Request.[7] PostCom agrees with NAPM's assessment of the recent developments. PostCom Statement at 1. The Public Representative asserts that extending both the initial and reply comment deadlines would allow interested persons to better evaluate the advisability of adopting a performance incentive mechanism and the structure of such a mechanism in light of the Postal Service's recently announced service changes. Public Representative Response at 1.

Given the recent developments, this requested extension is reasonable and does not prejudice any party. Therefore, the Request is granted.

Comments are due July 14, 2021. Reply comments are due August 13, 2021.

It is ordered:

1. The Request for Extension of Initial Comments Deadline, filed on April 1, 2021, is granted.
2. Interested persons may submit comments no later than July 14, 2021.
3. Interested persons may submit reply comments no later than August 13, 2021.
4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2021–07521 Filed 4–12–21; 8:45 am]

BILLING CODE 7710–FW–P

[1] Public Law 109–435, 201, 120 Stat. 3198, 3204 (2006).

[2] Advance Notice of Proposed Rulemaking Regarding Performance Incentive Mechanism, January 15, 2021, at 1 (Order No. 5816).

[3] *See* United States Postal Service, Delivering for America: Our Vision and Ten-Year Plan to Achieve Financial Sustainability and Service Excellence, March 23, 2021, at 3, available at *https://about.usps.com/what/strategic-plans/delivering-for-america/assets/USPS_Delivering-For-America.pdf* (Postal Service's Plan).

[4] Request for Extension of Initial Comments Deadline, April 1, 2021 (Request).

[5] *See* Request at 2; *see also* Postal Service's Plan at 52; Docket No. N2021–1, Notice of Pre-Filing Conference, March 23, 2021.

[6] No specific proceedings are referenced in the Request other than Docket No. N2021–1; however, the Commission takes note of the following four proceedings recently initiated by the Postal Service: Docket Nos. RM2021–5, CP2021–81, MC2021–78, and RM2021–4. *See* Docket No. RM2021–5, United States Postal Service Application for Waiver Under 39 CFR 3030.286, March 26, 2021 (seeking waiver of rules for setting the First-Class Mail Letters 5-Digit Automation workshare discount in the next rate adjustment filing); Docket No. CP2021–81, USPS Notice of Changes in Class of General Applicability for a Competitive Product, March 26, 2021 (seeking to eliminate the 10:30 a.m. delivery option for the Priority Mail Express product and the associated fee for that option); Docket No. MC2021–78, United States Postal Service Request to Transfer Bound Printed Matter Parcels to the Competitive Product List, March 26, 2021 (seeking to transfer Bound Printed Matter Parcels from the Market Dominant product list to the Competitive product list); Docket No. RM2021–4, Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Two), March 24, 2021 (seeking to change the assignment of cost pools in the First-Class Mail cost avoidance model).

[7] Statement in Support of the National Association of Presort Mailers Request for Extension of Initial Comments Deadline, March 30, 2021 (PostCom Statement); Response of the Public Representative in Support of Request for Extension of Comment Deadlines, April 2, 2021 (Public Representative Response).

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2020–0602; FRL–10022–54–Region 5]

Air Plan Approval; Ohio; Ohio Permit Fee Rule Removal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve under the Clean Air Act (CAA), a revision to Ohio's State Implementation Plan (SIP), submitted by the Ohio Environmental Protection Agency (OEPA) on November 12, 2020 and supplemented on February 11, 2021. OEPA is requesting to remove the Ohio Administrative Code (OAC) Permit Fees rule provisions from the Ohio SIP because they no longer exist and have been superseded by the fee system in Ohio's Title V permitting program and the Ohio Revised Code (ORC). OEPA rescinded the permit fee rules at the state level in 2003.

DATES: Comments must be received on or before May 13, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2020–0602 at *http://www.regulations.gov,* or via email to *damico.genevieve@epa.gov.* For

comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Richard Angelbeck, Environmental Scientist, Air Permits Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–9698, *angelbeck.richard@epa.gov.* The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. Background for Our Proposed Action

Ohio adopted OAC Chapter 3745–45 Permit Fee rules at the state level on November 24, 1973, and EPA approved the rules into Ohio's SIP on November 24, 1981 (46 FR 57490). Having OAC Chapter 3745–45 adopted into the SIP fulfilled the CAA section 110(a)(2)(K) requirement for Ohio to have a fee structure in place and to collect fees. The air permit fee requirements were then moved from CAA section 110(a)(2)(K) to CAA section 110(a)(2)(L) as a result of the 1990 CAA amendments. EPA approved (60 FR 42045) Ohio's Title V operating permits program on August 15, 1995. Ohio's Title V program relies on the air permit fee structure outlined by statute in ORC 3745.11.

Since Ohio no longer relied on OAC 3745–45 for its air permit fee system, Ohio rescinded OAC 3745–45 in stages at the state level with the final rule being rescinded in 2003. At that time, Ohio did not request recission of OAC 3745–45 from the SIP. On November 12, 2020, OEPA submitted a request to approve the removal of all of OAC Chapter 3745–45 from the SIP. In support, OEPA indicated that it is relying instead on the permit fee system in Ohio's Title V program, as contained in ORC 3745.11.

No emissions increases will result from the removal of OAC Chapter 3745–45 from the Ohio SIP. Because the rescinded OAC Chapter 3745–45 rules have been superseded by the Title V permit fee system as contained in ORC 3745.11, there are no CAA section 110(l) issues to address.

II. What action is EPA taking?

EPA is proposing to approve the removal of Ohio's OAC Chapter 3745–45 Permit Fee rule from the Ohio SIP. Removing OAC Chapter 3745–45 from the Ohio SIP is consistent with Federal regulations governing state permitting programs and would not interfere with reasonable further progress or attainment of any national ambient air quality standards.

III. Incorporation by Reference

In this document, EPA is proposing to amend regulatory text that includes incorporation by reference. EPA is proposing to remove the Chapter 3745–45 Permit Fees provisions of the EPA-Approved Ohio Regulations from the Ohio SIP, which is incorporated by reference in accordance with the requirements of 1 CFR part 51. EPA has made, and will continue to make the State Implementation Plan generally available through *www.regulations.gov* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: April 8, 2021.

Cheryl Newton,

Acting Regional Administrator, Region 5.

[FR Doc. 2021–07540 Filed 4–12–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60 and 63

[EPA–HQ–OAR–2002–0047; FRL–10012–39–OAR]

RIN 2060–AV01

National Emission Standards for Hazardous Air Pollutants: Municipal Solid Waste Landfills Residual Risk and Technology Review; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) published a final rule in the **Federal Register** on March 26, 2020, to complete the residual risk and technology review (RTR) for the Municipal Solid Waste (MSW) Landfills source category as regulated under national emission standards for hazardous air pollutants (NESHAP). The final rule also made minor changes to the 2016 MSW Landfills New Source Performance Standards (NSPS) and Emission Guidelines and Compliance Times for MSW Landfills to improve implementation of the sets of rules affecting MSW landfills. In this action, the EPA is proposing technical revisions and clarifications for the NESHAP for MSW Landfills established in the March 26, 2020, final rule. These changes correct inadvertent errors and clarify wellhead monitoring requirements for the purpose of identifying excess air infiltration; delegation of authority to state, local, or tribal agencies for ''emission standards''; applicability of the General Provisions to affected MSW landfills; and handling of monitoring data for combustion devices during periods of monitoring system breakdowns, repairs, calibration checks, and adjustments. We are proposing further amendments to the 2016 MSW Landfills NSPS to clarify and align the timing of compliance for certain requirements of the 2016 MSW Landfills NSPS for existing MSW landfills that have modified but previously triggered the requirement to install a gas collection and control system (GCCS) under related MSW landfill rules.

DATES: *Comments.* Comments must be received on or before May 28, 2021. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before May 13, 2021.

Public hearing: If anyone contacts us requesting a public hearing on or before April 19, 2021, the EPA will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2002–0047, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2002–0047 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2002–0047.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2002–0047, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday-Friday (except Federal holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room was closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: For questions about this final action, contact Mr. Andrew Sheppard, Natural Resources Group, Sector Policies and Programs Division (E143–03), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–4161; fax number: (919) 541–0516; and email address: *sheppard.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION:

Participation in virtual public hearing. Please note that the EPA is deviating from its typical approach because the President has declared a national emergency. Due to the current Centers for Disease Control and Prevention (CDC) recommendations, as well as state and local orders for social distancing to limit the spread of COVID–19, the EPA cannot hold in-person public meetings at this time.

If requested, the virtual hearing will be held on April 28, 2021. The hearing will convene at 9 a.m. Eastern Time (ET) and will conclude at 12:00 p.m. ET unless the number of registrants indicates more time is needed. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details on the virtual public hearing website at *https://www.epa.gov/stationary-sources-air-pollution/municipal-solid-waste-landfills-new-source-performance-standards.*

The EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/stationary-sources-air-pollution/municipal-solid-waste-landfills-national-emission-standards* or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* The last day to pre-register to speak at the hearing will be April 26, 2021. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/stationary-sources-air-pollution/municipal-solid-waste-landfills-national-emission-standards.*

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to

run either ahead of schedule or behind schedule.

Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to Mr. Andrew Sheppard and the public hearing team. The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/stationary-sources-air-pollution/municipal-solid-waste-landfills-national-emission-standards.* While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing with the public hearing team and describe your needs by April 20, 2021. The EPA may not be able to arrange accommodations without advanced notice.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2002–0047. All documents in the docket are listed in *Regulations.gov.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available electronically in *Regulations.gov.*

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2002–0047. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically any information that you consider to be CBI or other information whose disclosure is restricted by statue. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2002–0047. Note that written comments containing CBI and submitted by mail may be delayed and no hand deliveries will be accepted.

Preamble acronyms and abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

CAA Clean Air Act
CBI Confidential Business Information
CFR Code of Federal Regulations
EPA Environmental Protection Agency
GCCS gas collection and control system
HAP hazardous air pollutant(s)
m3 cubic meters
Mg megagrams
MSW municipal solid waste
NESHAP national emission standards for hazardous air pollutants
NMOC non-methane organic compounds

NSPS new source performance standards
OMB Office of Management and Budget
RTR risk and technology review
SSM startup, shutdown, and malfunction

Organization of this document. The information in this preamble is organized as follows:

I. General Information
A. Does this action apply to me?
B. What is the background for this proposal?
C. What is the statutory authority for this action?
II. Summary and Rationale of Proposed Changes
A. Technical Corrections for 40 CFR Part 63, Subpart AAAA
B. Clarification of Control System Timing Requirements for Modified Landfills in 2016 MSW Landfills NSPS
III. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
C. Paperwork Reduction Act (PRA)
D. Regulatory Flexibility Act (RFA)
E. Unfunded Mandates Reform Act (UMRA)
F. Executive Order 13132: Federalism
G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
J. National Technology Transfer and Advancement Act (NTTAA)
K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. General Information

A. Does this action apply to me?

Table 1 of this preamble lists the associated regulated industrial source categories that are the subject of this proposal. Table 1 is not intended to be exhaustive, but rather provides a guide for readers regarding the entities that this proposed action is likely to affect. The proposed standards, once promulgated, will be directly applicable to the affected sources. Federal, state, local, and tribal government entities could be affected by this proposed action because these entities are often the owners or operators of MSW landfills. As defined in the *Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990* (see 57 FR 31576, July 16, 1992) and *Documentation for Developing the Initial Source Category List, Final Report* (see EPA–450/3–91–030, July 1992), the MSW Landfills source category is any facility that is an entire disposal facility in a contiguous geographical space where household waste is placed in or on land. An MSW landfill may also receive commercial waste, sludges, and industrial waste. An MSW landfill may also receive other types of Resource Conservation and Recovery Act (RCRA), subtitle D wastes (see 40 CFR 257.2) such as commercial solid waste, nonhazardous sludge, conditionally exempt small quantity generator waste, and industrial solid waste portions of an MSW landfill that may be separated by access roads. An MSW landfill may be publicly or privately owned.

TABLE 1—INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Source category	NAICS code [1]
Industry: Air and water resource and solid waste management	924110
Industry: Refuse systems—solid waste landfills	562212
State, local, and tribal government agencies	562212, 924110

[1] North American Industry Classification System.

B. What is the background for this proposal?

The EPA promulgated the MSW Landfills NESHAP (codified at 40 CFR part 63, subpart AAAA) on January 16, 2003 (68 FR 2227). The NESHAP regulates hazardous air pollutant (HAP) emissions from MSW landfills that are either major or area sources, and applies to MSW landfills that have accepted waste since November 8, 1987, or have additional capacity for waste deposition and are major sources, are collocated with major sources, or are area source landfills with a design capacity equal to or greater than 2.5 megagrams (Mg) and 2.5 million cubic meters (m^3) and have estimated uncontrolled emissions equal to or greater than 50 megagrams per year (Mg/yr) of non-methane organic compounds (NMOC). The NESHAP also applies to MSW landfills that have accepted waste since November 8, 1987, or have additional capacity for waste deposition and include a bioreactor and are major sources, are collocated with major sources, or are area source landfills with a design capacity equal to or greater than 2.5 million Mg and 2.5 million m^3 that were not permanently closed as of January 16, 2003.

The EPA recently completed the RTR on the MSW Landfills NESHAP and promulgated amendments to 40 CFR part 63, subpart AAAA on March 26, 2020 (85 FR 17244). The rule finalized the EPA's determination that risks from this source category are acceptable and that the standards provide an ample margin of safety to protect public health and prevent an adverse environmental effect. There were no revisions to the NESHAP based on our analyses conducted under Clean Air Act (CAA) section 112(f). However, the final rule clarified regulatory provisions related to emissions during periods of startup, shutdown, and malfunction (SSM); revised wellhead operational standards and corrective action to improve effectiveness and provide compliance flexibility; incorporated provisions from the 2016 MSW Landfills NSPS; and added requirements for electronic reporting of performance test results. The EPA further published a document on October 13, 2020 (85 FR 64398), to correct inadvertent errors in the cross-referencing and formatting of the final rule, as well as minor clarifications to the operational and reporting requirements.

The EPA promulgated the 2016 MSW Landfills NSPS under CAA section 111 (40 CFR part 60, subpart XXX) (81 FR 59332, August 29, 2016). The control requirements in the 2016 MSW Landfills NSPS apply to MSW landfills for which construction, reconstruction, or modification commenced after July 17, 2014, and with a design capacity equal to or greater than 2.5 Mg and 2.5 million m^3 and estimated uncontrolled emissions equal to or greater than 34 Mg/yr of NMOC. As part of the final MSW Landfills NESHAP rules, the EPA also finalized minor changes to the 2016 MSW Landfills NSPS. These minor changes included provisions that streamlined requirements for affected sources by allowing them to demonstrate compliance with landfill gas control, operating, monitoring, recordkeeping, and reporting

requirements by following the corresponding requirements in the MSW Landfills NESHAP.

This action proposes technical revisions and clarifications to correct inadvertent errors and clarify the compliance and authority requirements for the MSW Landfills NESHAP established in the March 26, 2020, final rule. Additionally, this action proposes clarifying amendments to the 2016 MSW Landfills NSPS to clarify the timing of compliance for certain requirements for existing MSW landfills that have already triggered requirements to install a GCCS.

C. What is the statutory authority for this action?

The statutory authority for revisions to the MSW Landfills NESHAP (40 CFR part 63, subpart AAAA) is provided by sections 111, 112, and 301 of the CAA, as amended (42 U.S.C. 7411, 7412, and 7401). The statutory authority for revisions to the 2016 MSW Landfills NSPS (40 CFR part 60, subpart XXX) is provided by sections 111 and 301 of the CAA (42 U.S.C. 7411 and 7401).

II. Summary and Rationale of Proposed Changes

The EPA is proposing to correct inadvertent errors in the MSW Landfills NESHAP that were the result of extensive changes to the structure and content of the NESHAP during the development of the final RTR. The EPA is also proposing to clarify the control system timing requirements for MSW landfills that modify and become subject to the 2016 MSW Landfills NSPS that have already triggered the requirement to install emission controls under related MSW landfills regulations.

A. Technical Corrections for 40 CFR Part 63, Subpart AAAA

First, we are proposing to revise the compliance provisions of 40 CFR 63.1960(a)(4)(i) to reestablish the phrase, ''for the purpose of identifying whether excess air infiltration exists.'' This phrase was removed in error between proposal and promulgation of the NESHAP. The preamble to the final rule indicated that this phrase was removed because the phrase does not apply to temperature. Except for approved alternatives, we require wells to be operated at negative pressure. When wells are operated at negative pressure, excess air can lead to increased temperatures. Therefore, the phrase should be included to identify that the requirement to monitor temperature is so that the operation of the landfill can be monitored to ensure that excess air infiltration is not occurring. The intent was for this paragraph to be consistent with 40 CFR 60.765(a)(5) of the 2016 MSW Landfills NSPS, which contains the phrase, ''for the purpose of identifying whether excess air infiltration into the landfill is occurring,'' for demonstrating whether excess air infiltration is occurring when putting a well under negative pressure. The proposed revision would correct the requirement and ensure consistency between the NESHAP and NSPS.

We are proposing to revise 40 CFR 63.1961(a)(5)(vi) to eliminate redundancy and to add sampling times. The EPA is revising 40 CFR 63.1961(a)(5)(vi)(A) to change ''and'' at the end of paragraph (A) to an ''or.'' This change eliminates redundancy by requiring either paragraph (A) or (B) instead of both (A) and (B). Language defining the sampling time to be used when measuring carbon monoxide (CO) at the wellheads was inadvertently not included in the final rule. A sampling time is proposed for both the samples taken directly from the wellhead and the samples collected in passivated canisters or multi-layer foil sampling bags for analysis. The proposed sampling times are consistent for both sampling methodologies and provide five 1-minute samples that are then averaged to give a CO reading at each monitored wellhead. Additionally, when analyzing samples collected in a canister or bag, in order to ensure the uniformity of the collected sample, the five 1-minute averages resulting from the analysis of the collected sample can vary from one another by no more than 7 parts per million.

We are proposing to revise 40 CFR 63.1975 because it erroneously requires the inclusion of monitoring data that should be excluded from 3-hour compliance averages for combustion temperature. The recent amendments to the provisions at 40 CFR 63.1975 specify that the calculation of 3-hour average combustion temperature for enclosed combustors must include data collected during monitoring system breakdowns, repairs, calibration checks, and zero (low-level) and high-level adjustments. In brief, we stated in the *Summary of Public Comments and EPA's Responses for the Proposed Risk and Technology Review and Amendments for the Municipal Solid Waste Landfills NESHAP,* available in Docket ID No. EPA–HQ–OAR–2002–0047, that because the standard applies at all times, data collected during these periods must be included in the averages to demonstrate continuous compliance with the NESHAP. We further stated in our response that the data in 40 CFR 63.1975(a) are needed to determine if the landfill operator is meeting the standard and the general duty in 40 CFR 63.1955(c) to operate and maintain the affected source, including the air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices. However, we now recognize that including data from these periods in the combustion temperature averages is not appropriate for demonstrating compliance and is not otherwise necessary. First, the data collected during monitoring system breakdowns, repairs, calibration checks, and zero (low-level) and high-level adjustments is not quality-assured and is unlikely to be reliable because it may not reflect accurate measurements of the target analyte in the emission matrix (*e.g.,* calibrations and audits using reference gases would not result in accurate measurements). Therefore, inclusion of these data in calculations would result in inaccurate or misinformed estimates. As such, we have consistently excluded data collected during these periods from data averages or calculations used to report emission or operating levels in other NESHAP (*e.g.,* Nutritional Yeast Manufacturing NESHAP (82 FR 48156, October 16, 2017) and Miscellaneous Organic Chemical Manufacturing NESHAP (85 FR 49084, August 12, 2020)). Further, 40 CFR 63.1965(b) specifies that a deviation occurs when 1 hour or more of the hours during the 3-hour block averaging period does not constitute a valid hour of data for all periods during which the landfill GCCS is required to be operated. In such cases, the enforcement authority will evaluate all reported information and determine if the owner or operator has complied with the general duty in 40 CFR 63.1955(c). The general duty requires the owner or operator to operate and maintain the affected source, including the air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices. In addition, the General Provisions, 40 CFR 63.10(b)(2)(vi), require reporting of each period during which a continuous monitoring system is malfunctioning or inoperative (including out-of-control periods). Therefore, with these amendments, the reported 3-hour temperature data will include only quality-assured measurements. In addition, reporting under 40 CFR 63.10(b)(2)(vi) will provide the enforcement authority with information on periods of malfunctioning or inoperative measurement monitoring

equipment. Taken together, these two periodic reports will provide adequate information for the enforcement authority to make a compliance determination; and, if appropriate based on the circumstances of each case, the enforcement authority could determine that the periods of missing compliance data constitute a violation of the general duty standard.

We also are proposing associated editorial corrections to Table 1 to 40 CFR part 63, subpart AAAA. In Table 1, we intended to specify that 40 CFR 63.10(b)(2)(vi) applies to 40 CFR part 63, subpart AAAA, but inadvertently labeled the entry in Table 1 as 40 CFR 63.10(b)(vi). Similarly, we intended to specify that 40 CFR 63.10(b)(2)(vii) through (xiv) applies to 40 CFR part 63, subpart AAAA, but inadvertently labeled the entry in Table 1 as 40 CFR 63.10(b)(vii) through (xiv). The references to 40 CFR 63.10(b)(vi) and 40 CFR 63.10(b)(vii) through (xiv) are incorrect because these are not actual paragraphs in the general provisions. We are proposing to correct these entries to 40 CFR 63.10(b)(2)(vi) and 40 CFR 63.10(b)(2)(vii) through (xiv), respectively.

Next, we are proposing to revise the implementation and enforcement provisions of 40 CFR 63.1985. The proposed revision would amend paragraph (c) to add the word ''emission'' to read as follows: ''Approval of alternatives to the emission standards in 40 CFR 63.1955 through 63.1962.'' The proposed correction would clarify that the EPA intended to restrict delegation of authority for approval of alternatives to the emissions standards but did not intend to preclude delegation of authority for state or local agencies for approval or disapproval of higher operating values and other alternative monitoring or compliance provisions that are needed to reflect a source's site-specific conditions. We intended to make this clarification in the March 26, 2020, final rule. As explained in the preamble and response to comments, ''the EPA intends the use of the phrase ''alternative emission standards'' to refer to the ''standards'' for MSW landfill emissions in 40 CFR 63.1955 through 63.1962. The EPA does not intend ''alternative emission standards'' to include alternatives for wellhead monitoring in 40 CFR 63.1958'' (85 FR 17255). However, we inadvertently excluded the word ''emissions'' in the final rule text. See section IV.D.2 of the preamble to the final MSW Landfills NESHAP (85 FR 17254) and section 14 of the *Summary of Public Comments and the EPA's Responses for the Proposed Risk and Technology Review and Amendments for the Municipal Solid Waste Landfills NESHAP,* available in Docket ID No. EPA–HQ–OAR–2002–0047 for additional information.

We are also proposing revisions to Table 1 to Subpart AAAA—Applicability of NESHAP General Provisions to Subpart AAAA. First, we are proposing to revise the Table 1 entry for 40 CFR 63.6(f)(1). We propose to change the ''Yes'' to a ''No'' in the column labeled, ''Applicable to subpart AAAA before September 28, 2021.'' Section 63.6(f)(1) addresses ''Exemption of nonopacity emission standards during SSM.'' In the final rule published March 26, 2020, the EPA removed the exemptions for periods of SSM to reflect the vacatur by the United States Court of Appeals for the District of Columbia Circuit (the court) of provisions governing the emissions of HAP during periods of SSM. See *Sierra Club* v. *EPA,* 551 F. 3d 1019 (D.C. Cir. 2008). As explained in the final rule, the court held that under CAA section 302(k), emissions standards or limitations must be continuous in nature and that the SSM exemptions in 40 CFR 63.6(f)(1) and (h)(1) violate this CAA requirement.

In the final rule, we revised Table 1 to subpart AAAA of 40 CFR part 63, which incorporated the SSM exemption in 40 CFR 63.6(f)(1), to specify that 40 CFR 63.(f)(1) applies before but not after the compliance date of September 27, 2021. However, because the SSM exemption in 40 CFR 63.6(f)(1) has been vacated, it has no legal effect and the language in Table 1 suggesting that 40 CFR 63.6(f)(1) applies until September 27, 2021, was incorrect and misleading. The SSM exemption in 40 CFR 63.6(f)(1) has been without legal effect since the date of the court order in *Sierra Club* v. *EPA.* To correct this error, we are proposing an amendment to the General Provisions Table 1 entry for 40 CFR 63.6(f)(1) by changing the entry in the column labeled ''Applicable to subpart AAAA before September 28, 2021'' from ''Yes'' to ''No.'' This amendment only revises the table entry related to 40 CFR 63.6(f)(1) to reflect the court order vacating the General Provisions exemption language. See the final rule for any other requirements related to SSM and the requirement to comply at all times.

We propose to correct the Table 1 entry for 40 CFR 63.10(d)(3). We are proposing to change the ''Yes'' to a ''No'' in the column labeled, ''Applicable to subpart AAAA no later than September 27, 2021.'' Section 63.10(d)(3) addresses reporting of visible emissions observations. Because no opacity or visible emission observations are required by 40 CFR part 63, subpart AAAA, 40 CFR 63.10(d)(3) does not apply. In the *Summary of Public Comments and the EPA's Responses for the Proposed Risk and Technology Review and Amendments for the Municipal Solid Waste Landfills NESHAP,* available in Docket ID No. EPA–HQ–OAR–2002–0047, the EPA pointed out that the 40 CFR part 63 General Provisions contain more than 150 references to opacity and visible emission standards. The EPA noted that to revise Table 1 to specify applicability of each subparagraph that addresses opacity or visible emission standards would render the table dense, tedious, and difficult to comprehend, so we chose not to follow that approach. However, because this is one of the three instances where opacity or visible emissions are directly or uniquely addressed in the table, we believe that changing the table will be less confusing. Because there are no opacity or visible emission standards, as listed in the table entry for 40 CFR 63.6(h) and 63.9(f), there would have been nothing to report in the 40 CFR 63.10(d)(3) entry. Therefore, this correction does not result in adding or removing any practical requirements for landfills. Thus, we are proposing to correct the Table 1 entry for 40 CFR 63.10(d)(3) to change the ''Yes'' to a ''No'' in the column labeled, ''Applicable to subpart AAAA no later than September 27, 2021.''

B. Clarification of Control System Timing Requirements for Modified Landfills in 2016 MSW Landfills NSPS

The 2016 MSW Landfills NSPS requires that a GCCS must be installed within 30 months after an MSW landfill that equals or exceeds the design capacity threshold (2.5 million Mg and 2.5 million m^3) files a report indicating that it has reached or exceeded an NMOC emissions level of 34 Mg/yr. 40 CFR 60.762(b)(2)(ii). This threshold for GCCS installation is lower than several related federal MSW landfills regulations, such as the 1996 MSW Landfills NSPS and Emission Guidelines, in which the emissions threshold for GCCS installation is 50 Mg/yr NMOC. Many landfills that modify and become subject to the 2016 MSW Landfills NSPS previously exceeded the 50 Mg/yr NMOC threshold set by those other federal regulations and have, therefore, already installed and begun operating GCCS. However, the 2016 MSW Landfills NSPS did not explicitly specify a compliance date for landfills with existing GCCS to transition operations to meet the

amended requirements upon modification. Therefore, some landfills with existing GCCS that have become subject to 2016 MSW Landfills NSPS have followed the compliance requirements and timeline for installation of GCCS at a new landfill (*i.e.,* 30 months).

It was not the EPA's intent in promulgating the 2016 MSW Landfills NSPS to permit a landfill that was already classified as a ''controlled landfill'' pursuant to either the 1996 MSW Landfills NSPS at 40 CFR part 60, subpart WWW, or the emission guidelines at subparts Cc or Cf to be permitted an additional 30-month period before compliance with the requirements of the 2016 MSW Landfills NSPS would be required. As the EPA explained in the rulemaking for the 2014 proposal (79 FR 41805), the 30-month period provided in 40 CFR 60.762(b)(2)(ii) is intended as an initial one-time lag period to allow adequate time for landfills to install and start up GCCS. New ''greenfield'' landfills would be starting from scratch with designing, permitting, and building GCCS infrastructure. In contrast, existing landfills that modified and become subject to the 2016 MSW Landfills NSPS from another subpart but have already triggered the design plan requirements from their previous MSW landfill rule, have already completed the GCCS design. These landfills have completed permitting and construction of all or significant portions of GCCS infrastructure. The only new requirements that a modified source is subject to are the updated monitoring, recordkeeping, and reporting requirements promulgated in the 2016 MSW Landfills NSPS, which do not require 30 months of additional time for compliance. The EPA notes that these landfill owners and operators will be required to comply with similar monitoring, reporting, and recordkeeping requirements under the MSW Landfills NESHAP by September 27, 2021, regardless of when they modify. Given the 30-month period was plainly intended to provide sources sufficient time for the initial installation of GCCS, it, therefore, clearly was not the EPA's intent to provide that same period of time for compliance for modified sources that do not need to install GCCS. The EPA acknowledges, however, that the regulations promulgated in the 2016 MSW Landfills NSPS did not clearly provide for the compliance timeframe for modifying sources. To correct this issue, the EPA is making four regulatory text edits to clarify the applicable requirements for modifying landfills.

First, the EPA is proposing to clarify the definition for landfills that are considered to be a controlled landfill. The 2016 MSW Landfills NSPS identifies and defines the term ''controlled landfill'' as one that has triggered the emissions threshold of 34 Mg/yr of NMOC or more and submitted its collection and control system design plan. The 2016 MSW Landfills NSPS requires the design plan to be submitted within 1 year of the first NMOC annual emission rate report that is equal to or greater than 34 Mg/yr of NMOC. While this language accurately describes landfills that reach the 34 Mg/yr NMOC emissions threshold after promulgation of the 2016 MSW Landfills NSPS, its applicability to landfills that had exceeded the emissions threshold and submitted a design plan under previously promulgated landfill regulations was not specified. The EPA is proposing to revise the definition of the term ''controlled landfill'' in 40 CFR 60.761 to clarify that a landfill is considered controlled at the time a collection and control system design plan is submitted in compliance with whichever applicable regulation first required submission of a collection and control system design plan for the source in question, whether pursuant to 40 CFR 60.762(b)(2)(i) or 40 CFR part 60, subpart WWW; or pursuant to a Federal plan or EPA-approved and effective state plan or tribal plan that implements either 40 CFR part 60, subpart Cc or Cf.

Second, the EPA is proposing to amend 40 CFR 60.767(d) to clarify that submittal of an initial design plan includes submittal under not only the 2016 MSW Landfills NSPS, but also under 40 CFR part 60, subpart WWW, or a state or Federal plan implementing 40 CFR part 60, subpart Cc or Cf. As stated in 40 CFR 60.767(d), revised design plans are required 90 days before expanding operations into an area not covered by a previously approved design plan, or prior to installing or expanding a system in a way inconsistent with the initial design plan. By making this clarification to the introductory paragraph for the revised GCCS design plan requirements, the EPA is clarifying that the landfill owner or operator would only need to submit a revised design plan if the initial design plan submitted under any of these subparts required changes.

Third, the EPA is proposing to amend 40 CFR 60.762(b)(2) to clarify when an initial or revised GCCS design plan is required to be submitted. The EPA is proposing adding language to 40 CFR 60.762(b)(2)(i) to clarify that the requirement to submit a collection or control system design plan can be met with either an initial *or revised* plan once the NMOC emission rate threshold is exceeded. The initial design plan is required to be submitted within 1 year of the first time a landfill exceeded the threshold of 34 Mg/yr of NMOC.

Finally, to clarify the EPA's intent that the timing be linked to a landfill's emissions regardless of the specific subpart the report was submitted under, the EPA is also proposing to add language to 40 CFR 60.762(b)(2)(ii)(A) to add NMOC emission rate reports submitted under any 40 CFR part 60 or 40 CFR part 62 MSW Landfills regulation, and not only a report submitted under the 2016 MSW Landfills NSPS.

With these proposed amendments, the EPA intends to clarify that MSW landfills that become subject to the 2016 MSW Landfills NSPS due to modification but have already been required to submit a collection and control system under another MSW landfills regulation do not restart the 30-month compliance timeline for installation of an initial GCCS and do not need to duplicate previously submitted reports. Rather, these landfills should follow the pathway established for landfills to submit revised design plans and meet any applicable requirements that were not previously required by another subpart. Specifically, the proposed amendments should clarify: (1) Controlled landfills are those that already met requirements to install a GCCS under any of the promulgated MSW landfill regulations; (2) controlled landfills that have previously submitted initial NMOC emission rate reports do not need to resubmit the initial reports; (3) controlled landfills that have an operational GCCS do not need to resubmit annual NMOC reports; (4) controlled landfills do not need to resubmit initial design plans; (5) controlled landfills do need to submit revised design plans 90 days before expanding operations into an area not covered by a previously approved design plan, or prior to installing or expanding a system in a way inconsistent with the initial design plan; and (6) controlled landfills would be required to prepare a site-specific treatment system monitoring plan, as applicable.

As noted above, some controlled landfills that have become subject to the requirements of the 2016 MSW Landfills NSPS have been allowed 30 months to comply with the requirements of the rule. If the EPA finalized the proposed

amendments, 30 months will only be allowed for the initial installation of a GCCS for landfills newly subject to these rules. Controlled landfills will be expected to comply with operational, monitoring, reporting, and recordkeeping requirements immediately upon becoming subject to the 2016 MSW Landfills NSPS, unless an alternate timeline has been approved. These operational, monitoring, reporting, and recordkeeping requirements are substantively similar or the same as the requirements for these landfills under the MSW Landfills NESHAP. Landfills subject to the NESHAP must meet these requirements no later than September 27, 2021.

The EPA requests comment on whether the proposed modifications to the 2016 MSW Landfills NSPS regulations adequately clarify the expected compliance deadlines for controlled landfills that become subject to the 2016 MSW Landfills NSPS through modification and/or whether other approaches are needed to align the timing provisions of the 2016 MSW Landfills NSPS with the timing provisions of the MSW Landfills NESHAP. The EPA is not otherwise reopening or accepting comments on any other aspects of the 2016 MSW Landfills NSPS not discussed in this proposal.

III. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is not a significant regulatory action and was, therefore, not submitted to OMB for review.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0505 for the NESHAP and OMB control number 2060–0697 for the NSPS. The proposed revisions include technical corrections to the NESHAP and NSPS and do not pose any changes to the information collection burden for either.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. The small entities subject to the requirements of the NESHAP and NSPS may include private small business and small governmental jurisdictions that own or operate landfills, but the cost for complying are owned by a small entity. This action only proposes technical corrections to provisions from the March 26, 2020, final RTR rulemaking and clarifying amendments to the 2016 MSW Landfills NSPS and does not implement new requirements. We have, therefore, concluded that this action will have no net regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. Although state, local, or tribal governments own and operate landfills subject to these final amendments, this action proposes only technical corrections to provisions from the March 26, 2020, final RTR rulemaking and clarifying amendments to the 2016 MSW Landfills NSPS and there are no impacts resulting from this regulatory action.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. As explained in the March 26, 2020, final rule, the EPA previously identified one tribe that owns three landfills that are potentially subject to the MSW Landfills NESHAP. However, this action proposes only technical corrections to provisions from the March 26, 2020, final RTR rulemaking and clarifying amendments to the 2016 MSW Landfills NSPS and does not impose any new requirements on tribes.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This regulatory action is a technical correction to a previously promulgated regulatory action and does not have any impact on human health or the environment.

List of Subjects

40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations,

Reporting and recordkeeping requirements.

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, the EPA proposes to amend 40 CFR parts 60 and 63 as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart XXX—Standards of Performance for Municipal Solid Waste Landfills That Commenced Construction, Reconstruction, or Modification After July 17, 2014

■ 2. Amend section 60.761 by revising the definition of ''Controlled landfill'' to read as follows:

§ 60.761 Definitions.

* * * * *

Controlled landfill means any landfill at which collection and control systems are required under this subpart as a result of the nonmethane organic compounds emission rate. The landfill is considered controlled at the time a collection and control system design plan is submitted in compliance with either § 60.762(b)(2)(i), subpart WWW of this part, or a Federal plan or EPA-approved and effective state plan or tribal plan that implements either subpart Cc or Cf of this part, whichever regulation first required submission of a collection and control system design plan for the landfill.

* * * * *

■ 3. Amend section 60.762 by revising paragraphs (b)(2)(i) and (b)(2)(ii)(A) to read as follows:

§ 60.762 Standards for air emissions from municipal solid waste landfills.

* * * * *

(b) * * *

(2) * * *

(i) *Calculated NMOC Emission Rate.* Submit an initial or revised collection and control system design plan prepared by a professional engineer to the Administrator as specified in § 60.767(c) or (d); calculate NMOC emissions using the next higher tier in § 60.764; or conduct a surface emission monitoring demonstration using the procedures specified in § 60.764(a)(6). The collection and control system must meet the requirements in paragraphs (b)(2)(ii) and (iii) of this section.

(ii) * * *

(A) The first annual report submitted under parts 60 or 62 of this subchapter in which the NMOC emission rate equals or exceeds 34 megagrams per year, unless Tier 2 or Tier 3 sampling demonstrates that the NMOC emission rate is less than 34 megagrams per year, as specified in § 60.767(c)(4); or

* * * * *

■ 4. Amend section 60.767 by revising paragraph (d) introductory text to read as follows:

§ 60.767 Reporting requirements.

* * * * *

(d) *Revised design plan.* The owner or operator who has already been required to submit a design plan under paragraph (c) of this section, subpart WWW of this part, or a Federal plan or EPA-approved and effective state plan or tribal plan that implements subparts Cc or Cf of this part, must submit a revised design plan to the Administrator for approval as follows:

* * * * *

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 5. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart AAAA—National Emission Standards for Hazardous Air Pollutants: Municipal Solid Waste Landfills

■ 6. Amend section 63.1960 by revising paragraph (a)(4)(i) to read as follows:

§ 63.1960 Compliance provisions.

(a) * * *

(4) * * *

(i) Once an owner or operator subject to the provisions of this subpart seeks to demonstrate compliance with the operational standard for temperature in § 63.1958(c)(1), the owner or operator must monitor each well monthly for temperature for the purpose of identifying whether excess air infiltration exists. If a well exceeds the operating parameter for temperature as provided in § 63.1958(c)(1), action must be initiated to correct the exceedance within 5 days. Any attempted corrective measure must not cause exceedances of other operational or performance standards.

* * * * *

■ 7. Amend section 63.1961 by revising paragraph (a)(5)(vi) to read as follows:

§ 63.1961 Monitoring of operations.

(a) * * *

(5) * * *

(vi) Monitor and determine carbon monoxide concentrations, as follows:

(A) Collect the sample from the wellhead sampling port in a passivated canister or multi-layer foil gas sampling bag (such as the Cali-5-Bond Bag) and analyze that sample using EPA Method 10 of appendix A–4 to part 60 of this chapter, or an equivalent method with a detection limit of at least 100 ppmv of carbon monoxide in high concentrations of methane; or

(B) Collect and analyze the sample from the wellhead using EPA Method 10 of appendix A–4 to part 60 of this chapter to measure carbon monoxide concentrations.

(C) When sampling directly from the wellhead, you must sample for 5 minutes plus twice the response time of the analyzer. These values must be recorded. The five 1-minute averages are then average to give you the carbon monoxide reading at the wellhead.

(D) When collecting samples in a passivated canister or multi-layer foil sampling bag, you must sample for the period of time needed to assure that enough sample is collected to provide five (5) consecutive, 1-minute samples during the analysis of the canister or bag contents, but no less than 5 minutes plus twice the response time of the analyzer. When analyzing canister or bag samples, the analysis will continue until a minimum of five (5) consecutive, 1-minute averages recorded by the data acquisition system differ by no more than 7 ppm. The five (5) consecutive, 1-minute averages are then averaged together to give you a carbon monoxide value from the wellhead.

* * * * *

■ 8. Amend section 63.1975 by revising the introductory paragraph to read as follows:

§ 63.1975 How do I calculate the 3-hour block average used to demonstrate compliance?

Before September 28, 2021, averages are calculated in the same way as they are calculated in § 60.758(b)(2)(i) of this subchapter for average combustion temperature and § 60.758(c) for 3-hour average combustion temperature for enclosed combustors), except that the data collected during the events listed in paragraphs (a) through (d) of this section are not to be included in any average computed under this subpart. Beginning no later than September 27, 2021, averages are calculated according to § 63.1983(b)(2)(i) for average combustion temperature and § 63.1983(c)(1)(i) for 3-hour average combustion temperature for enclosed combustors, except that the data collected during the event listed in

paragraph (a) of this section are not to be included in any average computed under this subpart.

* * * * *

■ 9. Amend section 63.1985 by revising paragraph (c) to read as follows:

§ 63.1985 Who enforces this subpart?

* * * * *

(c) The authorities that will not be delegated to state, local, or tribal agencies are as follows. Approval of alternatives to the emission standards in §§ 63.1955 through 63.1962. Where this subpart references part 60, subpart WWW of this subchapter, the cited provisions will be delegated according to the delegation provisions of part 60, subpart WWW of this subchapter. For this subpart, the EPA also retains the authority to approve methods for determining the NMOC concentration in § 63.1959(a)(3) and the method for determining the site-specific methane generation rate constant k in § 63.1959(a)(4).

■ 10. Amend Table 1 to subpart AAAA of part 63 by:

■ a. Revising the entry ''§ 63.6(f)(1)'';

■ b. Removing the entries for ''§ 63.10(b)(vi)'' and ''§ 63.10(b)(vii)–(xiv)'' and adding in their places ''§ 63.10(b)(2)(vi)'' and''§ 63.10(b)(2)(vii)–(xiv)'', respectively; and

■ c. Revising the entry for ''§ 63.10(d)(3).''

The revisions and additions read as follows:

* * * * *

TABLE 1 TO SUBPART AAAA OF PART 63—APPLICABILITY OF NESHAP GENERAL PROVISIONS TO SUBPART AAAA

Part 63 citation	Description	Applicable to subpart AAAA before September 28, 2021	Applicable to subpart AAAA no later than September 27, 2021	Explanation
* *	* *	*	*	*
§ 63.6(f)(1)	Exemption of nonopacity emission standards during SSM.	No	No.	
* *	* *	*	*	*
§ 63.10(b)(2)(vi)	Recordkeeping for CMS malfunctions	No [1]	Yes.	
§ 63.10(b)(2)(vii)-(xiv)	Other Recordkeeping of compliance measurements.	No [1]	Yes.	
* *	* *	*	*	*
§ 63.10(d)(3)	Reporting of visible emission observations.	No [1]	No.	
* *	* *	*	*	*

[1]Before September 28, 2021, this subpart requires affected facilities to follow part 60, subpart WWW of this subchapter, which incorporates the General Provisions of part 60 of this subchapter.

* * * * *

[FR Doc. 2021–07566 Filed 4–12–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2018–0042; FXES11130900000–167–FF09E42000]

RIN 1018–BD00

Endangered and Threatened Wildlife and Plants; Reclassification of Layia carnosa (Beach Layia) From Endangered to Threatened Species Status With Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period; announcement of a public informational meeting and public hearing.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), recently proposed to reclassify the beach layia (*Layia carnosa*) as a threatened species with a rule issued under section 4(d) of the Endangered Species Act of 1973 (Act), as amended. We are reopening the proposed rule comment period to give all interested parties an additional opportunity to comment on the proposed rule, and we announce a public informational meeting and public hearing on the proposed rule. Comments previously submitted need not be resubmitted as they are already incorporated into the public record and will be fully considered in the final rule.

DATES: *Comment submission:* The comment period for the proposed rule that published September 30, 2020 (85 FR 61684), is reopened. We will accept comments received or postmarked on or before May 13, 2021. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Pacific Time on the closing date.

Public informational meeting and public hearing: On April 29, 2021, we will hold a public informational meeting from 4:30 p.m. to 5 p.m., Pacific Time, followed by a public hearing from 5 p.m. to 6 p.m., Pacific Time.

ADDRESSES:

Availability of documents: You may obtain copies of the September 30, 2020, proposed rule and associated documents on the internet at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0042.

Public informational meeting and public hearing: The public informational meeting and the public hearing will be held virtually using the Zoom platform. See Public Hearing, below, for more information.

Comment submission: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R8–ES–2018–0042, which is the docket number for the proposed reclassification and section 4(d) rule. Then click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this

document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: Docket No. FWS–R8–ES–2018–0042, U.S. Fish and Wildlife Service, MS: PRB/3W; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Public Comments, below, for more information).

FOR FURTHER INFORMATION CONTACT: Jenny Ericson, Acting Field Supervisor, U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, 1655 Heindon Rd., Arcata, CA 95521; telephone 707–822–7201. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

On September 30, 2020, we published a proposed rule (85 FR 61684) to reclassify beach layia from endangered to threatened (*i.e.,* ''downlist'' the species) under the Act (16 U.S.C. 1531 *et seq.*). The proposed rule established a 60-day public comment period, ending November 30, 2020. We received a request for a public hearing. Therefore, we are reopening the comment period and announcing a public informational meeting and a public hearing to allow the public an additional opportunity to provide comments on the proposed rule.

For a description of previous Federal actions concerning beach layia and information on the types of comments that would be helpful to us in promulgating this rulemaking action, please refer to the September 30, 2020, proposed rule (85 FR 61684).

Public Hearing

We have scheduled a public informational meeting and public hearing on our September 30, 2020, proposed rule to reclassify beach layia (85 FR 61684). We will hold the public informational meeting and public hearing on the date and at the times listed above under *Public informational meeting and public hearing* in **DATES**. We are holding the public informational meeting and public hearing via the Zoom online video platform and via teleconference so that participants can attend remotely. For security purposes, registration is required. To listen and view the meeting and hearing via Zoom, listen to the meeting and hearing by telephone, or provide oral public comments at the public hearing by Zoom or telephone, you must register. For information on how to register, or if you encounter problems joining Zoom the day of the meeting, visit *https://www.fws.gov/arcata/es/plants/beachLayia/layia.html.* Registrants will receive the Zoom link and the telephone number for the public informational meeting and public hearing. If applicable, interested members of the public not familiar with the Zoom platform should view the Zoom video tutorials (*https://support.zoom.us/hc/en-us/articles/206618765-Zoom-video-tutorials*) prior to the public informational meeting and public hearing.

The public hearing will provide interested parties an opportunity to present verbal testimony (formal, oral comments) regarding the September 30, 2020, proposed rule to reclassify beach layia (85 FR 61684). While the public informational meeting will be an opportunity for dialogue with the Service, the public hearing is not. The purpose of the public hearing is to provide a forum for accepting formal verbal testimony, which will then become part of the record for the proposed rule. In the event there is a large attendance, the time allotted for verbal testimony may be limited. Therefore, anyone wishing to provide verbal testimony at the public hearing is encouraged to provide a prepared written copy of their statement to us through the Federal eRulemaking Portal, or U.S. mail (see **ADDRESSES**, above). There are no limits on the length of written comments submitted to us. Anyone wishing to provide verbal testimony at the public hearing must register before the hearing (*https://www.fws.gov/arcata/es/plants/beachLayia/layia.html*). The use of a virtual public hearing is consistent with our regulations at 50 CFR 424.16(c)(3).

Reasonable Accommodation

The Service is committed to providing access to the public informational meeting and public hearing for all participants. Closed captioning will be available during the public informational meeting and public hearing. Further, a full audio and video recording and transcript of the public hearing will be posted online at *https://www.fws.gov/arcata/es/plants/beachLayia/layia.html* after the hearing. Participants will also have access to live audio during the public informational meeting and public hearing via their telephone or computer speakers. Persons with disabilities requiring reasonable accommodations to participate in the meeting and/or hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT** at least 5 business days prior to the date of the meeting and hearing to help ensure availability. An accessible version of the Service's public informational meeting presentation will also be posted online at *https://www.fws.gov/arcata/es/plants/beachLayia/layia.html* prior to the meeting and hearing (see **DATES**, above). See *https://www.fws.gov/arcata/es/plants/beachLayia/layia.html* for more information about reasonable accommodation.

Public Comments

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via hard copy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.* Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, will be available for public inspection on *http://www.regulations.gov.*

Authors

The primary author of this document is Ecological Services staff of the Pacific Southwest Regional Office, U.S. Fish and Wildlife Service, Sacramento, California.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Martha Williams,

Principal Deputy Director, Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2021–07608 Filed 4–12–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2020–0153; FF09E21000 FXES11110900000 212]

RIN 1018–BE76

Endangered and Threatened Wildlife and Plants; Threatened Species Status for Streaked Horned Lark With Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to affirm the listing of the streaked horned lark (*Eremophila alpestris strigata*), a bird species from Washington and Oregon, as a threatened species under the Endangered Species Act of 1973, as amended (Act). After a review of the best available scientific and commercial information, we again conclude that listing the species as threatened is warranted. We also propose to revise the rule issued under section 4(d) of the Act (''4(d) rule'') for this bird. If we finalize this rule as proposed, it will maintain this species as a threatened species on the List of Endangered and Threatened Wildlife and continue to extend the Act's protections to the species.

DATES: We will accept comments received or postmarked on or before June 14, 2021. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by May 28, 2021.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R1–ES–2020–0153, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R1–ES–2020–0153, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see *Information Requested*, below, for more information).

FOR FURTHER INFORMATION CONTACT: Paul Henson, State Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Suite 100, Portland, OR 97266; telephone 503–231–6179. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, if we determine that a species is an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. To the maximum extent prudent and determinable, we must designate critical habitat for any species that we determine to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species and designation of critical habitat can only be completed by issuing a rule.

What this document does. We propose to affirm the listing of the streaked horned lark as a threatened species, and we propose to revise the 4(d) rule for the species.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the streaked horned lark is threatened due to the ongoing loss and degradation of suitable habitat (Factor A), as well as land management activities and related effects, and recreation (Factor E), combined with the synergistic effects of small population size and climate change (Factor E), such that it is likely to become an endangered species within the foreseeable future.

Supporting documents and peer review. The Service prepared a species status assessment (SSA) report for the streaked horned lark (U.S. Fish and Wildlife Service 2021, entire). The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of five appropriate specialists regarding the SSA report; we received three responses. We also sent the SSA report to six partners, including scientists with expertise in ornithology and streaked horned lark biology and habitat, for review. We received review from three partners. The purpose of peer review is to ensure that our listing determinations and 4(d) rules are based on scientifically sound data, assumptions, and analyses.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species

and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(5) Information on regulations that are necessary and advisable to provide for the conservation of the streaked horned lark and that the Service can consider in revising the 4(d) rule for the species. In particular, information concerning the extent to which we should include any of the Act's section 9 prohibitions in the 4(d) rule or whether any other forms of take should be excepted from the prohibitions in the 4(d) rule.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov.*

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the species is endangered instead of threatened, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. In addition, we may change the parameters of the prohibitions or the exceptions to those prohibitions in our proposed 4(d) rule if we conclude it is appropriate in light of comments and new information received. For example, we may expand the incidental take prohibitions to include prohibiting additional activities if we conclude that those additional activities are not compatible with conservation of the species. Conversely, we may establish additional exceptions to the incidental take prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the species.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On October 3, 2013, we published in the **Federal Register** (78 FR 61452) a final rule listing the streaked horned lark as a threatened species under the Act; that rule includes a 4(d) rule to exempt certain activities from the take prohibitions of the Act and our regulations in order to provide for the conservation of the streaked horned lark.

In addition, on October 3, 2013, we published in the **Federal Register** (78 FR 61506) a final rule designating critical habitat for the streaked horned lark in Washington and Oregon.

On February 28, 2018, the Center for Biological Diversity filed suit against the Department of the Interior and the Service on the listing and 4(d) rules for the streaked horned lark. The plaintiff challenged the adequacy of our significant portion of the range analysis, and the 4(d) rule's exception to the take prohibition for agricultural activities in the Willamette Valley. The court did not vacate the rules but remanded them to us for reconsideration. In July 2019, the Service was ordered, upon agreement of the parties, to submit a new proposed listing rule (and, as applicable, a new 4(d) rule) to the **Federal Register** by March 31, 2021. To facilitate reconsideration of new information and the proposed rule in general, the Service determined that a full, new analysis of the best available scientific information according to our now standard SSA framework (Service 2016a, entire) was appropriate. This proposed rule reflects an updated assessment of the status of the subspecies (including an updated analysis of any significant portions of the range) based on the 2021 SSA for the Streaked Horned Lark, and proposed revisions to the current 4(d) rule.

I. Proposed Listing Determination

Background

A thorough review of the taxonomy, life history, and ecology of the streaked horned lark is presented in the SSA report (U.S. Fish and Wildlife Service 2021, pp. 4–19).

The streaked horned lark, a small songbird endemic to the Pacific Northwest, is one of 42 subspecies of horned lark worldwide and one of five breeding subspecies of horned larks in Washington and Oregon (Beason 1995, p. 2). Adults are pale brown, but shades of brown vary geographically among the subspecies. The male's face has a yellow wash in most subspecies. Adults have a black bib, black whisker marks, black ''horns'' (feather tufts that can be raised or lowered), and black tail feathers with white margins (Beason 1995, p. 2). Adults feed mainly on grass and forb seeds, but feed insects to their young (Beason 1995, p. 6). At coastal sites, streaked horned larks forage in the wrack line and in intertidal habitats (Pearson and Altman 2005, p. 8), and streaked horned larks in the Willamette Valley eat seeds of introduced weedy grasses and forbs, focusing on the seed source that is most abundant (Moore 2008a, p. 9).

Streaked horned larks historically selected habitat in relatively flat, open areas maintained by flooding, fire, and sediment transport dynamics. The interruption of these historical processes due to flood control dams, fire suppression, and reduction of sediment transport by dams resulted in a steep decline in the extent of historical habitat for the lark. Currently, larks are found in open areas free from visual obstructions like grasslands, prairies, wetlands, beaches, dunes, and modified or temporarily disturbed habitats (such as agricultural or grass seed fields, airports, dredged material placement

sites, and gravel roads). Streaked horned larks need relatively flat landscapes with sparse vegetation, preferring habitats with an average of 17 percent bare ground for foraging and 31 percent of bare ground for nesting (Altman 1999, p. 18). Typically, preferred habitats contain short vegetation, contain forbs and grasses that are less than 13 inches (in) (33 centimeters (cm)) in height, and have few or no trees or shrubs (Altman 1999, p. 18; Pearson and Hopey 2005, p. 27). The large, open areas used by populations of larks are regularly disturbed via burning, mowing, herbicide application, crop rotation, dredging material placement, and/or other anthropogenic regimes.

Habitat characteristics of agricultural lands used by streaked horned larks include: (1) Bare or sparsely vegetated areas within or adjacent to grass seed fields, pastures, or fallow fields; (2) recently planted (0 to 3 years) conifer farms with extensive bare ground; and (3) wetland mudflats or ''drown outs'' (*i.e.,* washed out and poorly performing areas within grass seed or row crop fields). Currently, in the Willamette Valley, there are approximately 420,000 acres (ac) (169,968 hectares (ha)) of grass seed fields and an additional approximately 500,000 ac (202,343 ha) of other agriculture. In any year, some portion of these 920,000 ac (372,311 ha) will have suitable streaked horned lark habitat, but the geographic location of those areas may not be consistent from year to year due to variable agricultural practices (fallow fields, crop rotation, etc.), and we cannot predict the changing and dynamic locations of those areas.

Horned larks form breeding pairs in the spring (Beason 1995, p. 11), and territory size is variable. Territory size can range from 1.5 to 2.5 ac (0.61 to 1.0 ha) (Altman 1999, p. 11), and varies widely between sites and across years; for 16 pairs of larks, territories ranged in size from 4.0 to 20.6 ac (1.6 to 8.3 ha) (Wolf *et al.* 2017, p. 12). Territories overlap substantially, which is not surprising given the semi-colonial breeding behavior of the species (breeding territories are adjacent to other pairs at the same site but nests are not in extremely close proximity) (Wolf *et al.* 2017, p. 12). The nesting season (*i.e.,* clutch initiation to fledging) for streaked horned larks begins in mid-April and ends in late August, with peaks in May and early June (Pearson and Hopey 2004, p. 11; Moore 2011, p. 32; Wolf 2011, p. 5; Wolf and Anderson, 2014, p. 19). After the first nesting attempt in April, streaked horned larks will often re-nest in late June or early July (Pearson and Hopey 2004, p. 11). Nests are positioned adjacent to vegetation or other structural elements and are lined with soft vegetation (Pearson and Hopey 2005, p. 23; Moore and Kotaich 2010, p. 18). Streaked horned lark nesting success (*i.e.,* the proportion of nests that result in at least one fledged chick) is highly variable, consistent with ground-nesting passerines (Best 1978, pp. 16–20; Johnson and Temple 1990, p. 6).

The average minimum viable population (MVP) for the groups Aves and Passerines has been identified as 5,269 and 6,415 individuals respectively; this number was determined using methodology described in a meta-analysis of multiple taxa (birds, fish, mammals, reptiles and amphibians, plants, insects, and marine invertebrates) (Anderson 2015, p. 2). Though we don't know what the historical abundance was for streaked horned lark rangewide, based on the MVPs for similar species, it was most likely larger than the current abundance. The most recent rangewide population estimate for streaked horned larks is 1,170 to 1,610 individuals; this estimate is based on data compiled from multiple survey efforts, plus extrapolation to areas of potential suitable habitat not surveyed (*e.g.,* inaccessible private lands), particularly in the Willamette Valley (Altman 2011, p. 213).

The streaked horned lark currently occurs at local populations (defined here as scattered breeding sites or areas of habitat to which individuals return each year) in three regions across the range: The South Puget Lowlands in Washington, the Pacific Coast and Lower Columbia River in Washington and Oregon, and the Willamette Valley in Oregon. Based on 2013 to 2019 survey data from some regularly monitored sites across the range of the subspecies, the number, distribution, and size of streaked horned lark local populations appear to have increased. Regional population breeding pair counts and the rangewide total are summarized in Table 1 and Figure 1, below.

TABLE 1—REGIONAL SUMMARIES OF BREEDING PAIRS, WITH NUMBER OF LOCAL POPULATIONS, BASED ON SITES REGULARLY MONITORED FROM 2013 TO 2019

Regional population (with number of local populations)	2013	2014	2015	2016	2017	2018	2019
South Puget Lowlands (8)	75	97	116	124	142	121	121
Pacific Coast and Lower Columbia River (24)	81	89	77	85	77	86	97
Pacific Coast (5)	*10*	*12*	*11*	*9*	*13*	*13*	*10*
Lower Columbia River (19)	*71*	*77*	*66*	*76*	*64*	*73*	*87*
Willamette Valley (10)	42	* incomplete	109	127	92	133	165
Rangewide total	198	* 186	302	336	311	340	383

* Several of the locations were not surveyed in 2014; other sites have no data available.

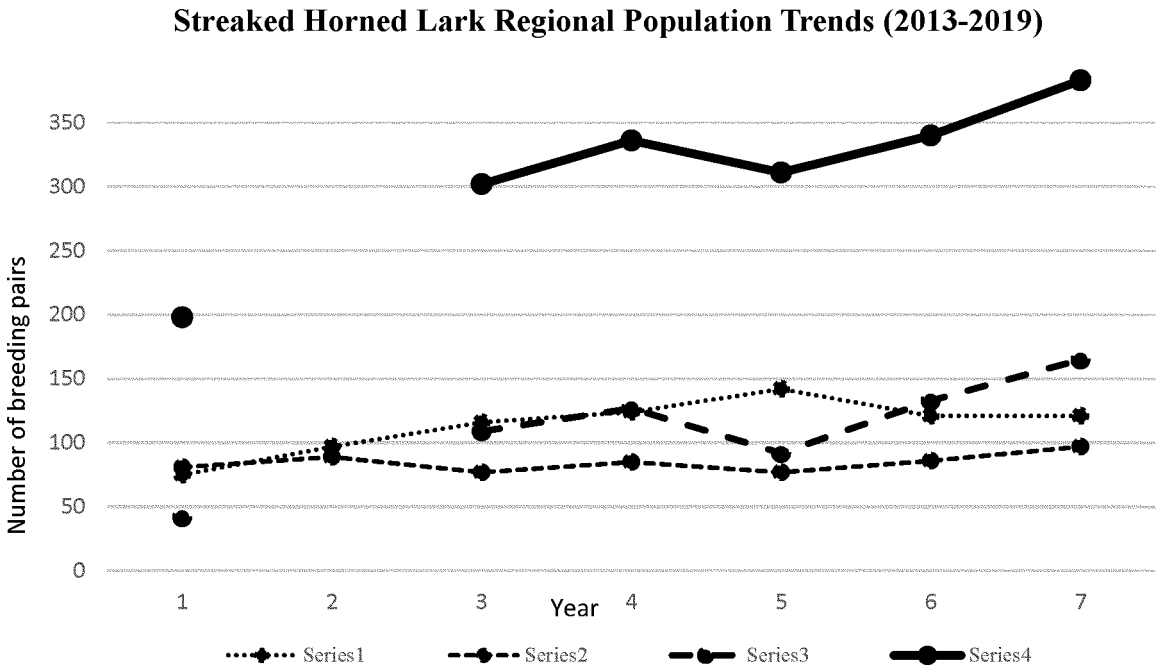

Figure 1. Regional population trends based on 2013–2019 survey data

The South Puget Lowlands region consists of eight local populations at three municipal airports and five sites at Joint Base Lewis McChord (JBLM). Since streaked horned larks were listed in 2013, this regional population has stabilized to some degree, but two of its local populations continue to experience declining trends (Keren and Pearson 2019, p. 4).

The Pacific Coast and Lower Columbia River region currently consists of twenty-four local populations, including the new population recently detected at Clatsop Spit in Oregon. The region currently appears stable (Keren and Pearson 2019, p. 3), although local population surveys are inconsistent and do not occur at each site every year. Two of the sites on the coast of Washington (Oyhut Spit and Johns River) have no positive records since the 2013 listing and appear to be extirpated. Although the current abundance of local populations on the Pacific Coast is low compared to other areas, it has been low for many years, the size of those coastal sites is relatively small compared to other local populations (and therefore naturally limits the number of breeding pairs), and there is no apparent declining trend in this area based on survey data between 2013 and 2019.

The Willamette Valley regional population was previously estimated at 900 to 1,300 individuals based on data compiled and extrapolated from multiple survey efforts between 2008 and 2010 (Altman 2011, p. 213), including estimates from the many known occupied but inaccessible sites on private lands in the region. Surveys from the ten regularly monitored accessible occupied sites in the Willamette Valley counted 165 breeding pairs in 2019. These monitored sites include four at municipal airports, three at National Wildlife Refuges, two at natural areas, and one on private land. One historical site for a local population in this region (Salem Municipal Airport) has no positive records since 2013 and appears to be extirpated. The Willamette Valley regional population appears to be well distributed and increasing, but the limited surveys of accessible sites may not accurately reflect the trend in the whole region. The subspecies appears to be more abundant in the southern end of the valley where there is more suitable habitat.

While the number of local populations in the South Puget Lowlands has not increased, the local populations at JBLM have increased in size. Furthermore, two additional sites in the Lower Columbia River area, and at least two additional sites in the Willamette Valley, have increased the number and distribution of local populations throughout the range since 2013. Despite recent observations of individual larks at Clatsop Spit (*i.e.,* not breeding pairs), the number, distribution, and size of local breeding populations along the Pacific Coast has remained relatively constant.

Across the range of the subspecies, the number of breeding pairs at some regularly monitored sites increased from 198 in 2013, to 383 in 2019. However, because a rangewide population estimate has not been reanalyzed since 2011, we are unable to state conclusively that the rangewide population has increased. The North American Breeding Bird Survey (BBS) analyzes regional data to provide a trend for rangewide breeding populations. In contrast to the data from site-specific surveys for the streaked horned lark from 2013–2019, the most recent BBS analysis for the region encompassing streaked horned larks indicates a 6.52 percent decline for the subspecies between 2005 and 2015 (95 percent confidence interval: –12.66 to –2.26 percent) (Sauer *et al.* 2017, p. 3). It is important to keep in mind however, that when a species is listed and recovery actions begin, it may still be many years before the abundance recovers to the point where the species demonstrates a rangewide increasing population trend. The streaked horned lark was listed in 2013, only two years before the last data set that was included in the most recent BBS analysis.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an ''endangered species'' or a ''threatened species.'' The Act defines an ''endangered species'' as a species that

is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an ''endangered species'' or a ''threatened species'' because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be proposed for listing as an endangered or threatened species under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–R1–ES–2020–0153 on *http://www.regulations.gov.*

To assess streaked horned lark viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences in the future. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

Factors Influencing the Species

In our October 3, 2013, listing rule (78 FR 61452), we found that the streaked horned lark was a threatened species due to loss and degradation of habitat from development, fire suppression, and invasive (native and nonnative) plants; dredge spoil deposition timing and placement on Columbia River islands; incompatibly timed burning and mowing regimes; activities associated with military training; conversion of large grass seed production fields to

incompatible agricultural commodities; predation; small population effects; activities associated with airports; and recreation.

In our SSA, we carefully analyzed these previously identified threats, as well as additional potential threats and positive conservation measures, to determine if they operate at a scope and magnitude as to influence the condition, or resiliency, of populations rather than only some individuals (U.S. Fish and Wildlife Service 2021, pp. 19–38). Based on our assessment, disease and pesticides do not rise to the level of affecting the condition of local or regional populations. Although the 2013 listing rule stated that predation was likely to be a significant and ongoing threat to the subspecies (particularly in the South Puget Lowlands region), our SSA did not find evidence of effects to the subspecies from predation beyond effects to individuals in any local population (U.S. Fish and Wildlife Service 2021, p. 20). Although predation does occur, we did not find that it occurred at a level beyond regular life-history dynamics. We acknowledge, however, that predation combined with the effects of small population size may reduce the resiliency of some local populations, as noted below under ''Synergistic Effects.'' In 2013, a predator control program under the Wildlife Services Predator Damage Management Program of the Animal and Plant Health Inspection Service, U.S. Department of Agriculture was initiated at Leadbetter Point and Midway Beach on the Washington coast (U.S. Fish and Wildlife Service 2011). Data shows that western snowy plovers have shown improved nesting success since the program was implemented; however, monitoring data for streaked horned larks are inconclusive, and we cannot reliably determine if predator control has improved nesting success for larks at these sites.

The primary driver of the status of streaked horned lark has been the scarcity of large, open spaces with very early seral stage vegetation. Historically, habitat was created and maintained by natural ecological processes of flooding, fire, and coastal sediment transport dynamics, as well as prairies maintained by Native American burning. The loss of regular disturbance regimes that created these open spaces impacted the abundance and distribution of historical populations, but the impact occurred decades ago and is not ongoing. Though this loss of historical disturbance led to displacement of lark into less suitable alternative habitat and subsequent population declines, it is not considered a significant influence on the condition of current populations. Furthermore, our current and future condition analyses take into consideration the quality of habitat, so the condition ranking of any populations that were displaced into lower quality habitat due to loss of historical disturbance is reflective of that displacement.

The primary factors currently influencing the condition of streaked horned lark populations are the ongoing loss and conversion of suitable habitat, land management activities and related effects, and recreation. Since we listed the streaked horned lark as threatened under the Act in 2013, multiple entities have implemented a series of regulatory and voluntary conservation measures (section 7 consultations due to the listing of the subspecies under the Act) to offset negative impacts to larks and lark habitat, reducing the overall impact of stressors influencing local populations. We discuss these primary influence factors and associated conservation actions below.

Ongoing Loss and Conversion of Suitable Habitat

Following Euro-American settlement of the Pacific Northwest in the mid-19th century, fire was actively suppressed on grasslands in the Willamette Valley, allowing encroachment by woody vegetation into prairie habitat and oak woodlands (Franklin and Dyrness 1973, p. 122; Boyd 1986, entire; Kruckeberg 1991, p. 286; Agee 1993, p. 360; Altman *et al.* 2001, p. 262). Native and nonnative species that have encroached on these habitats throughout the lark's range include native Douglas fir (*Pseudotsuga menziesii*), nonnative Scotch broom (*Cytisus scoparius*), and nonnative grasses such as tall oatgrass (*Arrhenatherum elatius*) and false brome (*Brachypodium sylvaticum*) (Dunn and Ewing 1997, p. v; Tveten and Fonda 1999, p. 146). This expansion of woody vegetation and nonnative plant species, including noxious weeds, has reduced the quantity and quality and overall suitability of prairie habitats for larks (Tveten and Fonda 1999, p. 155; Pearson and Hopey 2005, pp. 2, 27). On JBLM alone, over 16,000 ac (6,600 ha) of prairie has been converted to Douglas fir forest since the mid-19th century (Foster and Shaff 2003, p. 284). Trees and/or other woody vegetation infiltrate open areas with formerly low vegetation and long sight lines preferred by streaked horned larks.

The introduction of Eurasian beachgrass (*Ammophila arenaria*) and American beachgrass (*Ammophila breviligulata*) in the late 1800s, currently found in high and increasing densities in most of coastal Washington and Oregon, has dramatically altered the structure of dunes on the coast (Wiedemann and Pickart 1996, p. 289). Beachgrass creates areas of dense vegetation unsuitable for larks (MacLaren 2000, p. 5). The spread of beachgrass has reduced the available nesting habitat for streaked horned larks in Washington at Damon Point and at Grays Harbor and Leadbetter Point on Willapa National Wildlife Refuge (NWR) (Washington Department of Fish and Wildlife 1995, p. 19; Stinson 2005, p. 65; U.S. Fish and Wildlife Service 2011, p. 4–2). On the Oregon coast, the low abundance of streaked horned lark is attributed to the invasion of exotic beachgrasses and resultant dune stabilization (Gilligan *et al.* 1994, p. 205). Without management (mechanical and chemical) to maintain the open landscape at sites like these, invasive beachgrasses will continue to influence current and future local populations of streaked horned larks and reduce suitability of these habitats, particularly in the Pacific Coast and Lower Columbia River region.

Habitat restoration work on Leadbetter Point by the Service's Willapa NWR has successfully reduced the cover of encroaching beachgrasses into streaked horned lark habitat. In 2007, the area of open habitat measured 84 ac (34 ha). However, after mechanical and chemical treatment to clear beachgrass (mostly American beachgrass) and spreading oyster shells across 45 ac (18 ha), there is now 121 ac (50 ha) of sparsely vegetated habitat available, increasing the extent of open habitat (Pearson *et al.* 2009b, p. 23). The main target of the Leadbetter Point restoration project was the federally listed western snowy plover (*Charadrius alexandrinus nivosus*), but the restoration actions also benefited streaked horned larks. Before the restoration project, this area had just 2 streaked horned lark territories (Stinson 2005, p. 63); after the project, an estimated 7 to 10 territories were located in and adjacent to the restoration area (Pearson *in litt.* 2012b).

Human activity has converted native prairie and grassland habitats to residential and commercial development, reducing habitat availability for streaked horned larks throughout their range. About 96 percent of the Willamette Valley is privately owned, and it is home to almost three-fourths of Oregon's human population, which is anticipated to nearly double in the next 50 years (Oregon Department of Fish and Wildlife 2016, p. 17). The Willamette Valley provides about half of the State's

agricultural sales and is the location of 16 of the top 17 private-sector employers (manufacturing, technology, forestry, agriculture, and other services). In the South Puget Lowlands, prairie habitat continues to be lost, particularly via the removal of native vegetation and the excavation and conversion to non-habitat surfaces in the process of residential development (*i.e.,* buildings, pavement, residential development, and other infrastructure) (Stinson 2005, p. 70; Watts *et al.* 2007, p. 736). The region also contains glacial outwash soils and deep layers of gravels underlying the prairies that are valuable for use in construction and road building.

Industrial development has also reduced habitat available to breeding and wintering streaked horned larks. Rivergate Industrial Park, owned by the Port of Portland, is a large industrial site in north Portland near the Columbia River that was developed on a dredge disposal site. Rivergate has long been an important breeding site for streaked horned larks and a wintering site for large flocks of mixed lark subspecies. In 1990, the field used by streaked horned larks at Rivergate measured more than 650 ac (260 ha) of open sandy habitat (Dillon *in litt.* 2012). In the years since, the Port of Portland has constructed numerous industrial buildings on the site, subsequently reducing habitat availability for larks and likely displacing all breeding and wintering larks from the area (Port of Portland 2019, entire).

As part of the section 10(a)(1)(B) permit associated with the development of a habitat conservation plan (HCP) under the Act, the Port of Portland mitigated for the loss of streaked horned lark habitat by securing a long-term easement on a 32-ac (13-ha) parcel at Sandy Island. Sandy Island is an occupied breeding site on the Columbia River about 30 miles (mi) (50 kilometers (km)) north of the Rivergate industrial site and is designated as critical habitat for the streaked horned lark (Port of Portland 2017, p. 4). The Port's 30-year commitment to manage the site and protect breeding streaked horned larks helps to offset impacts to the regional population from the loss of available habitat at the Rivergate site.

Roughly half of all the agricultural land in the Willamette Valley, approximately 360,000 ac (145,000 ha), is devoted to grass seed production (Oregon Seed Council 2018, p. 1). Grasslands, both native prairies and grass seed fields, are important habitats for streaked horned larks in the Willamette Valley, as they are used as both breeding and wintering habitat (Altman 1999, p. 18; Moore and Kotaich 2010, p. 11; Myers and Kreager 2010, p. 9). Demand for grass seed and the overall acreage of grass seed harvested in Oregon has declined since 2005 (Oregon State University 2005 and 2019, entire). In 2019, approximately 364,355 ac (147,450 ha) were planted for forage and turf grass seed crops in the Willamette Valley compared to approximately 484,080 ac (195,900 ha) in 2005 (Oregon State University 2005 and 2019, entire). The reduction in grass seed production has resulted in growers switching to other commodities, such as wheat, stock for nurseries and greenhouses, grapes, blueberries, and hazelnuts (U.S. Department of Agriculture National Agricultural Statistics Service 2009, p. 3; Oregon Department of Agriculture 2011, p. 1; U.S. Department of Agriculture National Agricultural Statistics Service 2017, pp. 34, 55, 101). These other crop types do not have the low-statured vegetation and bare ground preferred by the streaked horned lark.

The continued decline of the grass seed industry in the Willamette Valley due to the variable economics of agricultural markets will likely result in a continued conversion from grass seed fields to other agricultural types, and fewer acres of suitable habitat for streaked horned larks. Across the range, the conversion of streaked horned lark habitat into agricultural, industrial, residential, or urban development will continue to influence current and future streaked horned lark local or regional populations to some degrees throughout the range of the species, though the Pacific Coast is less affected than other areas.

Land Management Activities and Related Effects

Streaked horned larks evolved in a landscape of ephemeral habitat with regular historical disturbance regimes that maintained the large, open spaces with very early seral stage vegetation relied upon by the subspecies. Human activity led to the stabilization of these historical disturbance regimes, as well as the unintentional creation of ''replacement'' habitat for streaked horned larks that mimics their preferred large, open spaces. Replacement habitat occurs in a variety of settings across the range of the subspecies, including agricultural fields, at airports, and on dredge spoil islands. Open habitat is maintained in these areas by way of frequent human disturbance, including burning, mowing, cropping, chemical treatments (herbicide and pesticide application), or placement of dredged materials (Altman 1999, p. 19). Without regular large-scale, human-caused disturbance, the quantity of suitable habitat available to larks would decrease rapidly. These land management activities are key to providing and maintaining habitat for the streaked horned lark; without replacement habitat, the status of the subspecies would likely be much worse.

However, when these same activities are conducted during the most active breeding season (mid-April to mid-June) for streaked horned larks, they have the potential to result in destruction of nests, crushing of eggs or nestlings, or flushing of fledglings or adults (Pearson and Hopey 2005, p. 17; Stinson 2005, p. 72). During the nesting seasons from 2002 to 2004, monitoring at Gray Army Airfield, McChord Airfield, and Olympia Airport in the South Puget Lowlands region documented nest failure at 8 percent of nests due to mowing over nests, forcing young to fledge early (Pearson and Hopey 2005, p. 18). Additionally, though dredge deposits can mimic sandy beach habitat typically used by larks, they have also been documented to destroy breeding sites and active nests (Pearson in litt. 2012a; Pearson et al. 2008a, p. 21; MacLaren 2000, p. 3; Pearson and Altman 2005, p. 10).

The list of threats to the subspecies in the 2013 listing rule (78 FR 61452) included dredge spoil deposition timing and placement on Columbia River islands, incompatibly timed burning and mowing regimes, activities associated with military training, and activities associated with airports. Despite these threats noted at the time of listing, the Service determined that timing restrictions on these activities were not appropriate, stating in the rule: ''Our purpose in promulgating a special rule to exempt take associated with activities that inadvertently create habitat for the streaked horned lark is to allow landowners to continue those activities without additional regulation. We believe that imposing a timing restriction would likely reduce the utility of the special rule for land managers and could have the unintended side effect of causing landowners to discontinue their habitat creation activities'' (78 FR 61464). No timing restrictions were included in the 2013 4(d) rule and these land management activities continued across the range since that time. Since 2013, survey data from some regularly monitored sites across the range of the subspecies show an increase from 198 breeding pairs in 2013, to 383 breeding pairs in 2019, despite a lack of timing restrictions on land management activities. While the loss of individuals is never welcome, the continuation of

land management activities that create replacement habitat is very important to the conservation of the subspecies, and the benefits appear to outweigh the cost of any loss of individuals.

In the Willamette Valley, some habitats in agricultural areas are consistently maintained and therefore available throughout the year (*e.g.,* on the margins of gravel roads), while other patches of suitable habitat shift as areas such as large fields are mowed, harvested, sprayed, or burned. In 2017, the Willamette Valley NWR entered into a 4-year programmatic consultation with the Service for its farming and pesticide use program (U.S. Fish and Wildlife Service 2016b, entire). This programmatic consultation documents the Refuge program's commitment to adapting its farming activities to improve the status of the streaked horned lark on the William L. Finley, Ankeny, and Baskett Slough units of the complex. Conservation measures include ensuring that farming activities minimize disturbance to larks, and that pesticides used in agricultural fields have a low risk of adverse effects to larks and their food sources.

Airports implement hazardous wildlife management programs that include vegetation management around roads and runways, to discourage the presence of wildlife near the runways and thereby promote human safety for flights. Streaked horned lark are very attracted to the wide-open spaces created by vegetation management, and several airports in the range are now sites for local populations of the subspecies. In the South Puget Lowlands, the streaked horned lark might have been extirpated if not for mowing at airports to maintain large areas of short grass (Stinson 2005, p. 70). Five of the eight streaked horned lark nesting sites in the South Puget Lowlands are located on or adjacent to airports and military airfields (Rogers 2000, p. 37; Pearson and Hopey 2005, p. 15). At least five breeding sites are found at airports in the Willamette Valley, including the largest known local population at Corvallis Municipal Airport (Moore 2008b, pp. 14–17). The Port of Olympia's Updated Master Plan includes recommendations to minimize impacts to larks at the airport by avoiding mowing during the breeding season; however, mowing still occurs during the breeding season (Port of Olympia/Olympia Regional Airport 2013, pp. 10–11) and the local population at the airport has fluctuated (both increased and decreased) in surveys from 2013 to 2019 (Wolf et al. 2020, p. 16). The overall count in 2019 of 27 breeding pairs was slightly lower that the count in 2013 (30), however, in 2019 there were six more breeding pairs than were counted in 2018.

In 2017, the JBLM finalized a programmatic consultation with the Service that covered multiple activities affecting streaked horned lark including mowing (U.S. Fish and Wildlife Service 2017) (although mowing is allowed during the breeding season under emergency circumstances (Wolf *et al.* 2017, p. 34)). The consultation has resulted in a significant reduction in adverse effects to larks from mowing at military airfields. The breeding population of larks on JBLM increased from fewer than 100 pairs when the streaked horned lark was listed in 2013 (Wolf and Anderson 2014, p. 12), to over 120 pairs in 2019 (Wolf et al. 2020, p. 6). However, there are no conservation measures at several municipal airports in the Puget Lowlands region and none of the airports in the Willamette Valley region to reduce effects to streaked horned larks from operations and maintenance activities, including mowing.

Individual lark in these local populations near runways are at increased risk of aircraft strikes and collisions. Horned lark strikes are frequently reported at military and civilian airports throughout the country, but because of the bird's small size, few strikes result in significant damage to aircraft (Dolbeer *et al.* 2011, p. 48; Air Force Safety Center 2012, p. 2). Juvenile males seem to be struck most often, perhaps because they are trying to establish new territories in unoccupied but risky areas on runway margins (Wolf *et al.* 2017, p. 31). With respect to streaked horned larks in particular, in the 5-year period from 2013 to 2017, McChord Airfield had seven confirmed strikes, and Gray Army Airfield recorded one confirmed streaked horned lark strike (Wolf *in litt.* 2018). Since January 2017, 16 adults have been killed by strikes on JBLM, including 10 adults and 2 juveniles killed by strikes at McChord Airfield in 2020 (Wolf *in litt.* 2020).

The increased number of strikes in 2020 were a direct result of construction activities that redirected aircraft traffic to the northern half of the runway where lark density is highest and lark abundance was relatively high; this led to a higher than normal mortality rate from aircraft strikes. Aside from the 12 strikes in 2020, JBLM recorded a total of 12 strikes in the seven years between 2013 and 2019, for a rate of 1.7 strikes per year. While aircraft strikes do occur in several local populations at airports throughout the range of the species (particularly in the South Puget Lowlands), the rate appears relatively low and the vegetation management conducted by these airports also maintains replacement habitat that supports breeding pairs (Pearson *et al.* 2008a, p. 13; Camfield *et al.* 2011, p. 10; FAA 2020, entire).

The streaked horned lark uses islands in the Lower Columbia River for both breeding and wintering habitat. The river channel is regularly dredged by the U.S. Army Corps of Engineers (Corps), and dredge deposits can both benefit and harm streaked horned larks depending on the location and timing of deposition. In 2014, the Corps entered into a programmatic consultation with the Service for the Corps' navigation channel dredging and dredge materials placement program in the Lower Columbia River (U.S. Fish and Wildlife Service 2014, entire). In this consultation, the Corps committed to planning for the placement of dredge material to minimize adverse effects to the lark on the Corps' network of placement sites and to maintain enough habitat in suitable condition to maintain the current regional population of breeding larks and allow for additional population growth. The 5-year program has been successful; from 2014 to 2019, numbers in the Lower Columbia River increased from an estimate of 77 pairs to 87 pairs, with the increases occurring at dredge deposition sites (Center for Natural Lands Management 2019, pp. 3–4). The original 5-year consultation was extended through 2022. The Corps is currently working on a 20-year dredge material management plan, which will build on the success of the previous consultation.

Military training activities at the 13th Division Prairie at JBLM, including bombardment with explosive ordnance and hot downdraft from aircraft, as well as civilian events, have caused nest failure and abandonment at JBLM's Gray Army Airfield and McChord Airfield (Stinson 2005, pp. 71–72). JBLM is also used for helicopter operations (paratrooper practices, touch-and-go landings, and load drop and retrievals) and troop training activities. Artillery training, off-road use of vehicles, and troop maneuvers at the 13th and 91st Division Prairies have been conducted in areas used by streaked horned larks during the nesting season, contributing to nest failure and low nest success. In addition to military training activities, McChord Airfield hosts an international military training event known as the Air Mobility Rodeo, which is held in odd-numbered years. In even-numbered years, McChord Airfield hosts a public air show known as the Air Expo; this event incorporates simulated bombing

and fire-bombing, including explosives and pyrotechnics launched from an area adjacent to one of JBLM's most densely populated streaked horned lark nesting sites. The Expo and Rodeo can affect the streaked horned lark through disturbance from aircraft, temporary infrastructure, and spectator-related nest abandonment, nest failure, and adverse effects to fledglings (Pearson *et al.* 2005, p. 18; Stinson 2005, p. 27). The 2017 programmatic consultation JBLM entered into with the Service covers military training and these other regular activities (U.S. Fish and Wildlife Service 2017, entire). The consultation has significantly reduced adverse effects to larks from military activities (including training at military airfields), and resulted in an increase in the breeding population of larks on JBLM from fewer than 100 pairs in 2013 (Wolf and Anderson 2014, p. 12), to over 120 pairs in 2019 (Wolf et al. 2020, p. 6).

Recreation

Recreation at coastal sites can cause the degradation of streaked horned lark habitat, as well as disturbance to adults and juveniles, and direct mortality to eggs, nestlings, and fledglings. Activities such as the annual spring razor clam digs, dog walking, beachcombing, off-road vehicle use, camping, fishing, and horseback riding in coastal habitats may directly or indirectly increase predation (primarily by corvids), resulting in nest abandonment and nest failure for streaked horned larks (Pearson and Hopey 2005, pp. 19, 26, 29). Streaked horned larks nest in the same areas as western snowy plovers along the Washington coast, and it is highly likely that recreation has caused nest failures for larks at sites that have documented nest failure for plovers; both species are ground nesters and, therefore, similarly at risk of effects of recreation. During western snowy plover surveys conducted between 2006 and 2010 at coastal sites in Washington, human-caused nest failures were reported in 4 of the 5 years (Pearson *et al.* 2007, p. 16; Pearson *et al.* 2008b, p. 17; Pearson *et al.* 2009a, p. 18; Pearson *et al.* 2010, p. 16), and one of 16 monitored nests at Midway Beach on the Washington coast was crushed by a horse in 2004 (Pearson and Hopey 2005, pp. 18–19).

In 2002, JBLM began restricting recreational activity at the 13th Division Prairie to protect lark nesting sites; JBLM prohibited model airplane flying, dog walking, and vehicle traffic in the area used by streaked horned larks (Pearson and Hopey 2005, p. 29). JBLM continues to restrict recreational activities during the lark breeding season at the 13th Division Prairie, although enforcement, especially on weekends, is intermittent (Wolf *et al.* 2016, p. 43). In addition, the 2017 programmatic consultation JBLM entered into with the Service (U.S. Fish and Wildlife Service 2017) included recreation. The programmatic consultation has resulted in a marked increase in the breeding population of larks on JBLM from fewer than 100 pairs in 2013 (Wolf and Anderson 2014, p. 12), to over 120 pairs in 2019 (Wolf et al. 2020, p. 6).

Summary of Threats

Table 2, below, summarizes the scope and magnitude of factors influencing the viability of streaked horned lark.

Table 2. Summary of Factors Influencing Regional Populations

Factors Influencing Populations		Regional Populations		
		South Puget Lowlands	Pacific Coast and Lower Columbia River	Willamette Valley
Habitat Fragmentation, Degradation, and Loss	Vegetation succession	XX	XX	XXX
	Encroachment of woody vegetation or grasses, invasive species	X	XXX	X
	Land use changes or conversion	X	X	XXX
	Crop conversion	--	--	XXX
	Loss of natural disturbance processes	XX	XX	XX
Land Management Activities and Related Effects	Vegetation management activities	XX	--	XX
	Military training and associated activities	X	--	--
	Dredged material placement	--	X	--
Recreation		--	XX	--
Aircraft Strikes		XX	--	X
Note: XXX indicates relatively frequent influence to the regional population; XX indicates moderate influence on the regional population; X indicates occasional influence on the regional population; no entry (--) indicates no influence on the regional population.				

Synergistic Effects

Climate Change—The effects of climate change have already been observed in the Pacific Northwest. Temperatures have risen 1.5 to 2 degrees Fahrenheit (°F) (0.83 to 1.1 degrees Celsius (°C)) over the past century, and the past three decades have been warmer than any other historical period (Frankson *et al.* 2017a, p. 1; Frankson *et al.* 2017b, p. 1). Climate change is widely expected to affect wildlife and their habitats in the Pacific Northwest by increasing summer temperatures, reducing soil moisture, increasing wildfires, reducing mountain snowpack, and causing more extreme weather events (Bachelet *et al.* 2011, p. 414). Climate change may increase the frequency and severity of stochastic weather events, which may have severe negative effects on small local populations throughout the range of the streaked horned lark. During the breeding season, small local populations of larks are distributed across the range; in the winter, however, streaked horned larks congregate mainly in the Willamette Valley and on islands in the Lower Columbia River. Such concentration exposes the wintering populations to potentially disastrous stochastic events such as ice storms or flooding, which could kill individuals, destroy limited habitat and food availability, or skew sex ratios. Severe winter weather could potentially impact one or more regional populations when birds congregate as larger flocks (Pearson and Altman 2005, p. 13).

Despite the climate projections for the region, the effects of climate change specific to prairie ecosystems are not anticipated to decrease the resiliency of regional populations in the South Puget Lowlands, Lower Columbia River, and Willamette Valley regions. The grasslands and prairies of Washington and Oregon span a wide geographic and climatic range, encompassing a rich variety of soil types, vegetation cover, elevations, and weather patterns. This heterogeneity will likely provide substantial buffering from the effects of changing weather and climate (Bachelet *et al.* 2011, p. 412). It is possible that increased summer droughts may affect less drought-tolerant trees and other forest species adjacent to prairies, possibly resulting in prairie expansion that could benefit the streaked horned lark (Bachelet *et al.* 2011, p. 417). Prairie and grassland ecosystems are well adapted to warm and dry conditions—periodic soil drought and future increases in temperature and drought for the region ''are unlikely to disadvantage (and may benefit) these systems'' (Washington Department of Fish and Wildlife 2015, p. 5–31).

The outlook for streaked horned larks along the Pacific Coast is less encouraging due to the effects of climate change. Sea level rise, increased coastal erosion, and more severe weather events will cause significant effects to lark habitats on the coast. Projected sea level rise could increase erosion or landward shift of dunes; similarly, increased severe weather events with greater wave and wind action from storms could magnify disturbance of dune habitats (Washington Department of Fish and Wildlife 2015, p. 5–31) and imperil nesting larks. Given these stressors, we expect that climate change may limit the resiliency of some local populations on

the coast by amplifying the negative effects from habitat loss or the spread of invasive species where not managed. A conservation measure that may help reduce effects from climate change in one area of the coast in the range of the streaked horned lark is the Shoalwater Bay Shoreline Erosion Control Project (U.S. Fish and Wildlife Service 2018), which is a long-term commitment by the Corps and the Shoalwater Bay Tribe to protect the reservation from coastal erosion. It has created and is maintaining habitat for both western snowy plovers and streaked horned larks and provides secure nesting area on the coast for both species.

Small Population Size—Most species' populations fluctuate naturally, responding to various factors such as weather events, disease, and predation. These factors have a relatively minor impact on a species with large, stable local populations and a wide and continuous distribution. However, populations that are small, isolated by habitat loss or fragmentation, or impacted by other factors are more vulnerable to extirpation by natural, randomly occurring events (such as predation or stochastic weather events), and to genetic effects that plague small populations, collectively known as small population effects (Purvis *et al.* 2000, p. 3). These effects can include genetic drift, founder effects (over time, an increasing percentage of the population inheriting a narrow range of traits), and genetic bottlenecks leading to increasingly lower genetic diversity, with consequent negative effects on adaptive capacity and reproductive success (Keller and Waller 2002, p. 235).

Various effects of small population size, including low reproductive success, loss of genetic diversity, and male skewed sex-ratio, have been noted in the range of the streaked horned lark, particularly at some local populations in the South Puget Lowlands region and the Lower Columbia River (Anderson 2010, p. 15; Camfield et al. 2010, p. 277; Drovetski *et al.* 2005, p. 881; Pearson 2019, Figures 1 and 2; Drovetski *et al.* 2005, p. 881; Wolf *et al.* 2017, p. 27). Any local population of streaked horned larks with very low abundance that does not interbreed with other local populations will be at more risk in the future due to small population effects.

Current Condition

To maintain adequate resiliency, populations of streaked horned larks need large open spaces with suitable habitat structure—specifically, low-stature vegetation and scattered patches of bare ground—and an appropriate disturbance regime sufficient to maintain habitat and support increased numbers of breeding birds. The size of populations with high resiliency varies among regions, depending on the extent and quality of available habitat. Needs of the streaked horned lark in relation to degree of estimated population resiliency are summarized below in Table 3; to evaluate current condition, we assigned each condition category a number as shown.

Table 3. Matrix for Evaluating Current Condition of the Streaked Horned Lark

Demographic and Habitat Parameters		**High Condition** ⟷			**Low Condition**
Abundance	*South Puget Lowlands*	Regular surveys detect ≥20 breeding pairs, (3)	Regular surveys detect 10–20 breeding pairs (2)	Regular surveys detect ≤10 breeding pairs (1)	Extirpated: larks no longer occupy site or region (0)
	Pacific Coast and Lower Columbia River	Regular surveys detect ≥15 breeding pairs on coast, (3)	Regular surveys detect 7–15 breeding pairs on coast, (2)	Regular surveys detect ≤7 breeding pairs on coast, (1)	
		Regular surveys detect ≥20 breeding pairs on river, (3)	Regular surveys detect 10–20 breeding pairs on river, (2)	Regular surveys detect ≤10 breeding pairs on river, (1)	
	Willamette Valley	Regular surveys detect ≥25 breeding pairs, (3)	Regular surveys detect 15–25 breeding pairs (2)	Regular surveys detect ≤15 breeding pairs (1)	
Population Trend		Increasing population trend (2)	Stable populations (1)	Declining or insufficient data to assess trends (0)	
Connectivity		Movement between local populations/regions (1)		No movement between local populations/regions (0)	
Habitat		Large, open areas with low-stature grasses, 17 percent bare ground (3)	Open areas with low-stature grasses, some shrubs and trees (2)	Small patches of suitable grasses surrounded by dense vegetation and trees (1)	Extirpated: habitat to support larks no longer exists at a site (0)
Beneficial Disturbance Regime		Regular disturbance occurs to maintain habitat for nesting, no adverse effects during breeding season (3)	Semi-regular disturbance, habitat is available but not ideal for nesting, some adverse effects during breeding season (2)	Infrequent disturbance, habitat may be temporarily unavailable; high adverse effects during breeding season (1)	Extirpated: disturbance does not occur to maintain habitat for larks; high adverse effects during breeding season (0)

Parameters that are in high condition support adequate population resiliency, whereas parameters that are in low condition reduce resiliency and increase the risk from stochastic events. Each of the five parameters were given equal weight, and the resulting scores were averaged to come up with an overall condition score for each local population unit as follows: High (≥1.7), Moderate (1.6 to 1.1), Low (1.0 to 0.2), and Extirpated (≤0.1). The overall condition score thresholds were based on the difference between the highest and lowest possible actual scores (2.4 and 0.2, respectively) for extant populations. If survey data showed a site had no detections of streaked horned larks, then the entire site is categorized as extirpated, regardless of the condition category assigned to the habitat or disturbance factors (*e.g.,* Oyhut Spit and Johns River Island in the Pacific Coast region).

The resulting current condition rankings of extant local populations varied between high to low condition. Some local populations ranked high (those that scored 1.7 or greater) as a result of abundant populations and high-quality habitat; other populations ranked lower (those that scored 1.0 or less) in part because of a combination of low abundance, declining population trends between 2013 and 2019, poor quality habitat, and effects of land management activities.

While the overall number of occupied sites represent a reduction from its historical range, of the 42 extant local populations across the three representational regions, there are eight in high condition, 15 in moderate condition, and 19 in low condition. Three sites that were occupied in years prior to the 2013 listing are currently considered extirpated. In general, the local populations with low condition have low abundance that has declined since 2013, and occur in locations that have less habitat availability and therefore limited capacity to support high numbers of birds. In addition, certain land management activities at these locations, such as construction and development or sand-borrow activities on the Columbia River, would not support long-term resiliency even if population abundance stabilized and increased. Use of these sites is opportunistic based on habitat availability, and most of these sites are not anticipated to meaningfully contribute to subspecies viability or support high numbers of birds.

The South Puget Lowlands region has an overall increasing population trend (based on the 2013–2019 survey data). The region contains four local populations with high condition, one local population with moderate condition, and three local populations with low condition. Those local populations with low condition have

small, declining populations and occur in areas where management activities have negative impacts on adult and juvenile birds, currently limiting resiliency. The populations at the JBLM airfields and 13th Division increased between 2013 and 2019 and movement between sites and habitat quality supports high resiliency. The Shelton Airport has a declining population trend. The Olympia Airport has good connectivity and its condition is moderate, but the condition of the Shelton and Tacoma airports are low.

The Pacific Coast and Lower Columbia region has an overall stable population trend (based on the 2013–2019 survey data). It has two local populations in high condition (including Sandy Island which is managed for the conservation of streaked horned lark), nine local populations in moderate condition, 13 local populations with low condition, and two locations that have no breeding pairs and are assumed extirpated (Oyhut Spit and Johns River Island). While Leadbetter Point is managed to improve habitat quality for larks and reduce corvid predation, the local population has fluctuated in the last several years and is currently considered unstable. A number of coastal sites and several Columbia River sites have low resiliency due to low abundance, small patches of high-quality habitat that currently limit potential abundance, limited connectivity, and/or management activities that are not optimal for successful breeding. While the Pacific Coast area currently has low numbers of breeding pairs, recent detections at Clatsop Spit (a previously unoccupied site) indicate the species could recolonize areas with suitable habitat. Streaked horned larks, however, have not recolonized new sites in the South Puget Lowlands despite 20 years of prairie restoration and intensive monitoring, suggesting recolonization is site-specific and difficult to predict.

The number of breeding pairs in Willamette Valley region appears to have increased for 10 local populations (based on the 2013–2019 survey data), and the region supports two local populations in high condition, five in moderate condition, and three in low condition. One historical location at Salem Airport had no breeding pairs in surveys from 2013–2019 and is assumed extirpated. The survey results reported in Table 1, above, may represent a small portion of the total number of streaked horned larks in the Willamette Valley due to lack of access on private lands, and there is no information to infer the condition of these potential populations.

The draft recovery plan for streaked horned lark (U.S. Fish and Wildlife Service 2019, entire) provides some thoughts on potential adequate redundancy and representation for the subspecies. The plan recommends that 38 resilient sites be managed for long-term conservation: Eight sites in the South Puget Lowlands; three sites along the Pacific Coast and six sites in the Lower Columbia River; and, 21 sites in the Willamette Valley. The current redundancy of streaked horned lark is characterized by 42 local populations across the range of the subspecies (eight in the South Puget Lowlands, five along the Pacific Coast and 19 in the Lower Columbia River, and 10 (accessible sites for surveys) in the Willamette Valley). Across the range, eight sites are considered high condition, 15 are ranked moderate, and 19 ranked low. There are at least two local populations ranked high in each regional population, suggesting relatively good representation in varying habitats, including prairies, wetlands, coastal dunes, sandy islands, airports and road margins, and agricultural fields. The rangewide distribution of 42 local populations confers some measure of protection against catastrophic events, particularly in the Willamette Valley where relatively large numbers of birds move about in response to changing habitat conditions. Recent detections of birds at sites previously unoccupied (*i.e.,* Clatsop Spit) suggest individuals are actively moving between sites, adapting to new areas and potentially recolonizing areas with suitable habitat. Additional local populations in high and moderate condition throughout the range would benefit the overall level of redundancy and representation for the subspecies.

Future Condition

The main factors influencing the future viability of the streaked horned lark include ongoing and sustained habitat loss; continued land management activities and related effects; recreation; and, the synergistic effects of climate change and small population size. We used the same habitat and population metrics to assess future condition of the local populations in response to projected land use changes and climate conditions. We forecasted the condition of local populations over time under three scenarios and use this information to forecast the viability of the streaked horned lark over the next 30 years. We chose 30 years because it is within the range of the available hydrological and climate change model forecasts, encompasses approximately five generations, and represents a biologically meaningful timeframe in which we could expect to observe any plausible changes in the status of the streaked horned lark.

We evaluated land use trends by looking at data on the quantity and type of agricultural crops in production throughout the State every 5 years from the U.S. Department of Agriculture, National Agricultural Statistics Service. In the State of Oregon, where larks largely occur on private agricultural lands, we evaluated trends in land use and crop type over the past 20 years to inform future trends. Specifically, we used these data to evaluate trends in the overall quantity of grass and other seed farms, and compared the changes to trends in the quantity of crop types that do not provide suitable habitat for larks, such as hazelnut orchards, blueberry farms, and wine grapes for viticulture.

To assess effects to the streaked horned lark from climate change, we relied on projections to mid-century from the U.S. Geological Survey, Land Change Science Program National Climate Change Viewer (Alder and Hostetler 2013, entire). The Coupled Model Intercomparison Project 5 provides a range of variability in climate projections for the time period 2025 to 2049. We used the combined range of the projection from two model scenarios, representative concentration pathways (RCP) 4.5 and RCP 8.5, to evaluate a range of potential future conditions. RCP 4.5 predicts that greenhouse gas emissions stabilize by the end of the century; RCP 8.5 predicts emissions continue to rise unchecked through the end of the century. Climate model results largely follow the same trajectory until mid-century (*e.g.,* 2040s to 2050s) and diverge beyond that point, resulting in greater uncertainty beyond 2050. For this analysis, we evaluated possible future conditions using these climate scenarios and the resulting impacts on species and habitat through the year 2050. Climate change is not expected to decrease the resiliency of any local populations in the prairie ecosystem because prairie and grassland ecosystems are well adapted to warm and dry conditions like the periodic soil drought and future increases in temperature and drought forecasted for those areas. With respect to coastal populations however, sea level rise, increased coastal erosion, and more severe weather events will cause significant effects to lark habitats. Climate change may limit the resiliency of some local populations on the coast by amplifying the negative effects from habitat loss or the spread of invasive species where not managed.

We forecasted what the streaked horned lark may experience in terms of resiliency, redundancy, and representation under three plausible future scenarios over the next 30 years: Status quo, improved conditions, and degraded conditions. Under the status quo, the adverse effects of habitat loss, climate change, and management activities and related effects are consistent with current levels (including current levels of conservation); the level of recreation increases in accordance with human population growth. Under improved conditions, the adverse effects of habitat loss and climate change are reduced compared to current conditions; management activities and related effects are consistent with current levels with additional conservation measures to protect larks; and the level of recreation increases in accordance with human population growth. However, both recreation and management activities and related effects act on larger lark populations, resulting in reduced impact to overall population status. Under degraded conditions, the adverse effects of habitat loss and climate change are increased; management activities and related effects continue with no additional conservation measures; and the level of recreation increases in accordance with human population growth. However, both recreation and management activities and related effects act on smaller population sizes, resulting in increased impact to overall population status.

Under the three future scenarios selected for this analysis, the number and size of extant populations change in response to assumed habitat conditions and changes in management activities at individual sites. Changes in population condition impact the overall species' redundancy and representation. Under the status quo scenario, one population in the South Puget Lowlands drops from high to moderate condition, four local populations in the Pacific Coast and Columbia River region drop from moderate to low condition, and all five moderate populations in the Willamette Valley drop to low condition. Even though influence factors don't change in magnitude from current levels under this scenario, the synergistic effects of small population size would amplify the effect of negative influence factors in some local populations overtime. Under this scenario, the subspecies would continue to occupy roughly an equal number of habitat types and distribution of 42 local populations across the range, but some small, isolated populations may be at risk of eventual extirpation without intentional habitat management or conservation measures.

Under the improved conditions scenario, careful management and conservation actions are implemented to increase the quantity, quality, and distribution of suitable habitats for streaked horned larks. One local population in the South Puget Lowlands and three in the Pacific Coast and Columbia River region improve from moderate to high condition, and one population in each of the South Puget lowlands and Willamette Valley regions move from low to moderate. As local populations become more resilient under this scenario, the species' ability to move between sites in response to changing environmental conditions and re-establish breeding populations would increase overall redundancy, buffering against adverse effects of catastrophic events. With respect to ecological representation, it is unlikely that birds would occupy new or different habitat types relative to current patterns of occupancy in the Pacific Coast and Lower Columbia region under this scenario, due to the limited availability of alternative habitats that provide the structural habitat features preferred by larks. In the South Puget Lowlands and Willamette Valley regions, the number of resilient local populations would increase; however it is unlikely that larks would disperse into the north Puget Lowlands region, or south into the Umpqua and Rogue Valley regions without substantial recovery efforts to support habitat development in these areas.

Under the degraded conditions scenario, further habitat loss and increased instability would lead to reduced condition in many local populations with only one local population remaining in high condition in the range of the subspecies (Rice Island). Eighteen local populations would decrease in condition across the range of the streaked horned lark, leaving 10 moderate condition and 30 low condition populations distributed across the three regions. Under this scenario, Shelton Airport would become extirpated, reducing redundancy. Many other local populations would decrease in resiliency and be at higher risk of extirpation, putting the subspecies at risk of further reduction in redundancy. If local populations become less resilient, larks would be less able to move between sites in response to changing environmental conditions or re-establish local populations following a catastrophic event. Furthermore, the loss of local populations would decrease the species' representation and overall ability to adapt to changing environmental conditions.

Because the streaked horned lark is dependent on land management activities that create and maintain suitable replacement habitat throughout the species' range, the future viability of the species relies upon the continuation of these actions. The synergistic effects of both small population size and the effects of climate change will likely amplify the negative effects of influence factors and reduce resiliency of some local populations, particularly along the Pacific Coast, the South Puget Lowlands, and the Lower Columbia River.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Determination of Streaked Horned Lark's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines ''endangered species'' as a species in danger of extinction throughout all or a significant portion of its range, and ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of ''endangered species'' or ''threatened species'' because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D)

the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

We evaluated threats to the streaked horned lark and assessed the cumulative effect of the threats under the Act's section 4(a)(1) factors. The primary driver of the status of streaked horned lark has been the scarcity of large, open spaces with very early seral stage vegetation. The loss of historical disturbance regimes that created these open spaces impacted the abundance and distribution of historical populations, but the impact occurred decades ago and is not ongoing. The best available information does not indicate that overutilization (Factor B), predation or disease (Factor C), pesticides, or loss of historical disturbance regimes (Factor A) are threats to the viability of the subspecies. The streaked horned lark has been affected through loss of preferred habitats (Factor A) as a result of successional changes in plant species composition and encroachment of woody vegetation; invasion of beach grasses; conversion of suitable habitat into unsuitable habitat through changes in land use; and changes in agricultural practices from crops that mimic preferred habitats (*i.e.,* grass seed farms) to crops that diminish habitat suitability (*i.e.,* hazelnut orchards and blueberry farms). The streaked horned lark is also affected by land management activities and related affects, as well as other human activities (Factor E) including agricultural activities, airport management activities and related airstrikes, military training and related activities, the placement of dredged materials, and recreation.

Despite the ongoing influence of these factors, however, the subspecies does not appear to be currently in danger of extinction as none of these factors influence populations of the streaked horned lark or its habitat at a level that is currently impacting the viability of the subspecies. Survey data from some regularly monitored sites across the range of the subspecies show an increase from 198 breeding pairs in 2013 to 383 breeding pairs in 2019. The subspecies has shown relative stability for the last 7 years based on survey data from known populations, with 42 redundant local populations across the range. Several local populations in all three representative regions have high condition, and a total of 23 local populations across the range have high or moderate condition. Negative influence factors on the subspecies have not fluctuated much for the last 20 years and are not of a scope or magnitude such that the subspecies is currently in danger of extinction. Local populations in South Puget Lowlands and Lower Columbia River populations have benefited from conservation efforts implemented as part of section 7 consultations under the Act.

Abundance of larks across the Willamette Valley appears relatively high, but many of these local populations cannot be surveyed due to lack of access. Although the current abundance of local populations along the Pacific Coast is lower than other areas, it has been low for many years, and we see no apparent declining trend in this regional population based on survey data from 2013 to 2019. Recent detections of birds at Clatsop Spit, as well as sites with restored habitat on private lands in the Willamette Valley, indicate that individuals can move between sites, and there are a few instances of detections at previously unoccupied locations, but recolonization appears very low and difficult to predict.

In the foreseeable future, however, there is potential for a decline in resiliency of local populations across the range. The loss of preferred habitat will continue from plant succession and encroachment of woody vegetation, invasion of beach grasses, changes in land use, and changes in beneficial agricultural practices. The regular large-scale, human-caused disturbance (burning, mowing, cropping, chemical treatments, or placement of dredged materials) that now creates and maintains replacement habitat for the streaked horned lark will continue, as will the related effects of these activities that can negatively impact individual lark (nest destruction, mortality, disturbance, and aircraft strikes). Recreation will also continue. Any negative effects from these factors will likely be amplified in some local populations due to the synergistic effects related to small population size and the increased effects of climate change in the range over the next 30 years, particularly along the Pacific Coast, the South Puget Lowlands, and Lower Columbia River. As climate change and small population size increase in influence, the realized benefit of these replacement habitats to the subspecies may decrease.

Additionally, any future changes in the maintenance of these landscapes will affect the resiliency of larks in the area. Agriculture remains the primary influence on land use in the Willamette Valley, and the resilience of larks in that area is tied to practices that can change easily given market demands. This uncertainty regarding future land use and anthropogenic effects to habitat increases the potential risk of extinction in the foreseeable future. Numerous conservation measures resulting from section 7 consultation under the Act in the range of the streaked horned lark have helped reduce effects of threats on the subspecies (Factor D), but the continued effects of habitat loss (Factor A), land management activities and related effects, and recreation, in combination with small population size and the effects of climate change (Factor E), are expected to reduce viability of the subspecies over the next 30 years.

Thus, after assessing the best available information, we conclude that the streaked horned lark is not currently in danger of extinction but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Center for Biological Diversity*), vacated the aspect of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014) that provided that the Service does not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Center for Biological Diversity,* we now consider whether there are any significant portions of the species' range where the species is in danger of

extinction now (*i.e.,* endangered). In undertaking this analysis for the streaked horned lark, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.

For the streaked horned lark, we considered whether the threats are geographically concentrated in any portion of the species' range at a biologically meaningful scale. We examined the following influence factors (including cumulative effects): Loss of preferred habitats as a result of successional changes in plant species composition and encroachment of woody vegetation; invasion of beach grasses; conversion of suitable habitat into unsuitable habitat through changes in land use; changes in agricultural practices from crops that mimic preferred habitats to crops that diminish habitat suitability; land management activities and related effects including airport management activities, military training, and the placement of dredged materials; and recreation. The influence of these factors vary somewhat across the range, and there is no portion of the range where there is currently a biologically meaningful concentration of threats relative to other areas in the range. Although the current abundance of local populations along the Pacific Coast is low compared to other areas, it has been low for many years, the size of those coastal sites is relatively small compared to other local populations and therefore naturally limits the number of breeding pairs, and we see no apparent declining trend in this regional population based on survey data between 2013 and 2019. However, in the foreseeable future, the synergistic effects of small population size and climate change will likely amplify the effects of any ongoing threats on some local populations in the range of the subspecies, particularly along the Pacific Coast, in the South Puget Lowlands, and along the Lower Columbia River.

We found no concentration of threats in any portion of the streaked horned lark's range at a biologically meaningful scale. Thus, there are no portions of the species' range where the species has a different status from its rangewide status. Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best available scientific and commercial information indicates that the streaked horned lark meets the definition of a threatened species. Therefore, we propose to affirm the current listing of the streaked horned lark as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies; private organizations; and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning consists of preparing draft and final recovery plans, beginning with the development of a recovery outline and making it available to the public within 30 days of a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. A notice of the draft recovery plan for streaked horned lark was published in the **Federal Register** on October 30, 2019 (84 FR 58170); the draft plan is available on our website (*http://www.fws.gov/endangered*), or from our Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Funding for recovery actions is available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State(s) of Oregon and Washington are eligible for Federal funds to implement management actions that promote the protection or recovery of the streaked horned lark. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning

purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the Service; issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the Corps; and road construction by the Federal Highway Administration in cooperation with the Service at Baskett Slough NWR.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within the range of the species. The discussion below regarding protective regulations under section 4(d) of the Act complies with our policy.

II. Proposed Rule Issued Under Section 4(d) of the Act

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of species listed as threatened. The U.S. Supreme Court has noted that statutory language like ''necessary and advisable'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Additionally, the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants. Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting some or all of the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife, or include a limited taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

On October 3, 2013, we issued a rule under the authority of section 4(d) of the Act to provide for the conservation of the streaked horned lark (78 FR 61452) (see 50 CFR 17.41(a)). That rule applies all of the prohibitions of section 9 of the Act to the streaked horned lark, with the following exceptions for incidental take: (1) Certain activities on airports on non-Federal lands; (2) certain agricultural activities on non-Federal land in the range of the subspecies in Oregon and Washington; (3) certain noxious weed control activities on non-Federal lands; and (4) habitat restoration activities that benefit the conservation of streaked horned lark.

Exercising authority under section 4(d), we developed a proposed revised 4(d) rule that is designed to address the streaked horned lark's specific threats and conservation needs. Although the statute does not require us to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, for the reasons stated below we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the streaked horned lark. As discussed above under *Summary of Biological Status and Threats,* we have concluded that the streaked horned lark is likely to become in danger of extinction within the foreseeable future primarily due to the synergistic effects of small population size and climate change on continued loss and degradation of habitat, land management activities and related effects, and recreation. The influence of these factors is expected to continue into the foreseeable future.

The provisions of this proposed revised 4(d) rule would promote conservation of the streaked horned lark by encouraging management of the landscape in ways that meet both land management considerations and the conservation needs of the streaked horned lark. The provisions of this proposed revised 4(d) rule are one of many tools that we would use to promote the conservation of the streaked horned lark. For these reasons, we find the proposed revised 4(d) rule as a whole is necessary and advisable to provide for conservation of the streaked horned lark.

Provisions of the Proposed Revised 4(d) Rule

The provisions of the proposed revised 4(d) rule for the streaked horned lark are discussed in more detail below, but we note here that the substantive differences between the current 4(d) rule for the streaked horned lark at 50 CFR 17.41(a) and this proposed revised 4(d) rule are limited to the following: The expansion of the exception for incidental take for certain agricultural activities on non-Federal lands throughout the range of the subspecies in Oregon and Washington; and, the addition of an exception to the take prohibition for incidental take associated with habitat restoration

activities that benefit streaked horned lark. The primary driver of the status of streaked horned lark has been the scarcity of large, open spaces with very early seral stage vegetation. Therefore, this 4(d) rule is designed to support the continuation of activities taking place in the range of the subspecies that lead to these features, and to encourage the development of these features in new areas in the range of the subspecies in the future. The proposed revised 4(d) rule would provide for the conservation of the streaked horned lark by prohibiting take, except as otherwise authorized, permitted, or incidental to the following activities: Wildlife hazard management at airports and accidental strikes by aircraft, normal agricultural practices in Oregon and Washington, noxious weed control on non-Federal lands, and habitat restoration activities beneficial to streaked horned lark. The prohibition, and the exceptions, are, for the most part, already included in the current 4(d) rule for the streaked horned lark at 50 CFR 17.41(a). All take not included in the exceptions would continue to be prohibited in order to support existing populations of the streaked horned lark.

Some management actions taken at airports are generally beneficial to streaked horned larks and have led to the creation of replacement habitat the subspecies relies upon. Streaked horned larks breed successfully and maintain populations at airports in the South Puget Sound and Willamette Valley. Airports maintain safe conditions for aviation in part by routinely implementing programs to minimize the presence of hazardous wildlife on airfields; these activities unintentionally create suitable habitat for streaked horned larks. Activities involved in wildlife hazard management at airports that benefit streaked horned lark include hazing of hazardous wildlife (geese and other large birds and mammals) and modification and management of forage, water, and shelter to be less attractive to these hazardous wildlife, including vegetation management to maintain desired grass height on or adjacent to airports through mowing, discing, herbicide use, or burning. As with other land management activities, vegetation management during the nesting season has the potential to destroy streaked horned lark nests and young. However, despite concerns over potential adverse effect of vegetation management during the breeding season at airports, this activity is very important to the maintenance of the low-statured vegetation required by nesting and wintering larks in the area. Therefore, excepting hazardous wildlife management from the Act's prohibitions of take when conducted by airport staff or employees contracted by the airport to perform hazardous wildlife management activities, furthers the conservation of the subspecies by helping to prevent the spread of those noxious weeds that may render existing habitat unsuitable for the streaked horned lark.

The listing of the streaked horned lark imposes a requirement on airport managers where the subspecies occurs to consider the effects of their management activities on this subspecies when actions are funded or approved by the Federal Aviation Administration. Excepting hazardous wildlife management and accidental aircraft strikes from prohibitions on take eliminates the incentive for airports to reduce or eliminate replacement habitat that supports populations of streaked horned larks from the airfields, and therefore provides for the conservation of the species by allowing current beneficial management activities to continue. Accidental aircraft strikes are an unavoidable consequence of the vegetation management that also maintains habitat that supports breeding pairs. While aircraft strikes do occur in several local populations at airports throughout the range of the species (particularly in the South Puget Lowlands), the rate appears relatively low. Additionally, the potential take of streaked horned lark associated with the routine management, repair, and maintenance of roads and runways is minimal. Therefore, in order to support activities involved in wildlife hazard management that maintain habitat features beneficial to streaked horned lark, incidental take associated with wildlife hazard management activities, as well as aircraft strikes and routine maintenance of existing roads and runways at airports is excepted from the prohibition on take. We recommend that airport operators follow the guidance provided in Federal Aviation Administration advisory circular 150/5200–33C, ''Hazardous Wildlife Attractants on or near Airports'' (FAA 2020, entire), and all other applicable related guidance.

In the Willamette Valley, large expanses of burned prairie or the scour plains of the Willamette and Columbia Rivers may have provided suitable habitat for streaked horned larks in the past. With the loss of these historical habitats during the last century, alternative breeding and wintering sites, including active agricultural lands, have become critical for the continued survival and recovery of the streaked horned lark. The largest area of potential habitat for streaked horned larks is the agricultural land base in the Willamette Valley. Larks are attracted to the wide open landscape context and low vegetation structure in agricultural fields, especially in grass seed fields, probably because those working landscapes resemble the historical habitats formerly used by the subspecies when the historical disturbances associated with floods and fires maintained a mosaic of suitable habitats. Habitat characteristics of agricultural lands used by streaked horned larks include: (1) Bare or sparsely vegetated areas within or adjacent to grass seed fields, pastures, or fallow fields; (2) recently planted (0 to 3 years) conifer farms with extensive bare ground; and (3) wetland mudflats or ''drown outs'' (*i.e.,* washed out and poorly performing areas within grass seed or row crop fields). Currently in the Willamette Valley, there are approximately 420,000 ac (169,968 ha) of grass seed fields and approximately 500,000 ac (202,343 ha) of other agriculture. In any year, some portion of these 920,000 ac (372,311 ha) will have suitable streaked horned lark habitat, but the geographic location of those areas may not be consistent from year to year, nor can we predict their occurrence due to variable agricultural practices (crop rotation, fallow fields, etc.), and we cannot predict the changing and dynamic locations of those areas.

While agricultural activities also have the potential to harm or kill individual streaked horned larks or destroy their nests, maintenance of extensive agricultural lands (primarily grass seed farms) in the Willamette Valley is crucial to maintaining the population of streaked horned larks in the valley and aiding in the recovery of the subspecies in Oregon. Although we are unaware of any current breeding populations of streaked horned larks on agricultural lands in Washington, use of these habitats by streaked horned larks would aid in recovery of the subspecies in Washington and is therefore encouraged. We propose to expand the exception for incidental take for certain agricultural activities on non-Federal lands in the proposed revised 4(d) rule to the entire range of the subspecies, to encourage management actions that would facilitate the use of areas other than civilian and military airports by streaked horned within the range of the subspecies in Oregon and Washington.

Because landowners are free to allow vegetation growth that results in the conversion of lands into habitats

unsuitable for the streaked horned lark, conservation of the species will benefit from the support of agricultural practices that result in the creation and maintenance of habitat that is suitable for the subspecies. This proposed revised 4(d) rule, if finalized, would remove the incentive for private landowners in Oregon to discontinue activities resulting in suitable habitat for larks on the highest-priority agricultural lands based on section 9 liability concerns. Additionally, the rule would reduce any section 9 liability concerns of private landowners in Washington considering the implementation of agricultural practices that result in the creation and maintenance of habitat that is suitable for the subspecies. The primary crop type that results in habitat features preferred by lark is grass seed, and the typical harvest (combining) period for grass seed fields occurs in late June or early July, after the most active part of the breeding season for larks is done. Because the timing of ground disturbance for grass seed farms is after the primary part of the nesting season is over, it does not put the reproductive success of the subspecies at great risk, the benefits of encouraging the continuation of the inadvertent creation of lark habitat through normal grass seed farming practices outweigh the benefit of restricting the timing of this exception to take. Excepting routine agricultural activities on non-Federal lands from the prohibition on take would help provide an overall benefit to the subspecies by maintaining suitable habitat for the streaked horned lark. This exception to the prohibition on take for agricultural activities would be rangewide in Oregon and Washington, and we find that the definition of ''normal farming practices'' in this 4(d) rule is consistent with relevant Oregon and Washington State laws (Oregon Revised Statutes (ORS), chapter 30, section 30.930, and Revised Code of Washington (RCW), title 7, chapter 7.48, section 7.48.310, respectively).

Streaked horned larks nest, forage, and winter on extensive areas of bare ground with low-statured vegetation. These areas include native prairies, coastal dunes, fallow and active agricultural fields, wetland mudflats, sparsely vegetated edges of grass fields, recently planted conifer farms with extensive bare ground, moderately to heavily grazed pastures, gravel roads or gravel shoulders of lightly traveled roads, airports, and dredge deposition sites in the Lower Columbia River. The suppression and loss of ecological disturbance regimes such as fire and flooding across vast portions of the landscape have resulted in altered vegetation structure and facilitated invasion by nonnative grasses and woody vegetation, including noxious weeds, rendering habitat unsuitable for streaked horned larks. By their nature, noxious weeds grow aggressively and multiply quickly, negatively affecting all types of habitats, including those used by larks. Some species of noxious weeds spread across long distances through wind, water, and animals, as well as via humans and vehicles, thereby affecting habitats far away from the source plants.

Because noxious weed control maintains the low statured vegetation and the open landscape that streaked horned lark relies upon, this activity is essential to the retention of suitable nesting, wintering, and foraging habitat. As with other land management activities, noxious weed control during the nesting season has the potential to destroy streaked horned lark nests and young. On the other hand, streaked horned larks can benefit from weeds, as they eat the seeds of weedy forbs and grasses. However, despite any potential benefit from weeds or concerns over timing of control, the eradication (or removal) of noxious weeds wherever they may occur is important to the maintenance of the low-statured vegetation required by nesting and wintering larks. Therefore, excepting the routine mechanical or chemical management of noxious weeds from the Act's prohibitions of take, furthers the conservation of the subspecies by helping to prevent the spread of those noxious weeds that may render habitat unsuitable for the streaked horned lark. It also encourages landowners to manage their lands in ways that meet their property management needs and also help to prevent degradation or loss of suitable habitat for the streaked horned lark. Noxious weed control targets those species included on County, State, and Federal noxious weed lists (see State and Federal lists via links at *http://plants.usda.gov/java/noxious;* Washington State counties each have a noxious weed control website, and selected Oregon State counties maintain noxious weed lists).

Finally, activities associated with streaked horned lark habitat restoration (*e.g.,* removing non-native plants and planting native plants, creating open areas, and maintaining sparse vegetation through vegetation removal or suppression via controlled burns) would be very beneficial to the subspecies; any adverse effects to the subspecies from these activities would likely be only short-term or temporary, especially with respect to harassment or disturbance of individual lark. In the long term, the risk of adverse effects to both individuals and populations is expected to be mitigated as these types of activities will likely benefit the subspecies by helping to preserve and enhance the habitat of existing local populations over time. Reasonable care for habitat management may include, but would not be limited to, procuring and implementing technical assistance from a qualified biologist on habitat management activities, and best efforts to minimize streaked horned lark exposure to hazards (*e.g.,* predation, habituation to feeding, entanglement, etc.). Therefore, we propose in the 4(d) rule an exception to the prohibition on take for any habitat restoration actions that would create or enhance streaked horned lark habitat, provided that reasonable care is taken to minimize such take.

We acknowledge that all of these activities excepted from incidental take in this rule have the potential to result in destruction of nests, crushing of eggs or nestlings, or flushing of fledglings or adults when conducted during the active breeding season for streaked horned larks. The 2013 listing rule (78 FR 61452) included dredge spoil deposition timing and placement on Columbia River islands, incompatibly timed burning and mowing regimes, activities associated with military training, and activities associated with airports as threats to the subspecies. Despite these threats noted at the time of listing, the Service determined that timing restrictions on these activities were not appropriate, stating in the rule: ''Our purpose in promulgating a special rule to exempt take associated with activities that inadvertently create habitat for the streaked horned lark is to allow landowners to continue those activities without additional regulation. We believe that imposing a timing restriction would likely reduce the utility of the special rule for land managers, and could have the unintended side effect of causing landowners to discontinue their habitat creation activities'' (78 FR 61464). No timing restrictions were included in the 4(d) rule, and these land management activities have continued across the range since 2013. Survey data from some regularly monitored sites throughout the range of the subspecies now show an increase from 198 breeding pairs in 2013, to 383 breeding pairs in 2019, despite the lack of timing restrictions on land management activities. While the loss of individuals is never welcome, this 4(d) rule provides for the conservation of the subspecies by including provisions that

support the continuation of land management activities that create replacement habitat; the benefits of these provisions to the subspecies outweigh the cost of any loss of individuals.

As discussed above under *Summary of Biological Status and Threats,* multiple factors are affecting the status of the streaked horned lark. A range of activities have the potential to affect the streaked horned lark, including the management of hazardous wildlife at airports and associated airstrikes, routine agricultural activities, and the routine removal or other management of noxious weeds. Prohibiting take rangewide under section 9 of the Act to the streaked horned lark, will help preserve the species' remaining populations, slow their rate of decline, and allow for the maintenance of suitable habitat for the species. However, these same activities also benefit streaked horned lark through the creation of the very habitat features (large open spaces with very early seral stage vegetation) that streaked horned lark prefer; without these replacement habitats throughout the range, the status of the subspecies would likely be much worse. Therefore, while we are extending the take prohibition for the streaked horned lark, we are excepting from this prohibition take that is incidental to the management of hazardous wildlife at airports, accidental airstrikes by aircraft, routine agricultural activities, the routine removal or other management of noxious weeds, and habitat restoration activities. As discussed above, we believe that that these exceptions will provide for the conservation of the species by supporting the maintenance and creation of habitat features that streaked horned lark rely upon.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulations at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating incidental take would help preserve the species' remaining populations, slow their rate of decline, and decrease synergistic, negative effects from other threats.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances. Regulations governing permits for threatened species are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

We recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, will be able to conduct activities designed to conserve streaked horned lark that may result in otherwise prohibited take without additional authorization.

As a subspecies of the horned lark (*Eremophila alpestris*), the streaked horned lark is protected by the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703 *et seq.*). The MBTA makes it unlawful, at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such bird included in the terms of four specific conventions between the United States and certain foreign countries (16 U.S.C. 703). See 50 CFR 10.13 for the list of migratory birds protected by the MBTA.

Like the current 4(d) rule for the subspecies, this proposed revised 4(d) rule adopts existing requirements under the MBTA as appropriate regulatory provisions for the streaked horned lark. Accordingly, under the proposed revised 4(d) rule, incidental take is not prohibited, and purposeful take is not prohibited if the activity is authorized or exempted under the MBTA, such as activities under a migratory bird rehabilitation permit necessary to aid a sick, injured, or orphaned bird. Thus, if a permit is issued for activities resulting in purposeful take of streaked horned larks under the MBTA, it will not be necessary to have an additional permit under the Act.

Nothing in this proposed revised 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the streaked horned lark. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service, where appropriate. We ask the public, particularly State agencies and other interested stakeholders that may be affected by the proposed revised 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that the Service could provide or use, respectively, to streamline the implementation of this proposed revised 4(d) rule (see *Information Requested,* above).

III. Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals

for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). We also determine that 4(d) rules that accompany regulations adopted pursuant to section 4(a) of the Act are not subject to the National Environmental Policy Act.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

References Cited

A complete list of references cited in this proposed rulemaking is available on the internet at *http://www.regulations.gov* and upon request from the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Oregon Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

IV. Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.41 by revising paragraph (a) to read as set forth below:

§ 17.41 Special rules—birds.

(a) Streaked horned lark (*Eremophila alpestris strigata*).

(1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to streaked horned lark. Except as provided under paragraph (a)(2) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(iv) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(2) *Exceptions from prohibitions.* In regard to this species, you may:

(i) Conduct activities as authorized by a permit under § 17.32.

(ii) Take, as set forth at § 17.21(c)(2) through (4) for endangered wildlife, and (c)(6) and (7) for endangered migratory birds.

(iii) Take, as set forth at § 17.31(b).

(iv) Take incidental to an otherwise lawful activity caused by:

(A) The management of hazardous wildlife at airport facilities by airport staff or employees contracted by the airport to perform hazardous wildlife management activities. Hazardous wildlife is defined by the Federal Aviation Administration as species of wildlife, including feral animals and domesticated animals not under control, that are associated with aircraft strike problems, are capable of causing structural damage to airport facilities, or act as attractants to other wildlife that pose a strike hazard. Routine management activities include, but are not limited to, the following:

(1) Hazing of hazardous wildlife;

(2) Habitat modification and management of sources of forage, water, and shelter to reduce the attractiveness of the area around the airport for hazardous wildlife. This exception for habitat modification and management includes control and management of vegetation (grass, weeds, shrubs, and trees) through mowing, discing, herbicide application, or burning;

(3) Routine management, repair, and maintenance of roads and runways (does not include upgrades or construction of new roads or runways);

(B) Accidental aircraft strikes at airports on non-Federal lands.

(C) Agricultural (farming) practices implemented on farms consistent with State laws on non-Federal lands in Washington and Oregon.

(1) For the purposes of this rule, farm means any facility, including land, buildings, watercourses and appurtenances, used in the commercial production of crops, nursery stock, livestock, poultry, livestock products, poultry products, vermiculture products, or the propagation and raising of nursery stock.

(2) For the purposes of this rule, an agricultural (farming) practice means a mode of operation on a farm that is or may be used on a farm of a similar nature; is a generally accepted, reasonable, and prudent method for the operation of the farm to obtain a profit in money; is or may become a generally accepted, reasonable, and prudent method in conjunction with farm use; complies with applicable State laws; and is done in a reasonable and prudent manner. Common agricultural (farming) practices include, but are not limited to, the following activities:

(i) Planting, harvesting, rotation, mowing, tilling, discing, burning, and herbicide application to crops;

(ii) Normal transportation activities, and repair and maintenance of unimproved farm roads (this exemption does not include improvement or construction of new roads) and graveled margins of rural roads;

(iii) Livestock grazing according to normally acceptable and established levels;

(iv) Hazing of geese or predators; and

(v) Maintenance of irrigation and drainage systems.

(D) Removal or other management of noxious weeds. Routine removal or other management of noxious weeds are limited to the following, and must be conducted in such a way that impacts to non-target plants are avoided to the maximum extent practicable:

(1) Mowing;

(2) Herbicide and fungicide application;

(3) Fumigation; and

(4) Burning.

(E) Habitat restoration actions. Habitat restoration and enhancement activities for the conservation of streaked horned lark may include activities consistent with formal approved conservation plans or strategies, such as Federal or State plans that include streaked horned lark conservation prescriptions or compliance, which the Service has determined would be consistent with this rule.

(v) Possess and engage in other acts with unlawfully taken wildlife, as set forth at § 17.21(d)(2) through (d)(4).

* * * * *

Martha Williams,

Principal Deputy Director, Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2021–06943 Filed 4–12–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 210407–0077]

RIN 0648–BK42

Pacific Halibut Fisheries; Catch Sharing Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to revise regulations for the commercial individual fishing quota (IFQ) Pacific halibut (halibut) fisheries for the 2021 IFQ fishing year. This proposed rule would remove limits on the maximum amount of halibut IFQ that may be harvested by a vessel, commonly known as vessel use caps, in IFQ regulatory areas 4A (Eastern Aleutian Islands), 4B (Central and Western Aleutian Islands), 4C (Central Bering Sea), and 4D (Eastern Bering Sea). This action is needed to provide additional flexibility to IFQ participants in 2021 to ensure allocations of halibut IFQ can be harvested by the limited number of vessels operating in these areas. This action is within the authority of the Secretary of Commerce to establish additional regulations governing the taking of halibut which are in addition to, and not in conflict with, those adopted by the International Pacific Halibut Commission (IPHC). This action is intended to promote the goals and objectives of the IFQ Program, the Northern Pacific Halibut Act of 1982, and other applicable laws.

DATES: Submit comments on or before April 28, 2021.

ADDRESSES: You may submit comments, identified by FDMS Docket Number NOAA–NMFS–2021–0032, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2021–0032 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Susan Meyer. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: NMFS may not consider comments sent by any other method, to any other address or individual, or received after the end of the comment period. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous).

Electronic copies of the Categorical Exclusion and the Regulatory Impact Review (RIR) prepared for this action (referred to as the ''Analysis'') are available from *http://www.regulations.gov* or from the NMFS Alaska Region website at *http://alaskafisheries.noaa.gov.*

Additional requests for information regarding halibut may be obtained by contacting the IPHC, 2320 W Commodore Way, Suite 300, Seattle, WA 98199–1287; or Sustainable Fisheries Division, NMFS Alaska Region, P.O. Box 21668, Juneau, AK 99802; Sustainable Fisheries Division.

FOR FURTHER INFORMATION CONTACT: Abby Jahn, 907–586–7228.

SUPPLEMENTARY INFORMATION:

Authority for Action

The IPHC and NMFS manage fishing for halibut through regulations established under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). The IPHC promulgates regulations governing the halibut fishery under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Convention). The IPHC's regulations are subject to approval by the Secretary of State with the concurrence of the Secretary of Commerce (Secretary). NMFS publishes the IPHC's regulations as annual management measures pursuant to 50 CFR 300.62. The 2021 IPHC annual management measures were published on March 9, 2021 (86 FR 13475).

The Halibut Act, 16 U.S.C. 773c(a) and (b), provides the Secretary with general responsibility to carry out the Convention and the Halibut Act. The Halibut Act, 16 U.S.C. 773c(c), also provides the North Pacific Fishery Management Council (Council) with authority to develop regulations, including limited access regulations, that are in addition to, and not in conflict with, approved IPHC regulations. Regulations recommended by the Council may be implemented by NMFS only after approval by the Secretary.

The Council has exercised its authority in developing halibut management programs for the subsistence, sport, and commercial halibut fisheries. The Secretary exercised authority to implement the commercial IFQ halibut fishery management program (58 FR 59375; November 9, 1993). The IFQ Program for the halibut fishery is implemented by Federal regulations at 50 CFR part 679.

The halibut IFQ fishery is managed in specific areas defined by the IPHC. These IFQ regulatory areas (Areas) are: Area 2A (California, Oregon, and Washington); Area 2B (British Columbia); Area 2C (Southeast Alaska), Area 3A (Central Gulf of Alaska), Area 3B (Western Gulf of Alaska), and Area 4 (subdivided into five areas, 4A through 4E, in the Bering Sea and Aleutian Islands of Western Alaska). These Areas are described at 50 CFR part 679, Figure 15. Halibut allocated under the IFQ program in Areas 2C, 3A, 3B, and Area 4 are subject to limits on the maximum amount of halibut IFQ that may be harvested by a vessel, commonly known as vessel use caps.

NMFS also allocates halibut to the Western Alaska Community Development Quota (CDQ Program) in Areas 4B, 4C, 4D, and 4E (§ 679.31(a)(2)). Halibut is allocated to the CDQ Program in Areas 4B, 4C, 4D, and 4E and those allocations are not subject to a vessel use cap. Throughout this preamble, the term ''vessel use cap''

refers to regulations applicable to the halibut IFQ fishery.

Background

This proposed rule would implement regulations to temporarily remove vessel use caps in Areas 4A, 4B, 4C, and 4D in 2021. The existing vessel use caps were recommended by the Council and implemented by NMFS as part of the IFQ Program (58 FR 59375; November 9, 1993) as regulations that were in addition to, and not in conflict with, those adopted by the IPHC, consistent with the Halibut Act (16 U.S.C. 773c(c)).

The following sections describe the IFQ Program, halibut IFQ vessel use caps, the rationale and effects of temporarily removing vessel use caps in Areas 4A, 4B, 4C, and 4D, and the regulations that would be implemented under this proposed rule.

IFQ Program

Commercial halibut and sablefish fisheries in Alaska are subject to regulation under the IFQ Program and the CDQ Program (50 CFR part 679). A key objective of the IFQ Program is to support the social and economic character of the fisheries and the coastal fishing communities where many of these fisheries are based. For more information about the IFQ Program, please refer to Section 2.3.1 of the Analysis. Because this rule is specific to the halibut IFQ fishery, reference to the IFQ Program in this preamble is specific to halibut unless otherwise noted.

Under the IFQ Program, access to the commercial halibut fisheries is limited to those persons holding quota share (QS). Quota share is an exclusive, revocable privilege that allows the holder to harvest a specific percentage of the annual commercial catch limit in the halibut fishery. In addition, QS is designated for specific geographic areas of harvest, a specific vessel operation type (catcher vessel (CV) or catcher/processor), and for a specific range of vessel sizes that may be used to harvest the sablefish or halibut (vessel category). Out of the four vessel categories of halibut QS, Category A shares are designated for catcher/processors that process their catch at sea (*e.g.,* freezer longline vessels) and do not have a vessel length designation, whereas Category B, C, and D shares are designated to be fished on CVs that meet specific length designations (§ 679.40(a)(5)).

NMFS annually issues IFQ permits to each QS holder. An annual IFQ permit authorizes the permit holder to harvest a specified amount of the IFQ species in an Area from a specific operation type and vessel category. IFQ is expressed in pounds (lbs) and is based on the amount of QS held in relation to the total QS pool for each Area with an assigned catch.

The IFQ Program established: (1) Limits on the maximum amount of QS that a person could use (*i.e.,* be used to receive annual IFQ) (§ 679.42(f)); (2) limits on the number of small amounts of indivisible QS units, known as QS blocks, that a person can hold (§ 679.42(g)); (3) limits on the ability of IFQ assigned to one CV vessel category (vessel category B, C, or D IFQ) to be fished on a different (larger) vessel category with some limited exceptions (§ 679.42(a)(2)); and (4) limits on the maximum amount of halibut IFQ that may be harvested by a vessel during an IFQ fishing year (§ 679.42(h)). Only qualified individuals and initial recipients of QS are eligible to hold CV QS and they are required to be on the vessel when the IFQ is being fished, with a few limited exceptions (§ 679.41(h)(2)). All of these limitations were established to retain the owner-operator nature of the CV halibut IFQ fisheries, limit consolidation of QS, and ensure the annual IFQ is not harvested on a small number of larger vessels.

On March 30, 2021, NMFS published an emergency rule to modify the temporary transfer provision of the IFQ Program for the commercial halibut and sablefish fisheries for the 2021 IFQ fishing year (86 FR 16542, March 30, 2021). That emergency rule allows QS holders to transfer IFQ to otherwise eligible recipients. This transfer flexibility promotes the complete and efficient harvest of the IFQ fisheries. Furthermore, that emergency rule temporarily alleviates impacts of unforeseen economic and social conditions in the IFQ fisheries. For example, QS holders would have more flexibility to select vessels to harvest their IFQ which may increase the number of vessels available to harvest (Section 2.6 of the Analysis). That emergency rule does not modify other provisions of the IFQ Program, including vessel use caps that may constrain fishing operations.

Halibut IFQ Vessel Use Caps

The IFQ Program established vessel use caps to limit the maximum amount of halibut that could be harvested on any one vessel. The limits are intended to help ensure that a minimum number of vessels are engaged in the halibut fishery and to address concerns about the socio-economic impacts of consolidation under the IFQ Program. For additional detail on vessel use caps, see the preamble to the proposed rule for the IFQ Program (57 FR 57130; December 3, 1992).

This proposed rule refers to halibut catch limits, commercial halibut allocations, and vessel use caps in net pounds or net metric tons. Net pounds and net metric tons are defined as the weight of halibut from which the gills, entrails, head, and ice and slime have been removed. This terminology used in this proposed rule is consistent with the IPHC, which establishes catch limits and calculates mortality in net pounds.

Relevant to this proposed rule, regulations at § 679.42(h)(1) state: ''No vessel may be used, during any fishing year, to harvest more IFQ halibut than one-half percent of the combined total catch limits of halibut for IFQ regulatory areas 2C, 3A, 3B, 4A, 4B, 4C, 4D, and 4E.'' Applying this regulation to 2021 yields a vessel use cap of 92,848 lbs (42.1 mt). This vessel use cap applies to vessels harvesting IFQ halibut in the areas subject to this proposed rule: Areas 4A, 4B, 4C, and 4D.

In addition, regulations at § 679.42(h)(1)(ii) state that ''No vessel may be used, during any fishing year, to harvest more than 50,000 lb (22.7 mt) of IFQ halibut derived from QS held by a CQE.'' Compared to § 679.42(h)(1)'s vessel use cap, § 679.42(h)(1)(ii) imposes an even more restrictive vessel use cap on vessels that are harvesting IFQ halibut derived from QS held by a community quota entity (CQE). A CQE is a NMFS-approved non-profit organization that represents small, remote, coastal communities that meet specific criteria to purchase and hold CV halibut QS on behalf of an eligible community. The CQE holds QS and leases the IFQ derived from the underlying QS to community residents. Relevant to this proposed rule, a CQE is authorized to hold halibut QS in Area 4B on behalf of the community of Adak, Alaska (79 FR 8870; February 14, 2014). Any vessel harvesting halibut IFQ derived from the QS held by the CQE representing the community of Adak is subject to this more restrictive 50,000 lb (22.7 mt) vessel use cap.

Rationale and Effects of Temporarily Removing Vessel Use Caps in Areas 4A, 4B, 4C, and 4D

On February 10, 2021, at their regularly-scheduled meeting, the Council addressed requests from IFQ fishery stakeholders to remove vessel use caps applicable to the halibut IFQ fisheries (Sections 1 and 2.3 of the Analysis). These requests were in part based on the success of the 2020 emergency rule for removing vessel use caps in Area 4 which provided flexibility to the IFQ halibut fleet: In

multiple areas, vessels harvested up to or over the vessel use cap. Based on stakeholder engagement and considering a range of factors, the Council recommended, and now NMFS issues, this proposed rule. These factors include, but are not limited to:

- The unforeseen complications of health advisories and government-issued travel policies impose on fishing operations in the 2021 fishing year, particularly in the remote BSAI halibut IFQ fishery. These advisories and policies may restrict the ability for vessels and crew to operate and fully harvest their IFQ (Sections 2.3 and 2.5 of the Analysis);
- The relatively large proportion of vessels participating in the Area 4A, 4B, 4C, and 4D halibut IFQ fishery that are operating near the current vessel use cap, thereby limiting the amount of additional IFQ that could be harvested on vessels operating in those Areas (Section 2.3 of the Analysis);
- The minimum number of vessels required to fully harvest the IFQ held by the affected CQE representing the community of Adak, Alaska, exceeds the number of vessels owned by residents of the community (Sections 2.3.1.6 and 2.3.1.7 of the Analysis);
- Reduced ex-vessel prices due to poor market conditions that may further limit the number of vessels that can economically harvest their halibut IFQ in Areas 4A, 4B, 4C, and 4D (Sections 2.3.1.2 and 2.3.1.8 of the Analysis); and
- Public health risks, combined with health measures at specific remote ports in Areas 4A, 4B, 4C, and/or 4D, which may further limit the ability of smaller vessels to operate because processing facilities and vessel services are not available. For example, in 2020, the local St. Paul fleet did not operate due to public health risk and adverse economic conditions (Section 2.3 of the Analysis).

The reader is referred to the Analysis, particularly Sections 2.3 and 2.6, for additional detail on the efficacy of the 2020 emergency rule, the range of factors considered for this proposed rule, and the anticipated effects of removing the vessel use caps in Areas 4A, 4B, 4C, and 4D for both CQE-associated vessels and non-CQE-associated vessels.

After considering these factors, the Council recommended ''expedited action'' to remove vessel use caps for the halibut IFQ fishery in Areas 4A, 4B, 4C, and 4D. NMFS accordingly has established an expedited 15-day comment period for this proposed rule. Due to the widespread industry support and the Council's request for expedited rulemaking and NMFS determination that the final rule should take effect before fishing vessels approach their use caps, the benefits of providing a shortened comment period and potentially expedited implementation outweigh there is good cause to expedite this thoroughly-considered action.

The Council did not recommend, and this proposed rule does not include, measures to relieve the vessel use caps for the sablefish IFQ fishery, or for other halibut IFQ Areas, due to the larger number of vessels that are currently active in the sablefish IFQ fishery and these other halibut Areas. Detailed information indicating that halibut harvests in these other IFQ Areas would not be constrained under the current vessel use caps is available in Section 2.3.1.4 of the Analysis.

The Council and NMFS also considered the potential impacts on halibut conservation and management if vessel use caps vessels in Areas 4A, 4B, 4C, and 4D are relieved for the 2021 IFQ fishing year. The proposed regulatory amendments in this rule would temporarily add a regulation that would remove vessel use caps in Areas 4A, 4B, 4C, and 4D because the vessel use caps may restrict the harvest of halibut in these areas, and less restrictive management measures are needed as soon as practicable to ensure the more complete harvest of the halibut resource during the 2021 IFQ fishing year. This proposed rule is responsive to the uncommon circumstances in the fishery in 2021 and does not modify the vessel use cap provisions in future years, consistent with the Council's goals in implementing vessel use caps in this fishery (Section 2.3 in the Analysis). This proposed rule would not modify other elements of the IFQ Program. This proposed rule would not increase or otherwise modify the 2021 halibut catch limits adopted by the IPHC and implemented by NMFS (86 FR 13475, March 9, 2021). This proposed rule would not modify any other conservation measures recommended by the IPHC and adopted by NMFS, nor any other conservation measures implemented by NMFS independent of the IPHC. This proposed rule would not modify other limitations on the use of QS and IFQ described in the previous sections of this preamble.

Proposed Regulations

After considering the best available information, the Convention, the status of the halibut resource, and the potential social and economic costs of maintaining the vessel use cap limits described in this preamble, this proposed rule would add a new, temporary provision at 50 CFR 679.42(h)(1)(iii) to remove vessel use caps for vessels harvesting IFQ halibut in Areas 4A, 4B, 4C, and 4D during the 2021 IFQ fishing year. Because under existing regulations, vessel use caps are applied at the fishery level including harvest in all areas, the proposed regulations clarify that harvest of IFQ halibut in regulatory areas 4A, 4B, 4C, and 4D is excluded from the calculation of vessel use caps in IFQ regulatory areas 2C, 3A, or 3B during the 2021 IFQ fishing year.

Classification

Regulations governing the U.S. fisheries for Pacific halibut are developed by the International Pacific Halibut Commission (IPHC), the Pacific Fishery Management Council, the North Pacific Fishery Management Council (Council), and the Secretary of Commerce. Section 5 of the Northern Pacific Halibut Act of 1982 (Halibut Act, 16 U.S.C. 773c) allows the Regional Council with authority over a particular geographical area, to develop regulations governing the allocation and catch of halibut in U.S. Convention waters as long as those regulations do not conflict with IPHC regulations. This proposed action is consistent with the Council's authority to allocate halibut catches among fishery participants in the waters in and off Alaska.

This rule has been determined to be not significant for purposes of Executive Order 12866.

A Regulatory Impact Review was prepared to assess costs and benefits of available regulatory alternatives. A copy of this analysis is available from NMFS (see **ADDRESSES**). Specific aspects of the economic analysis are discussed below in the Initial Regulatory Flexibility Analysis section.

Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis (IRFA) was prepared for this proposed rule, as required by Section 603 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 603), to describe the economic impact this proposed rule, if adopted, would have on small entities. The IRFA describes the action; the reasons why this proposed rule is proposed; the objectives and legal basis for this proposed rule; the number and description of directly regulated small entities to which this proposed rule would apply; the recordkeeping, reporting, and other compliance requirements of this proposed rule; and the relevant Federal rules that may duplicate, overlap, or conflict with this proposed rule. The description of the proposed action, its purpose, and the

legal basis are explained in the preamble and are not repeated here.

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide.

Number and Description of Small Entities Regulated by This Proposed Rule

This proposed rule would directly regulate the owners and operators of vessels that have traditionally harvested halibut IFQ in IFQ Areas 4A, 4B, 4C, or 4D. From 2014 through 2019, (the most recent year with complete data) 119 unique vessels harvested halibut IFQ in IFQ Areas 4A, 4B, 4C, or 4D. Based on average annual gross revenue data, including affiliations, all but three of the vessels that landed halibut between 2014 and 2019 are considered small entities based on the $11 million threshold. Additional detail is included in Sections 2.8 in the Analysis prepared for this proposed rule (see **ADDRESSES**).

Impacts of This Action on Small Entities

This action would relieve a restriction which could lead to a larger total harvest of IFQ in Area 4 in fishing season 2021. Although it is difficult to predict the direct impact of the regulatory exemptions implemented for the 2020 IFQ seasons, harvest rates achieved in 2020 relative to all other years (2006–2020) likely indicates the regulatory flexibilities implemented in 2020 (both the temporary transfer provisions as well the vessel use cap exemption) had some positive impact on the harvest rates, as described in Section 2.6 of the Analysis prepared for this action (See **ADDRESSES**).

Description of Significant Alternatives That Minimize Adverse Impacts on Small Entities

The RFA requires identification of any significant alternatives to the proposed rule that accomplish the stated objectives of the proposed action, consistent with applicable statutes, and that would minimize any significant economic impact of the proposed rule on small entities. The Council requested an action alternative and in considering the Council's request NMFS analyzed the impacts of the action alternative compared to the status quo.

The status quo alternative would retain the existing vessel use cap restrictions as defined under 50 CFR 679.42(h). Considering the existing social and economic conditions in the IFQ fishery since 2020, the supply of vessels available to prosecute Area 4 halibut IFQ fisheries could be limited such that a portion of the 2021 annual halibut allocation could be left unharvested if available vessels must comply with existing halibut IFQ vessel use limitations.

The action alternative would remove limits on the maximum amount of halibut IFQ that may be harvested by a vessel in IFQ regulatory areas 4A, 4B, 4C, and 4D. The action alternative and the regulations proposed by this action would provide additional flexibility to IFQ participants in 2021 to ensure allocations of halibut IFQ can be harvested by the limited number of vessels operating in these areas.

Duplicate, Overlapping, or Conflicting Federal Rules

NMFS has not identified any duplication, overlap, or conflict between this proposed rule and existing Federal rules.

Recordkeeping, Reporting, and Other Compliance Requirements

This action does not contain additional recordkeeping, reporting, or other compliance requirements.

Collection-of-Information Requirements

This proposed rule does not contain a change to a collection of information requirement for purposes of the Paperwork Reduction Act of 1995. The existing collection of information requirements would continue to apply under the following OMB Control Number(s): 0648–0272, Alaska Pacific Halibut & Sablefish Fisheries: Individual Fishing Quota (IFQ).

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: April 7, 2021.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 679 is proposed to be amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Pub. L. 108–447; Pub. L. 111–281.

■ 2. In § 679.42, add paragraph (h)(1)(iii) to read as follows:

§ 679.42 Limitations on use of QS and IFQ.

* * * * *

(h) * * *

(1) * * *

(iii) Notwithstanding the vessel use caps specified in paragraphs (h)(1) introductory text and (h)(1)(ii) of this section, vessel use caps do not apply to vessels harvesting IFQ halibut in IFQ regulatory areas 4A, 4B, 4C, and 4D during the 2021 IFQ fishing year. Harvest of IFQ halibut in regulatory areas 4A, 4B, 4C, and 4D is excluded from the calculation of vessel use caps for IFQ regulatory areas 2C, 3A, or 3B during the 2021 IFQ fishing year.

* * * * *

[FR Doc. 2021–07520 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 86, No. 69

Tuesday, April 13, 2021

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–DA–21–0029]

Revision of a Currently Approved Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget (OMB), for a revision of a currently approved collection for the Regulations Governing the Inspection and Grading of Manufactured or Processed Dairy Products—Recordkeeping (Subpart B).

DATES: Comments received by June 14, 2021 will be considered.

ADDRESSES: Comments should be submitted at the Federal eRulemaking portal: *www.regulations.gov.* All comments can be viewed at: *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Dennis Glick, Dairy Grading and Standardization Division, Dairy Program, AMS, USDA, Room 2968-South Building, 1400 Independence Avenue SW, Washington, DC 20250–0230; Telephone: 202–720–4392, Fax: 202–690–3410, *AskDairy@usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Regulations Governing the Inspection and Grading of Manufactured or Processed Dairy Products—Record Keeping (Subpart B).

OMB Number: 0581–0110.

Expiration Date of Approval: May 31, 2021.

Type of Request: Revision of a currently approved collection.

Abstract: The Agricultural Marketing Act (AMA) of 1946 (7 U.S.C. 1621 *et seq.*) directs the U.S. Department Agriculture (USDA) to develop programs which will provide for and facilitate the marketing of agricultural products. One of these programs is the USDA voluntary inspection and grading program for dairy products (7 CFR part 58).

Dairy products are graded according to U.S. grade standards by a USDA grader. Dairy processors, buyers, retailers, institutional users, and consumers have requested that such a program be developed to assure the uniform quality of dairy products purchased. In order for any service program to perform satisfactorily, there are regulations for the provider and user. For these reasons, the dairy inspection and grading program regulations were developed and issued under the authority of AMA. These regulations are essential to administer the program to meet the needs of the user and to carry out the purposes of AMA.

The information collection requirements in this request are essential to carry out the intent of AMA to ensure that dairy products are produced under sanitary conditions and buyers are purchasing a quality product. In order for the General Specifications for Dairy Plants Approved for USDA Inspection and Grading Service to serve the government, industry, and the consumer, laboratory test results must be recorded.

Respondents are not required to submit information to the agency. The records are to be evaluated by a USDA inspector at the time of an inspection. These records include quality tests of each producer, plant records of required tests and analysis, and starter and cheese make records. As an offsetting benefit, the records required by USDA are also records that are routinely used by the inspected facility for their own supervisory and quality control purposes.

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 2.73 hours per response.

Respondents: Dairy products manufacturing facilities.

Estimated Number of Respondents: 362.

Estimated Number of Responses: 362.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 961.5.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2021–07511 Filed 4–12–21; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

April 7, 2021.

The Department of Agriculture has submitted the following information collection requirement(s) to Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological

collection techniques or other forms of information technology.

DATES: Comments regarding this information collection received by May 13, 2021 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Utilities Service

Title: RUS Electric Loan Application and Related Reporting Burdens.

OMB Control Number: 0572–0032.

Summary Of Collection: The Rural Utilities Service (RUS) was established in 1994 by the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Pub. L. 103–354, 108 stat. 3178, 7 U.S.C. 6941 *et seq.*) as successor to the Rural Electrification Administration (REA) with respect to certain programs, including the electric loan and loan guarantee program authorized under the Rural Electrification Act (RE Act) of 1936. The RE Act authorizes and empowers the Administrator of RUS to make and guarantee loans to furnish and improve electric service in rural areas. These loans are amortized over a period of up to 35 years and secured by the borrower's electric assets and/or revenue. RUS will collect information including studies and reports to support borrower loan applications.

Need and Use of the Information: RUS will collect information to determine the eligibility of applicants for loans and loan guarantees under the RE Act; monitor the compliance of borrowers with debt covenants and regulatory requirements in order to protect loan security; ensure that borrowers use loan funds for purposes consistent with the statutory goals of the RE Act; and obtain information on the progress of rural electrification and evaluate the success of RUS program activities. Without the information RUS would be unable to accomplish statutory goals.

Description of Respondents: Not-for-profit institutions; Business or other for-profit.

Number of Respondents: 625.

Frequency of Responses: Reporting: On occasion; Annually.

Total Burden Hours: 41,634.

Title: 7 CFR part 1724 and Part 1738 Electric Engineering, Architectural Services and Design Policies and Procedures; and Rural Broadband Access Loans and Loan Guarantees.

OMB Control Number: 0572–0118.

Summary of Collection: The Rural Electrification Act of 1936, 7 U.S.C. 901 *et seq.,* as amended, authorizes Rural Utilities Service (RUS) to make loans in several States and Territories of the United States for broadband access and rural electrification and the furnishing and improving of electric energy to persons in rural areas. Title 7 CFR 1724 requires each borrower to select a qualified architect to perform certain architectural services and to use the designated form that provides for these services. The agency has developed standardized contractual forms used by borrowers to contract for services.

Need and Use of the Information: The information collected stipulates the parties to the agreement, contain certain information relating to the approved loan or loan guarantee, and provide detailed contractual obligations and services to be provided and performed relating to construction, project design, construction management, compensation, and related information. The contractual forms provide standardized contract agreements between the electric or broadband borrower and the engineering or architectural firm providing services to the borrower. This has resulted in substantial savings to borrowers by reducing preparation of the documentation and the costly review by the government.

Description of Respondents: Business or other for-profit.

Number of Respondents: 4.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 8.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2021–07500 Filed 4–12–21; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2021–0007]

Notice of Request for Renewal of an Approved Information Collection (Animal Disposition Reporting)

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, the Food Safety and Inspection Service (FSIS) is announcing its intention to renew the approved information collection for animal disposition reporting in the Public Health Information System. There are no changes to the existing information collection. The approval for this information collection will expire on September 30, 2021.

DATES: Submit comments on or before June 14, 2021.

ADDRESSES: FSIS invites interested persons to submit comments on this **Federal Register** notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides commenters the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Go to *https://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.
- *Hand- or Courier-Delivered Submittals:* Deliver to 1400 Independence Avenue SW, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2021–0007. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202) 205–0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program

Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

SUPPLEMENTARY INFORMATION:

Title: Animal Disposition Reporting.

OMB Number: 0583–0139.

Expiration Date of Approval: 9/30/2021.

Type of Request: Renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and packaged.

FSIS is requesting renewal of the approved information collection regarding animal disposition reporting in the Public Health Information System. There are no changes to the existing information collection. The approval for this information collection will expire on September 30, 2021.

In accordance with 9 CFR 320.6, 381.180, 352.15, and 354.91, establishments that slaughter meat, poultry, exotic animals, and rabbits are required to maintain certain records regarding their business operations and to report this information to the Agency as required. Poultry slaughter establishments complete FSIS Form 6510–7 after each shift and submit it to the Agency. Other slaughter establishments provide their business records to FSIS to report the necessary information.

FSIS uses this information to plan inspection activities, to develop sampling plans, to target establishments for testing, to develop the Agency budget, and to develop reports to Congress. FSIS also provides this data to other USDA agencies, including the National Agricultural Statistics Service (NASS), the Animal and Plant Health Inspection Service (APHIS), and the Agricultural Marketing Service (AMS), for their publications and for other functions.

FSIS has made the following estimates as part of an information collection assessment:

Estimate of Burden: FSIS estimates that it will take slaughter establishments an average of two minutes per response to collect and submit this information to FSIS.

Respondents: Slaughter establishments.

Estimated Number of Respondents: 1,159.

Estimated Number of Annual Responses per Respondent: 600.

Estimated Total Annual Burden on Respondents: 23,180 hours.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the method and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online (*https://www.usda.gov/sites/default/files/documents/usda-program-discrimination-complaint-form.pdf*) and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by: (1) Mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Paul Kiecker,

Administrator.

[FR Doc. 2021–07518 Filed 4–12–21; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2021–0008]

Notice of Request To Revise an Approved Information Collection (Requirements To Notify FSIS of Adulterated or Misbranded Product, Prepare and Maintain Written Recall Procedures, and Document Certain HACCP Plan Reassessments)

AGENCY: Food Safety and Inspection Service (FSIS), USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, the Food Safety and Inspection Service (FSIS) is announcing its intention to revise the approved information collection regarding requirements for official establishments to notify FSIS of adulterated or misbranded product, prepare and maintain written recall procedures, and document certain HACCP plan reassessments. The approval for this information collection will expire on September 30, 2021. FSIS has decreased the burden estimate for this collection by 37,515 hours due to more recent, updated information. The public may comment on either the entire information collection or on one of its three parts.

DATES: Submit comments on or before June 14, 2021.

ADDRESSES: FSIS invites interested persons to submit comments on this **Federal Register** notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides commenters the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Go to *https://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.
- *Hand- or Courier-Delivered Submittals:* Deliver to 1400 Independence Avenue SW, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2021–0008. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202)205–0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

SUPPLEMENTARY INFORMATION:

Title: Requirements To Notify FSIS of Adulterated or Misbranded Product, Prepare and Maintain Written Recall Procedures, and Document Certain HACCP Plan Reassessments.

OMB Number: 0583–0144.

Expiration Date of Approval: 9/30/2021.

Type of Request: Renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat, poultry, and egg products are safe, wholesome, unadulterated, and properly labeled and packaged.

FSIS is requesting revision of the approved information collection regarding requirements for official establishments to notify FSIS of adulterated or misbranded product, prepare and maintain written recall procedures, and document certain HACCP plan reassessments. FSIS has decreased the burden estimate for this collection by 37,515 hours due to more recent, updated information.

The regulations at 9 CFR 418.2, 418.3 and 417.4(a)(3) require establishments to notify FSIS that they have shipped or received adulterated or misbranded product in commerce, prepare and maintain written recall procedures, and document certain HACCP plan reassessments. Accordingly, FSIS requires three information collection activities under these regulations.

First, FSIS requires that official establishments notify the appropriate District Office that an adulterated or misbranded product received by or originating from the establishment has entered commerce, if the establishment believes or has reason to believe that this has happened. Industry representatives of official establishments may now use FSIS Form 5720–16, *Industry Report of Adulteration,* to notify FSIS that an adulterated or misbranded meat, meat food, poultry, or poultry product was received from or shipped to commerce by the official establishment. The form is available as a paper form and digitally in PHIS.

Second, FSIS requires that establishments prepare and maintain written procedures for the recall of meat and poultry products produced and shipped by the establishment for use should it become necessary for the establishment to remove product from commerce. These written recall procedures have to specify how the establishment will decide whether to conduct a product recall, and how the establishment will effect the recall should it decide that one is necessary.

Finally, FSIS requires that establishments document each reassessment of the establishment's HACCP plans. FSIS requires establishments to reassess their HACCP plans annually and whenever any changes occur that could affect the hazard analysis or alter the HACCP plan. For annual reassessments, if the establishment determines that no changes are necessary, documentation of this determination is not necessary.

FSIS has made the following estimates as part of an information collection assessment.

Estimate of burden: The public reporting burden for this collection of information is estimated to average .232 hours per response.

Respondents: Official meat and poultry products establishments.

Estimated annual Number of Respondents: 6,300.

Estimated average number of responses per respondent: 6.8.

Estimated annual number of responses: 42,900.

Estimated total annual burden on respondents: 9,960.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection

assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the method and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online (*https://www.usda.gov/sites/default/files/documents/usda-program-discrimination-complaint-form.pdf*) and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by: (1) Mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *program.intake@usda.gov.* USDA is an equal opportunity provider, employer, and lender.

Paul Kiecker,

Administrator.

[FR Doc. 2021–07519 Filed 4–12–21; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2021–0009]

Notice of Request for Revision of an Approved Information Collection (Public Health Information System)

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, the Food Safety and Inspection Service (FSIS) is announcing its intention to revise the approved information collection regarding its Public Health Information System (PHIS). The Agency has increased the burden estimate by 433 hours due to the addition of the FSIS Form 9060–5EP, *Egg Products Export Certificate of Wholesomeness.* FSIS is currently issuing FSIS Form 9060–5 (meat and poultry) and 9060–5S (Siluriformes) export certificates for 38 countries and territories through the PHIS export component (*i.e.,* providing an electronic export certificate application for exporters and the FSIS Form 9060–5/5S printed on security paper). At this time, FSIS is seeking OMB approval to collect information for the existing paper FSIS Form 9060–5EP. FSIS will request additional approval for the electronic collection of information when egg products are added into the PHIS export component. FSIS will announce its plans to add egg products to the PHIS export component through a subsequent notice to the public, likely through the Agency's *Constituent Update.* The approval for this information collection will expire on August 31, 2022.

DATES: Submit comments on or before June 14, 2021.

ADDRESSES: FSIS invites interested persons to submit comments on this **Federal Register** notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides commenters the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Go to *https://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.

• *Hand- or Courier-Delivered Submittals:* Deliver to 1400 Independence Avenue SW, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2021–0009. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202) 205–0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

SUPPLEMENTARY INFORMATION:

Title: Public Health Information System.

OMB Number: 0583–0153.

Expiration Date of Approval: 8/31/2022.

Type of Request: Revision of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat, poultry, and egg products are safe, wholesome, unadulterated, and properly labeled and packaged.

FSIS is requesting a revision of the approved information collection regarding its Public Health Information System. The Agency has increased the burden estimate by 433 hours due to the addition of the FSIS Form 9060–5EP, *Egg Products Export Certificate of Wholesomeness.* FSIS is currently issuing FSIS Form 9060–5 (meat and poultry) and 9060–5S (Siluriformes) export certificates for 38 countries and territories through the PHIS export component (*i.e.,* providing an electronic export certificate application for exporters and the FSIS Form 9060–5/5S printed on security paper). At this time, FSIS is seeking OMB approval to collect information for the existing paper FSIS Form 9060–5EP. FSIS will request additional approval for the electronic collection of information when egg products are added into the PHIS export component. FSIS will announce its plans to add egg products to the PHIS export component through a subsequent notice to the public, likely through the Agency's *Constituent Update.* The approval for this information collection will expire on August 31, 2022.

FSIS requires the use of FSIS Form 9060–5EP, ''The Egg Products Export Certificate of Wholesomeness'' for all exports of egg products (9 CFR 590.407).

FSIS has made the following estimates based upon an information collection assessment:

Estimate of burden: The public reporting burden for this collection of information is estimated to average .179 hours per response.

Estimated total number of respondents: 6,294.

Estimated average number of responses per respondent: 102.

Estimated annual number of responses: 644,048.

Estimated Total Annual Burden on Respondents: 115,550 hours.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the method and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online (*https://www.usda.gov/sites/default/files/documents/usda-program-discrimination-complaint-form.pdf*) and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992.

Submit your completed form or letter to USDA by: (1) Mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Paul Kiecker,

Administrator.

[FR Doc. 2021–07522 Filed 4–12–21; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2021–0006]

Notice of Request for Renewal of an Approved Information Collection (Voluntary Recalls of Meat, Poultry, and Egg Products)

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, the Food Safety and Inspection Service (FSIS) is announcing its intention to renew the approved information collection regarding voluntary recalls from commerce of meat, poultry, and egg products. There are no changes to the existing burden estimates for this information collection. The approval for this information collection will expire on September 30, 2021.

DATES: Submit comments on or before June 14, 2021.

ADDRESSES: FSIS invites interested persons to submit comments on this **Federal Register** notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides commenters the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Go to *https://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.
- *Hand- or Courier-Delivered Submittals:* Deliver to 1400 Independence Avenue SW, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2021–0006. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202)205–0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

SUPPLEMENTARY INFORMATION:

Title: Voluntary Recalls of Meat, Poultry, and Egg Products.

OMB Number: 0583–0135.

Expiration Date of Approval: 9/30/2021.

Type of Request: Renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat, poultry, and egg products are safe, wholesome, unadulterated, and properly labeled and packaged.

FSIS is requesting a renewal of the approved information collection regarding voluntary recalls from commerce of meat, poultry, and egg products. There are no changes to the existing burden estimates for this information collection. The approval for this information collection will expire on September 30, 2021.

FSIS may request that a firm that has produced or imported meat, poultry, or egg products that are adulterated or misbranded and has distributed such products in commerce recall the products in question. When there is a recall, FSIS asks that the recalling firm (*e.g.,* a manufacturer, distributor, or importer of record) provide the Agency with basic information, including the identity of the recalled product, the reason for the recall, and information about the distributors and retail consignees to whom the product was shipped. Under the FMIA, firms are required to keep such records that fully and correctly disclose all transactions in their business (21 U.S.C. 642). Under the PPIA, firms are required to keep such records as are properly necessary for the effective enforcement of the PPIA (21 U.S.C. 460(b)).

Industry representatives use the FSIS Form 5020–3 *FSIS Preliminary Inquiry Worksheet* to provide firm contact information and specific details regarding adulterated or misbranded product in commerce, including product identifiers, product amounts and supplemental information. Recalling firms and distributors then use the FSIS Form 5020–4 *FSIS Recall Distribution Information Template* to provide the location and contact information of consignees who received recalled product.

When a firm voluntarily recalls a product, FSIS conducts recall effectiveness checks. In conducting recall effectiveness checks, if the recall is to the retail or consumer level, the Agency contacts the distributors and retail consignees to ensure that they were notified of the recall, to verify the amount of product they received, and to confirm that they are removing the product from commerce and returning it to the recalling firm or otherwise disposing of the product.

FSIS has made the following estimates based upon an information collection assessment.

Estimate of Burden: FSIS estimates that it will take respondents an average of approximately 1.08 hours to collect and make this information available to FSIS.

Respondents: Official establishments, importers of record, and retail consignees.

Estimated Number of Respondents: 6,090.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 6,600 hours.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection assessment can be obtained from Gina

Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the method and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online (*https://www.usda.gov/sites/default/files/documents/usda-program-discrimination-complaint-form.pdf*) and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by: (1) Mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *program.intake@usda.gov.* USDA is an equal opportunity provider, employer, and lender.

Paul Kiecker,

Administrator.

[FR Doc. 2021–07523 Filed 4–12–21; 8:45 am]

BILLING CODE 3410–DM–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Washington Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Washington Advisory Committee (Committee) will hold a meeting via web teleconference on Monday, May 3, 2021 from 2:00 p.m.–3:30 p.m. Pacific Time. To plan the Committee's upcoming panels on excessive use of force.

DATES: The meeting will be held on:

- Monday, May 3, 2021 from 2:00 p.m.–3:30 p.m. Pacific Time

ADDRESSES:

PUBLIC WEBEX REGISTRATION LINK: *https://tinyurl.com/yx9lb79b.*

FOR FURTHER INFORMATION CONTACT: Brooke Peery, Designated Federal Officer (DFO), at *bpeery@usccr.gov* or by phone at (202) 701–1376.

SUPPLEMENTARY INFORMATION: Members of the public may listen to the discussion. This meeting is available to the public through the public Webex registration link listed above. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be emailed to Brooke Peery at *bpeery@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit Office/Advisory Committee Management Unit at (202) 701–1376.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available at: *https://*

www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzkZAAQ.

Please click on the ''Meeting Details'' and ''Documents'' links. Persons interested in the work of this Committee are also directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit office at the above email address.

Agenda

I. Welcome & Introductions
II. Approval of Minutes
III. Discussion on Panels
IV. Public Comment
V. Adjournment

Dated: April 8, 2021.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2021–07560 Filed 4–12–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Household Pulse Survey

On March 18, 2021, the Department of Commerce received clearance from the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 to conduct Phase 3.1 of the Household Pulse Survey (OMB No. 0607–1013, Exp. 10/31/23). Phase 3.1 of the Household Pulse Survey includes new content designed to meet current needs for information associated with household experiences during the Covid–19 pandemic.

The Department is committed to ensuring that the data collected by the Household Pulse Survey continue to meet information needs as they may evolve over the course of the pandemic. This notice serves to inform of the Department's intent to request emergency clearance from OMB to add content to the Household Pulse Survey not included in the Request for Revision for Phase 3.1 approved on March 18, 2021. The content under consideration includes demographic screener questions from the Department of Defense (DOD) to identify Service members and military spouses (Q8a), and from the National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC) to classify respondents employed in ''essential'' worker groups (Q13c and Q13d). The Household Pulse Survey is designed to collect and disseminate data on a near real-time basis to inform on the social and economic impacts of the Covid–19 Pandemic. Data from the Household Pulse Survey will allow DOD to enhance services and target resources to help alleviate the impact of the pandemic on Service members and their families. The CDC will use the data to respond to ongoing impacts of the pandemic and target outreach efforts to promote vaccine access and uptake among essential worker groups.

It is the Department's intention to commence data collection using the revised instrument on or about April 14, 2021. The Department invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously sought on the Household Pulse Survey via the **Federal Register** on May 19, 2020, June 3, 2020, and again on February 1, 2021. This notice allows for an additional 30 days for public comments on the proposed revisions.

Agency: U.S. Census Bureau.

Title: Household Pulse Survey.

OMB Control Number: 0607–1013.

Form Number(s): None.

Type of Request: Request for a Revision of a Currently Approved Collection.

Number of Respondents: 3,150,000.

Average Hours per Response: 20 minutes.

Burden Hours: 1,039,500.

Needs and Uses: Data produced by the Household Pulse Survey are designed to inform on a range of topics related to households' experiences during the Covid–19 pandemic. Topics to date have included employment, facility to telework, travel patterns, income loss, spending patterns, food and housing security, access to benefits, mental health and access to care, intent to receive the COVID–19 vaccine, and educational disruption (K–12 and post-secondary). The requested revision, if approved by OMB, will include additional items that will allow agencies to enhance services and target resources to help alleviate the impact of the pandemic on Service members and their families and target outreach efforts to promote vaccine access and uptake among essential worker groups. The overall burden to the public will remain unchanged.

The Household Pulse Survey was initially launched in April, 2020 as an experimental project (see *https://www.census.gov/data/experimental-data-products.html*) under emergency clearance from the Office of Management and Budget (OMB) initially granted April 19, 2020; regular clearance was subsequently sought and approved by OMB on October 30, 2020 (OMB No. 0607–1013; Exp. 10/31/2023).

Affected Public: Households.

Frequency: Households will be selected once to participate in a 20-minute survey.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Sections 8(b), 182 and 196.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0607–1013.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–07509 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

National Advisory Committee

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of public virtual meeting.

SUMMARY: The Bureau of the Census (Census Bureau) is giving notice of a virtual meeting of the National Advisory Committee on Racial, Ethnic, and Other Populations (NAC). The NAC addresses policy, research, and technical issues relating to a full range of Census Bureau programs and activities, including decennial, economic, field operations, information technology, and statistics. Last minute changes to the schedule are possible, which could prevent giving advance public notice of schedule adjustments. Please visit the Census Advisory Committees website at *http://www.census.gov/cac* for the NAC meeting information, including the agenda, and how to join the meeting.

DATES: The virtual meeting will be held on:

- Thursday, May 6, 2021, from 11:00 a.m. to 5:00 p.m. EDT, and
- Friday, May 7, 2021, from 11:00 a.m. to 5:00 p.m. EDT

ADDRESSES: The meeting will be held via the WebEx platform at the following presentation links:

- May 6, 2021: *https://uscensus.webex.com/uscensus/onstage/g.php?MTID=efcaf77a6e00f35b325d6d157519654e0*
- May 7, 2021: *https://uscensus.webex.com/uscensus/onstage/g.php?MTID=e2cd2832795b3add4e439d45b643ce718*

For audio, please call the following number: 1–800–857–7003 OR 1–517–308–9428. When prompted, please use the following Password: @Nac1, and Passcode: 1129510.

FOR FURTHER INFORMATION CONTACT: Shana Banks, Advisory Committee Branch Chief, Office of Program, Performance and Stakeholder Integration (PPSI), *shana.j.banks@census.gov,* Department of Commerce, U.S. Census Bureau, telephone 301–763–3815. For TTY callers, please use the Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Committee provides scientific and technical expertise to address Census Bureau program needs and objectives. The members of the NAC are appointed by the Director of the Census Bureau. The Committee has been established in accordance with the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2, Section 10).

All meetings are open to the public. A brief period will be set aside during the virtual meeting for public comments on May 7, 2021. However, individuals with extensive questions or statements must submit them in writing to *shana.j.banks@census.gov,* (subject line ''2021 NAC Spring Virtual Meeting Public Comment'').

Ron S. Jarmin, Acting Director, Bureau of the Census, approved the publication of this Notice in the **Federal Register**.

Dated: April 7, 2021.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–07508 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–52–2021]

Foreign-Trade Zone 49—Newark, New Jersey; Application for Subzone; Woodfield Distribution LLC; Dayton, New Jersey

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Port Authority of New York and New Jersey, grantee of FTZ 49, requesting subzone status for the facility of Woodfield Distribution LLC, located in Dayton, New Jersey. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on April 8, 2021.

The proposed subzone (1.46 acres) is located at 15 Stults Road, Dayton, New Jersey. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 49.

In accordance with the FTZ Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is May 24, 2021. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to June 7, 2021.

A copy of the application will be available for public inspection in the ''Reading Room'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Christopher Kemp at *Christopher.Kemp@trade.gov.*

Dated: April 8, 2021.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2021–07554 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on April 27, 2021, at 1:00 p.m., Eastern Standard Time, via remote teleconference. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

Agenda

Public Session

1. Welcome and Introductions.
2. Remarks from the Bureau of Industry and Security Management.
3. Industry Presentations.
4. New Business.

Closed Session

5. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than April 20, 2021.

To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that the materials be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on February 9, 2021, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § 10(d)), that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and the U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 § § 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information contact Yvette Springer on (202) 482–2813.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2021–07538 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Information Systems Technical Advisory Committee; Notice of Partially Closed Meeting

The Information Systems Technical Advisory Committee (ISTAC) will meet on April 28 and 29, 2021, at 1:00 p.m., Eastern Standard Time. The meetings will be available via teleconference. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to information systems equipment and technology.

Wednesday, April 28

Open Session

1. Welcome and Introductions
2. Working Group Reports
3. Technical Presentations

Thursday, April 29

Closed Session

4. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than April 21, 2021.

To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that public presentation materials or comments be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on December 23, 2020, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § (l0)(d))), that the portion of the meeting concerning trade secrets and commercial or financial information deemed privileged or confidential as described in 5 U.S.C. 552b(c)(4) and the portion of the meeting concerning matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and l0(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2021–07541 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–857]

Oil Country Tubular Goods From India: Rescission of Antidumping Duty Administrative Review; 2019–2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty (AD) order on oil country tubular goods (OCTG) from India for the period of review (POR) covering September 1, 2019, through August 31, 2020, based on the timely withdrawal of the request for review.

DATES: Applicable April 13, 2021.

FOR FURTHER INFORMATION CONTACT: Gene H. Calvert, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3586.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2020, Commerce published a notice of opportunity to request an administrative review of the AD order on OCTG from India covering the POR.[1] On September 30, 2020, Maverick Tube Corporation, Tenaris Bay City, Inc., IPSCO Tubulars Inc., and the United States Steel Corporation (collectively, Domestic Interested Parties), timely requested an administrative review of the AD order with respect to four companies: Jindal SAW Limited; GVN Fuels Limited; Maharashtra Seamless Limited; and Jindal Pipe Limited.[2] Commerce received no other requests for an administrative review of the AD order for the POR.

On October 30, 2020, pursuant to section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.221(c)(1)(i), Commerce initiated an administrative review of the AD order covering the POR.[3] On January 15, 2021, the Domestic Interested Parties timely withdrew their request for review with respect to each of the four companies.[4]

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties that requested the review withdraw their requests within 90 days of the publication date of the notice of initiation of the requested review. The Domestic Interested Parties withdrew their request for review within 90 days of the publication of the *Initiation Notice,* and no other party requested an administrative review of the AD order for the POR. Therefore, in accordance with 19 CFR 351.213(d)(1), Commerce is rescinding the administrative review of the AD order on OCTG from India for the POR covering September 1, 2019, through August 31, 2020, in its entirety.

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of OCTG from India during the POR at rates equal to the cash deposit rate of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP no earlier than 35 days after the date of publication of this rescission notice in the **Federal Register**.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 85 FR 54349 (September 1, 2020).

[2] *See* Domestic Interested Parties' Letter, ''Oil Country Tubular Goods from India: Request for Administrative Review,'' dated September 30, 2020.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 68840 (October 30, 2020) (*Initiation Notice*).

[4] *See* Domestic Interested Parties' Letter, ''Oil Country Tubular Goods from India: Withdrawal of Request for Administrative Review,'' dated January 15, 2021.

duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: April 6, 2021.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2021–07547 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Request for Nominations for Members To Serve on National Institute of Standards and Technology Federal Advisory Committees

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST or Institute) invites and requests nomination of individuals for appointment to seven existing Federal Advisory Committees (Committees): Board of Overseers of the Malcolm Baldrige National Quality Award; Judges Panel of the Malcolm Baldrige National Quality Award; Information Security and Privacy Advisory Board; Manufacturing Extension Partnership Advisory Board; National Construction Safety Team Advisory Committee; Advisory Committee on Earthquake Hazards Reduction; and Visiting Committee on Advanced Technology. NIST will consider nominations received in response to this notice for appointment to the Committees, in addition to nominations already received. Registered Federal lobbyists may not serve on NIST Federal Advisory Committees in an individual capacity.

DATES: Nominations for all Committees will be accepted on an ongoing basis and will be considered as and when vacancies arise.

ADDRESSES: See below.

SUPPLEMENTARY INFORMATION:

Board of Overseers of the Malcolm Baldrige National Quality Award

Address: Please submit nominations to Robert Fangmeyer, Director, Baldrige Performance Excellence Program, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, MD 20899–1020. Nominations may also be submitted via email to *Robert.Fangmeyer@nist.gov.* Additional information regarding the Committee, including its charter, current membership list, and executive summary, may be found at *http://www.nist.gov/baldrige/community/overseers.cfm.*

Contact Information: Robyn Verner, Designated Federal Officer, Baldrige Performance Excellence Program, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, MD 20899–1020; telephone 301–975–2361 or via email at *Robyn.Verner@nist.gov.*

Committee Information

The Board of Overseers of the Malcolm Baldrige National Quality Award (Board) was established in accordance with 15 U.S.C. 3711a(d)(2)(B), pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Objectives and Duties

1. The Board shall review the work of the private sector contractor(s), which assists the Director of NIST in administering the Malcolm Baldrige National Quality Award (Award). The Board will make such suggestions for the improvement of the Award process as it deems necessary.

2. The Board shall make an annual report on the results of Award activities to the Director of NIST, along with its recommendations for the improvement of the Award process.

3. The Board will function solely as an advisory committee under the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

4. The Board will report to the Director of NIST.

Membership

1. The Board will consist of at least five and approximately 12 members selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance, and for their preeminence in the field of organizational performance excellence. There will be a balanced representation from U.S. service, manufacturing, nonprofit, education, and health care industries. The Board will include members familiar with the quality, performance improvement operations, and competitiveness issues of manufacturing companies, service companies, small businesses, nonprofits, health care providers, and educational institutions.

2. Board members will be appointed by the Secretary of Commerce for three-year terms and will serve at the discretion of the Secretary. All terms will commence on March 1 and end on the last day of February of the appropriate years.

Miscellaneous

1. Members of the Board shall serve without compensation, but may, upon request, be reimbursed travel expenses, including per diem, as authorized by 5 U.S.C. 5701 *et seq.*

2. The Board will meet at least annually, but usually two times a year. Additional meetings may be called as deemed necessary by the NIST Director or by the Chairperson. Meetings are usually one day in duration.

3. Board meetings are open to the public. Board members do not have access to classified or proprietary information in connection with their Board duties.

Nomination Information

1. Nominations are sought from the private and public sector as described above.

2. Nominees should have established records of distinguished service and shall be familiar with the quality improvement operations and competitiveness issues of manufacturing companies, service companies, small businesses, educational institutions, health care providers, and nonprofit organizations. The category (field of eminence) for which the candidate is qualified should be specified in the nomination letter. Nominations for a particular category should come from organizations or individuals within that category. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal

employment. In addition, each nomination letter should state that the person agrees to the nomination, acknowledges the responsibilities of serving on the Board, and will actively participate in good faith in the tasks of the Board. Besides participation at meetings, it is desired that members be able to devote the equivalent of seven days between meetings to either developing or researching topics of potential interest, and so forth, in furtherance of their Board duties.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Board membership.

Judges Panel of the Malcolm Baldrige National Quality Award

Address: Please submit nominations to Robert Fangmeyer, Director, Baldrige Performance Excellence Program, NIST, 100 Bureau Drive Mail Stop 1020, Gaithersburg, MD 20899–1020. Nominations may also be submitted via email *Robert.Fangmeyer@nist.gov.* Additional information regarding the Committee, including its charter, current membership list, and executive summary, may be found at *https://www.nist.gov/baldrige/how-baldrige-works/baldrige-community/judges-panel.*

Contact Information: Robyn Verner, Designated Federal Officer, Baldrige Performance Excellence Program, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, MD 20899–1020; telephone 301–975–2361 or via email at *Robyn.Verner@nist.gov.*

Committee Information

The Judges Panel of the Malcolm Baldrige National Quality Award (Panel) was established in accordance with 15 U.S.C. 3711a(d)(1) and the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Objectives and Duties

1. The Panel will ensure the integrity of the Malcolm Baldrige National Quality Award (Award) selection process. Based on a review of results of examiners' scoring of written applications, Panel members will vote on which applicants' merit site visits by examiners to verify the accuracy of quality improvements claimed by applicants. The Panel will also review results and findings from site visits, and recommend Award recipients.

2. The Panel will ensure that individual judges will not participate in the review of applicants as to which they have any real or perceived conflict of interest.

3. The Panel will function solely as an advisory body, and will comply with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

4. The Panel will report to the Director of NIST.

Membership

1. The Panel will consist of no less than 9, and not more than 12, members selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance. There will be a balanced representation from U.S. service, manufacturing, small business, nonprofit, education, and health care industries. The Panel will include members familiar with the quality improvement operations and competitiveness issues of manufacturing companies, service companies, small businesses, nonprofits, health care providers, and educational institutions.

2. Panel members will be appointed by the Secretary of Commerce for three-year terms and will serve at the discretion of the Secretary. All terms will commence on March 1 and end on the last day of February of the appropriate year.

Miscellaneous

1. Members of the Panel shall serve without compensation, but may, upon request, be reimbursed travel expenses, including per diem, as authorized by 5 U.S.C. 5701 *et seq.*

2. The Panel will meet three times per year. Additional meetings may be called as deemed necessary by the NIST Director or by the Chairperson. Meetings are usually one to four days in duration. In addition, each Judge must attend an annual three-day Examiner training course.

3. When approved by the Department of Commerce Chief Financial Officer and Assistant Secretary for Administration, Panel meetings are closed or partially closed to the public.

Nomination Information

1. Nominations are sought from all U.S. service and manufacturing industries, small businesses, education, health care, and nonprofits as described above.

2. Nominees should have established records of distinguished service and shall be familiar with the quality improvement operations and competitiveness issues of manufacturing companies, service companies, small businesses, health care providers, educational institutions, and nonprofit organizations. The category (field of eminence) for which the candidate is qualified should be specified in the nomination letter. Nominations for a particular category should come from organizations or individuals within that category. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on federal advisory boards and federal employment. In addition, each nomination letter should state that the person agrees to the nomination, acknowledges the responsibilities of serving on the Panel, and will actively participate in good faith in the tasks of the Panel. Besides participation at meetings, it is desired that members be either developing or researching topics of potential interest, reading Baldrige applications, and so forth, in furtherance of their Panel duties.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Panel membership.

Information Security and Privacy Advisory Board (ISPAB)

Address: Please submit nominations to Jeffrey Brewer, NIST, 100 Bureau Drive, Mail Stop 8930, Gaithersburg, MD 20899–8930. Nominations may also be submitted via email at *Jeffrey.Brewer@nist.gov,* Attn: ISPAB Nominations. Additional information regarding the ISPAB, including its charter and current membership list, may be found on its electronic home page at *http://csrc.nist.gov/groups/SMA/ispab/index.html.*

Contact Information: Jeffrey Brewer, ISPAB Designated Federal Officer (DFO), NIST, 100 Bureau Drive, Mail Stop 8930, Gaithersburg, MD 20899–8930; telephone 301–975–2489; or via email at *Jeffrey.Brewer@nist.gov.*

Committee Information

The ISPAB (Committee or Board) was originally chartered as the Computer System Security and Privacy Advisory Board by the Department of Commerce pursuant to the Computer Security Act of 1987 (Pub. L. 100–235). The E-Government Act of 2002 (Pub. L. 107–347, Title III), amended Section 21 of the National Institute of Standards and Technology Act (15 U.S.C. 278g–4), including changing the Committee's name, and the charter was amended accordingly.

Objectives and Duties

1. The Board will identify emerging managerial, technical, administrative, and physical safeguard issues relative to information security and privacy.

2. The Board will advise NIST, the Secretary of Homeland Security, and the Director of the Office of Management

and Budget (OMB) on information security and privacy issues pertaining to Federal Government information systems, including through review of proposed standards and guidelines developed by NIST.

3. The Board shall report to the Director of NIST.

4. The Board reports annually to the Secretary of Commerce, the Secretary of Homeland Security, the Director of OMB, the Director of the National Security Agency, and the appropriate committees of the Congress.

5. The Board will function solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Membership

1. The Director of NIST will appoint the Chairperson and the members of the ISPAB, and members serve at the discretion of the NIST Director. Members will be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

2. The ISPAB will consist of a total of 12 members and a Chairperson, for a total of 13.

- The Board will include four members from outside the Federal Government who are eminent in the information technology industry, at least one of whom is representative of small or medium sized companies in such industries.
- The Board will include four members from outside the Federal Government who are eminent in the fields of information technology, or related disciplines, but who are not employed by or representative of a producer of information technology.
- The Board will include four members from the Federal Government who have information system management experience, including experience in information security and privacy, at least one of whom shall be from the National Security Agency.

Miscellaneous

1. Members of the Board, other than full-time employees of the Federal government, will not be compensated for their services, but will, upon request, be allowed travel expenses pursuant to 5 U.S.C. 5701 *et seq.,* while otherwise performing duties at the request of the Board Chairperson, while away from their homes or a regular place of business.

2. Meetings of the ISPAB are usually two to three days in duration and are usually held quarterly. ISPAB meetings are open to the public, including the press. Members do not have access to classified or proprietary information in connection with their ISPAB duties.

Nomination Information

1. Nominations are being accepted in all three categories described above.

2. Nominees should have specific experience related to information security or privacy issues, particularly as they pertain to Federal information technology. Letters of nomination should include the category of membership for which the candidate is applying and a summary of the candidate's qualifications for that specific category. Also include (where applicable) current or former service on Federal advisory boards and any Federal employment. Each nomination letter should state that the person agrees to the nomination, acknowledges the responsibilities of serving on the ISPAB, and that they will actively participate in good faith in the tasks of the ISPAB.

3. Besides participation at meetings, it is desired that members be able to devote a minimum of two days between meetings to developing draft issue papers, researching topics of potential interest, and so forth in furtherance of their ISPAB duties.

4. Selection of ISPAB members will not be limited to individuals who are nominated. Nominations that are received and meet the requirements will be kept on file to be reviewed as ISPAB vacancies occur.

5. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse ISPAB membership.

Manufacturing Extension Partnership (MEP) Advisory Board

Address: Please submit nominations to Ms. Cheryl Gendron, NIST, 100 Bureau Drive, Mail Stop 4800, Gaithersburg, MD 20899–4800. Nominations may also be submitted via email at *Cheryl.Gendron@nist.gov.* Additional information regarding MEP, including its charter, may be found on its electronic home page at *http://www.nist.gov/mep/advisory-board.cfm.*

Contact Information: Ms. Cheryl Gendron, Designated Federal Officer, NIST, 100 Bureau Drive, Mail Stop 4800, Gaithersburg, MD 20899–4800; telephone 301–975–4919, fax 301–963–6556; or via email at *Cheryl.Gendron@nist.gov.*

Committee Information

The MEP Advisory Board (Board) is authorized under section 501 of the American Innovation and Competitiveness Act (Pub. L. 114–329); codified at 15 U.S.C. 278k(m), as amended, in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Objectives and Duties

1. The Board will provide advice on MEP activities, plans, and policies.

2. The Board will assess the soundness of MEP plans and strategies.

3. The Board will assess current performance against MEP program plans.

4. The Board will function solely in an advisory capacity, and in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

5. The Board shall transmit through the Director of NIST an annual report to the Secretary of Commerce for transmittal to Congress not later than 30 days after the submission to Congress of the President's annual budget request each year. The report shall address the status of the MEP program.

Membership

1. The Board shall consist of not fewer than 10 members, appointed by the Director of NIST and broadly representative of stakeholders. At least 2 members shall be employed by or on an advisory board for a MEP Center, at least 5 members shall be from U.S. small businesses in the manufacturing sector, and at least 1 member shall represent a community college. No member shall be an employee of the Federal Government.

2. The Director of NIST shall appoint the members of the Board. Members shall be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance. Board members serve at the discretion of the Director of NIST.

3. The term of office of each member of the Board shall be three years, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy. Any person who has completed two consecutive full terms of service on the Board shall thereafter be ineligible for appointment during the one-year period following the expiration of the second term.

Miscellaneous

1. Members of the Board will not be compensated for their services but will, upon request, be allowed travel and per diem expenses as authorized by 5 U.S.C. 5701 *et seq.,* while attending meetings of the Board or subcommittees thereof, or while otherwise performing duties at the request of the Chair, while away from their homes or regular places of business.

2. The Board will meet at least biannually. Additional meetings may be called by the Director of NIST or the Designated Federal Officer (DFO) or his or her designee.

3. Committee meetings are open to the public.

Nomination Information

1. Nominations are being accepted in all categories described above.

2. Nominees should have specific experience related to manufacturing and industrial extension services. Letters of nomination should include the category of membership for which the candidate is applying and a summary of the candidate's qualifications for that specific category. Each nomination letter should state that the person agrees to the nomination and acknowledges the responsibilities of serving on the MEP Advisory Board.

3. Selection of MEP Advisory Board members will not be limited to individuals who are nominated. Nominations that are received and meet the requirements will be kept on file to be reviewed as Board vacancies occur.

4. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse MEP Advisory Board membership.

National Construction Safety Team (NCST) Advisory Committee

Address: Please submit nominations to Benjamin Davis, Designated Federal Officer, NIST, 100 Bureau Drive, Mail Stop 8615, Gaithersburg, MD 20899–8604 or via email at *Benjamin.Davis@nist.gov.* Additional information regarding the NCST, including its charter, may be found on its electronic home page at *https://www.nist.gov/el/disaster-resilience/disaster-and-failure-studies/national-construction-safety-team-ncst/advisory.*

Contact Information: Maria Dillard, Acting Director, Disaster and Failure Studies Program, NIST, 100 Bureau Drive, Mail Stop 8615, Gaithersburg, MD 20899–8604, telephone 301–975–4953; or via email at *Maria.Dillard@nist.gov.*

Committee Information

The NCST Advisory Committee (Committee) was established in accordance with the National Construction Safety Team Act, Public Law 107–231, and the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Objectives and Duties

1. The Committee shall advise the Director of NIST on carrying out the National Construction Safety Team Act (Act), review the procedures developed under section 2(c)(1) of the Act, and review the reports issued under section 8 of the Act.

2. The Committee functions solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act.

3. The Committee shall report to the Director of NIST.

4. On January 1 of each year, the Committee shall transmit to the Committee on Science, Space, and Technology of the House of Representatives and to the Committee on Commerce, Science, and Transportation of the Senate a report that includes: (1) An evaluation of National Construction Safety Team (Team) activities, along with recommendations to improve the operation and effectiveness of Teams, and (2) an assessment of the implementation of the recommendations of Teams and of the Committee.

Membership

1. The Committee shall consist of no less than 4 and no more than 12 members. Members shall reflect the wide diversity of technical disciplines and competencies involved in the National Construction Safety Teams investigations. Members shall be selected on the basis of established records of distinguished service in their professional community and their knowledge of issues affecting the National Construction Safety Teams.

2. The Director of NIST shall appoint the members of the Committee, and they will be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

Miscellaneous

1. Members of the Committee shall not be compensated for their services but may, upon request, be allowed travel and per diem expenses in accordance with 5 U.S.C. 5703.

2. Members of the Committee shall serve as Special Government Employees (SGEs), will be subject to the ethics standards applicable to SGEs, and are required to file an annual Executive Branch Confidential Financial Disclosure Report.

3. The Committee shall meet at least once per year. Additional meetings may be called whenever requested by the NIST Director or the Designated Federal Officer (DFO); such meetings may be in the form of telephone conference calls and/or videoconferences.

Nomination Information

1. Nominations are sought from industry and other communities having an interest in the National Construction Safety Teams investigations.

2. Nominees should have established records of distinguished service. The field of expertise that the candidate represents should be specified in the nomination letter. Nominations for a particular field should come from organizations or individuals within that field. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on federal advisory boards and federal employment. In addition, each nomination letter should state that the nominee agrees to the nomination, acknowledges the responsibilities of serving on the Committee, and will actively participate in good faith in the tasks of the Committee.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Committee membership.

Advisory Committee on Earthquake Hazards Reduction (ACEHR)

Address: Please submit nominations to Tina Faecke, Management and Program Analyst, National Earthquake Hazards Reduction Program, NIST, 100 Bureau Drive, Mail Stop 8604, Gaithersburg, MD 20899–8604. Nominations may also be submitted via email at *tina.faecke@nist.gov.* Additional information regarding the ACEHR, including its charter and executive summary may be found on its electronic home page at *https://www.nehrp.gov.*

Contact Information: Steven McCabe, Director, National Earthquake Hazards Reduction Program, NIST, 100 Bureau Drive, Mail Stop 8604, Gaithersburg, MD 20899–8604, telephone 301–975–8549 or via email at *steven.mccabe@nist.gov.*

Committee Information

The Advisory Committee on Earthquake Hazards Reduction (Committee) was established in accordance with the National Earthquake Hazards Reduction Program Reauthorization Act of 2004, Public Law 108–360 (42 U.S.C. 7704(a)(5)) and the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Objectives and Duties

1. The Committee will act in the public interest to assess trends and developments in the science and engineering of earthquake hazards reduction; effectiveness of the National

Earthquake Hazards Reduction Program (Program) in carrying out the activities under section (a)(2) of the Earthquake Hazards Reduction Act of 1977, as amended (42 U.S.C. 7704(a)(2)); the need to revise the Program; and the management, coordination, implementation, and activities of the Program.

2. The Committee will function solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act.

3. The Committee shall report to the Director of NIST.

4. The Committee shall report to the Director of NIST at least once every two years on its findings of the assessments and its recommendations for ways to improve the Program. In developing recommendations, the Committee shall consider the recommendations of the United States Geological Survey (USGS) Scientific Earthquake Studies Advisory Committee (SESAC).

Membership

1. The Committee shall consist of not fewer than 11, nor more than 17 members. Members shall reflect the wide diversity of technical disciplines, competencies, and communities involved in earthquake hazards reduction. Members shall be selected on the basis of established records of distinguished service in their professional community and their knowledge of issues affecting the National Earthquake Hazards Reduction Program.

2. The Director of NIST shall appoint the members of the Committee. Members shall be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

3. The term of office of each member of the Committee shall be three years, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy and that members shall have staggered terms such that the Committee will have approximately one-third new or reappointed members each year.

Miscellaneous

1. Members of the Committee shall not be compensated for their services, but may, upon request, be allowed travel and per diem expenses in accordance with 5 U.S.C. 5701 *et seq.,* while attending meetings of the Committee or subcommittees thereof, or while otherwise performing duties at the request of the Chairperson, while away from their homes or regular places of business.

2. Members of the Committee shall serve as Special Government Employees (SGEs) and will be subject to the ethics standards applicable to SGEs and are required to file an annual Executive Branch Confidential Financial Disclosure Report.

3. The Committee members shall meet face-to-face at least once per year. Additional meetings may be called whenever requested by the NIST Director; such meetings may be in the form of telephone conference calls and/or videoconferences.

4. Committee meetings are open to the public.

Nomination Information

1. Members will be drawn from industry and other communities having an interest in the Program, such as, but not limited to, research and academic institutions, industry standards development organizations, state and local government, and financial communities, who are qualified to provide advice on earthquake hazards reduction and represent all related scientific, architectural, and engineering disciplines.

2. Any person who has completed two consecutive full terms of service on the Committee shall be ineligible for appointment for a third term during the two-year period following the expiration of the second term.

3. Nominees should have established records of distinguished service. The field of expertise that the candidate represents should be specified in the nomination letter. Nominations for a particular field should come from organizations or individuals within that field. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on federal advisory boards and federal employment. In addition, each nomination letter should state that the nominee agrees to the nomination, acknowledges the responsibilities of serving on the Committee, and will actively participate in good faith in the tasks of the Committee.

4. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad based and diverse Committee membership.

Visiting Committee on Advanced Technology (VCAT)

Address: Please submit nominations to Stephanie Shaw, Designated Federal Officer, VCAT, NIST, 100 Bureau Drive, Mail Stop 1060, Gaithersburg, MD 20899–1060. Nominations may also be submitted via email at *Stephanie.Shaw@nist.gov.* Additional information regarding the VCAT, including its charter, current membership list, and past reports may be found on its electronic homepage at *http://www.nist.gov/director/vcat/.*

Contact Information: Stephanie Shaw, Designated Federal Officer, VCAT, NIST, 100 Bureau Drive, Mail Stop 1060, Gaithersburg, MD 20899–1060, telephone 301–975–2667 or via email at *Stephanie.Shaw@nist.gov.*

Committee Information

The VCAT (Committee) was established in accordance with 15 U.S.C. 278 and the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Objectives and Duties

1. The Committee shall review and make recommendations regarding general policy for NIST, its organization, its budget, and its programs, within the framework of applicable national policies as set forth by the President and the Congress. 15 U.S.C. 278(a).

2. The Committee shall provide an annual report, through the Director of NIST, to the Secretary of Commerce for submission to the Congress not later than 30 days after the submittal to Congress of the President's annual budget request in each year. Such report shall deal essentially, though not necessarily exclusively, with policy issues or matters which affect NIST, or with which the Committee in its official role as the private sector policy adviser of NIST is concerned. Each such report shall identify areas of research and research techniques of the Institute of potential importance to the long-term competitiveness of United States industry, in which the Institute possesses special competence, which could be used to assist United States enterprises and United States industrial joint research and development ventures. 15 U.S.C. 278(h)(1). The Committee shall submit, through the Director of NIST, to the Secretary and the Congress such additional reports on specific policy matters as it deems appropriate. 15 U.S.C. 278(h)(2).

3. The Committee will function solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

4. The Committee shall report to the Director of NIST.

Membership

1. The Director of NIST shall appoint the members of the Committee. Members shall be selected on a clear, standardized basis, in accordance with applicable Department of Commerce

guidance. 15 U.S.C. 278(a). Members shall be selected solely on the basis of established records of distinguished service; shall provide representation of a cross-section of traditional and emerging United States industries; and shall be eminent in fields such as business, research, new product development, engineering, labor, education, management consulting, environment, and international relations. No employee of the Federal Government shall serve as a member of the Committee. 15 U.S.C. 278(b).

2. Members of the Committee shall serve as Special Government Employees (SGEs) and will be subject to the ethics standards applicable to SGEs.

3. The Committee shall consist of not fewer than nine members appointed by the Director of NIST, a majority of whom shall be from United States industry. 15 U.S.C. 278(a). The term of office of each member of the Committee shall be three years, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy. 15 U.S.C. 278(c)(1). Members shall serve at the discretion of the Director of NIST.

4. Any person who has completed two consecutive full terms of service on the Committee shall be ineligible for appointment for a third term during the one-year period following the expiration of the second term. 15 U.S.C. 278(c)(1).

5. Pursuant to 15 U.S.C. 278(f), the Committee chairperson and vice chairperson shall be elected by the members of the Committee at each annual meeting occurring in an even-numbered year. The vice chairperson shall perform the duties of the chairperson in his or her absence. In case a vacancy occurs in the position of the chairperson or vice chairperson, the Committee shall elect a member to fill such vacancy.

6. Members of the Committee will not be compensated for their services, but will, upon request, be allowed travel expenses in accordance with 5 U.S.C. 5701 *et seq.,* while attending meetings of the Committee or of its subcommittees, or while otherwise performing duties at the request of the chairperson, while away from their homes or a regular place of business.

7. Pursuant to 15 U.S.C. 278(g), the Committee may, with the concurrence of a majority of its members, permit the appointment of a staff consisting of not more than four professional staff members and such clerical staff members as may be necessary. Such staff members shall be appointed by the Director after consultation with the chairperson of the Committee and assigned at the direction of the Committee.

8. Subcommittees: Pursuant to 15 U.S.C. 278(e), the Committee shall have an executive committee, and may delegate to it such powers and functions of the Committee as it deems appropriate. The Committee and/or the Director of NIST may establish such other subcommittees, task forces, and working groups consisting of members from the parent Committee as may be necessary, subject to the provisions of FACA, the FACA implementing regulations, and applicable Department of Commerce guidance. Subcommittees must report back to the Committee and any recommendations based on their work will be deliberated and agreed upon by the Committee prior to dissemination to NIST.

Miscellaneous

1. Meetings of the VCAT usually take place at the NIST headquarters in Gaithersburg, Maryland. The Committee will meet at least twice each year at the call of the chairperson or whenever one-third of the members so request in writing. The Committee shall not act in the absence of a quorum, which shall consist of a majority of the members of the Committee not having a conflict of interest in the matter being considered by the Committee. 15 U.S.C. 278(d).

2. Generally, Committee meetings are open to the public.

Nomination Information

1. Nominations are sought from all fields described above.

2. Nominees should have established records of distinguished service and shall be eminent in fields such as business, research, new product development, engineering, labor, education, management consulting, environment and international relations. The category (field of eminence) for which the candidate is qualified should be specified in the nomination letter. Nominations for a particular category should come from organizations or individuals within that category. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment. In addition, each nomination letter should state that the candidate agrees to the nomination, acknowledges the responsibilities of serving on the VCAT, and will actively participate in good faith in the tasks of the VCAT.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse VCAT membership.

Kevin Kimball,

NIST Chief of Staff.

[FR Doc. 2021–07504 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB003]

North Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of web conference.

SUMMARY: The North Pacific Fishery Management Council (Council) Bering Sea Fishery Ecosystem Plan (BS FEP) Team will meet May 3, 2021, and from May 24, 2021, through May 25, 2021.

DATES: The meeting will be held on Monday, May 3, 2021, from 9 a.m. to 3 p.m. and on Monday, May 24, 2021, through Tuesday, May 25, 2021, from 9 a.m. to 3 p.m. Alaska Time.

ADDRESSES: The meeting will be a webconference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/2024.*

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave., Anchorage, AK 99501–2252; telephone: (907) 271–2809. Instructions for attending the meeting are given under **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: Diana Evans, Council staff; phone; (907) 271–2809 and email: *diana.evans@noaa.gov.* For technical support, please contact administrative Council staff, email: *npfmc.admin@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

Monday, May 3, 2021

The BS FEP team agenda will include a workshop on developing the Ecosystem Health Report Card.

Monday, May 24, 2021, Through Tuesday, May 25, 2021

The BS FEP team agenda will include (a) introductions and member updates; (b) reports from the FEP taskforces; (c) discussion about Council process and how FEP fits with other Council initiatives; (d) development of an Ecosystem Health Report Card; (e)

research priorities; (f) new FEP initiatives, and (g) other business. The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/2024* prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smartphone; or by phone only. Connection information will be posted online at: *https://meetings.npfmc.org/Meeting/Details/2024.*

Public Comment

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/2024.*

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 8, 2021.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–07532 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA994]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Oil and Gas Activities in Cook Inlet, Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of Letter of Authorization.

SUMMARY: Pursuant to the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, NMFS issued a Letter of Authorization (LOA) to Hilcorp Alaska LLC (Hilcorp) to take marine mammals incidental to oil and gas activities in Cook Inlet, Alaska.

DATES: Applicable until March 30, 2022.

FOR FURTHER INFORMATION CONTACT: Sara Young, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An incidental take authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term ''take'' means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Summary

NMFS issued regulations governing the take of 11 species of marine mammal, by Level A and Level B harassment, incidental to Hilcorp's oil and gas activities on July 31, 2019 (84 FR 37442). These regulations include mitigation, monitoring, and reporting requirements for the incidental take of marine mammals during the specified activities. As further detailed in the regulations (50 CFR 217.167), adaptive management measures allow NMFS to modify or renew LOAs as necessary if doing so creates a reasonable likelihood of more effective mitigation and monitoring. NMFS issued the first LOA to Hilcorp under these regulations on July 31, 2019. NMFS published a **Federal Register** notice seeking public comment on its proposal to modify the Year 1 LOA issued to Hilcorp on August 16, 2019 (84 FR 41957) and published a notice of modification on October 4, 2019 (84 FR 53119). The Year 1 LOA expired on July 30, 2020. To better align with the open water season, Hilcorp applied for their Year 2 LOA with a start date of April 1, 2020, rather than waiting until the expiration of their Year 1 LOA in July 2020. NMFS reviewed the application and issued the Year 2 LOA on April 22, 2020. Hilcorp submitted an application for their Year 3 LOA on January 2021 and the LOA was subsequently issued on March 30, 2021.

Authorization

NMFS has issued a LOA (available at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-hilcorp-alaska-llc-oil-and-gas-activities-cook-inlet-alaska*) to Hilcorp Alaska LLC for the potential harassment of small numbers of four marine mammal species incidental to oil and gas activities in Cook Inlet, Alaska, provided the mitigation, monitoring and reporting requirements of the rulemaking are incorporated.

Dated: April 7, 2021.

Catherine Marzin.

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–07479 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA990]

Fisheries of the South Atlantic; South Atlantic Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of its Scientific and Statistical Committee (SSC) via webinar. See **SUPPLEMENTARY INFORMATION**.

DATES: The SSC meeting will take place from 9 a.m. to 5 p.m. daily, from Tuesday, April 27, 2021 through Thursday, April 29, 2021 and Monday, May 3, 2021.

ADDRESSES: The meeting will be held via webinar.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION:

The meeting is open to the public via webinar as it occurs. Webinar registration is required. Information regarding webinar registration will be posted to the Council's website at: *http://safmc.net/safmc-meetings/scientific-and-statistical-committee-meetings/* as it becomes available. The meeting agenda, briefing book materials, and online comment form will be posted to the Council's website two weeks prior to the meeting. Written comment on SSC agenda topics is to be distributed to the Committee through the Council office, similar to all other briefing materials. For this meeting, the deadline for submission of written comment is 5 p.m. April 26, 2021.

Agenda Items

The SSC will review the SEDAR (Southeast Data Assessment and Review) 73 Red Snapper stock assessment; SEDAR 66 Tilefish stock assessment; SEDAR 71 Gag stock assessment; and aspects of the Council's Acceptable Biological Catch (ABC) Control Rule. SSC members will also review the Council's Research and Monitoring Plan; Amendment 10 to the Dolphin Wahoo Fishery Management Plan; and a report from the Council's SSC Socioeconomic Panel. The SSC will review the use of the Council's Decision Tree approach to sector allocations, receive an update on the Council Coordination Committee (CCC) Scientific Coordination Subcommittee Meeting, recommend SSC reviewers for the SEDAR 68 Scamp stock assessment and address other topics as needed.

The SSC will provide guidance to staff and make recommendations for Council consideration as appropriate.

Multiple opportunities for comment on agenda items will be provided during SSC meetings. Open comment periods will be provided at the start of the meeting and near the conclusion. Those interested in providing comment should indicate such in the manner requested by the Chair, who will then recognize individuals to provide comment. Additional opportunities for comment on specific agenda items will be provided, as each item is discussed, between initial presentations and SSC discussion. Those interested in providing comment should indicate such in the manner requested by the Chair, who will then recognize individuals to provide comment. All comments are part of the record of the meeting.

Although non-emergency issues not contained in the meeting agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 8, 2021.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–07530 Filed 4–12–21; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, April 14, 2021; 10:00 a.m.

PLACE: This meeting will be conducted by remote means.

STATUS: Commission Meeting—Closed to the Public.

MATTER TO BE CONSIDERED: Staff will brief the Commission on a compliance matter.

CONTACT PERSON FOR MORE INFORMATION: Alberta E. Mills, Secretary, Division of the Secretariat, Office of the General Counsel, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, (301) 504–7479 (Office) or 240–863–8938 (cell).

Dated: April 9, 2021.

Alberta E. Mills,

Secretary.

[FR Doc. 2021–07668 Filed 4–9–21; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Exchange of Air Force Real Property for Non-Air Force Real Property

AGENCY: Department of the Air Force, Department of Defense

ACTION: Notice of intent.

SUMMARY: The Department of the Air Force is publishing this Notice to identify Federal real property that it intends to exchange for property that is needed by the Air Force to construct and continue the existing perimeter road that supports the F–35 mission at Nellis AFB, NV.

DATES: Written objections must be filed no later than April 28, 2021.

ADDRESSES: Submit written objections to: Department of the Air Force, AFCEC/CITE, 2261 Hughes Ave., Ste 155, JBSA Lackland, TX 78236–9853; Email: *AFCEC.CIT.WORKFLOW@us.af.mil.* Include Docket No. [insert docket number] in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Air Force Civil Engineer Center (AFCEC/CITE), 2261 Hughes Avenue, Suite 155, Joint Base San Antonio (JBSA) Lackland, TX 78236–9853; telephone (210) 395–9478.

SUPPLEMENTARY INFORMATION: In 2018 when the construction for the F–35 Live Ordnance Loading Area (LOLA) project began, it was discovered the new perimeter road associated with the Air Force's project was going to transect Clark County property. On the other hand, Clark County Commissioner Kirkpatrick had expressed a desire to expand Cary Avenue as a means of alleviating traffic on other major thoroughfares by transecting Nellis AFB property on the south side of the base. Consequently, the Department of the Air Force, the Clark County Public Works Department, and Commissioner Kirkpatrick have agreed to exchange land of equal value vice granting one or more easements. The Government is entering into this Agreement pursuant to the authority contained in Title 10, United States Code, Section 2869, Exchange of Property at Military Installations. Clark County, NV, in conjunction with Clark County Regional Flood Control District, is requesting ~12 acres of Nellis AFB property for the Carey Road Alignment Project, which will widen the road to a four-lane road. In exchange, Nellis AFB is requesting ~14 acres of land owned by Clark County Regional Flood District, for the purpose of constructing and continuing

the existing perimeter road that supports the F–35 mission.

On February 22, 2021, the Department of the Air Force notified the appropriate Congressional committees of the terms and conditions of the proposed exchange pursuant to Title 10, United States Code, Section 2869(d)(2).

Adriane Paris,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2021–07510 Filed 4–12–21; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2021–OS–0022]

Notice of Request for Comments on Executive Order ''America's Supply Chains''

AGENCY: Office of the Deputy Assistant Secretary of Defense (Industrial Policy), Department of Defense (DoD).

ACTION: Notice of request for public comments.

SUMMARY: On February 24, 2021, President Biden issued the Executive Order ''America's Supply Chains,'' which directs several Federal agency actions to secure and strengthen America's supply chains. One of these directions is for the Secretary of Defense (as the National Defense Stockpile Manager pursuant to the *Strategic and Critical Materials Stock Piling Act*), in consultation with the heads of appropriate agencies, shall submit a report, within 100 days, identifying risks in the supply chain for strategic and critical materials as well as policy recommendations to address these risks.

DATES: The due date for submitting comments is April 28, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: The DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Matthew D. Zolnowski, Office of the Deputy Assistant Secretary of Defense for Industrial Policy, at (703) 697–0051 or *osd.pentagon.ousd-a-s.mbx.industrial-policy@mail.mil.*

SUPPLEMENTARY INFORMATION:

Background

On February 24, 2021, President Biden issued E.O. 14017, ''America's Supply Chains.'' The E.O. published in the **Federal Register** on March 1, 2021 at 86 FR 11849–11854 (available at *https://www.govinfo.gov/content/pkg/FR-2021-03-01/pdf/2021-04280.pdf*) (E.O. 14017). E.O. 14017 focuses on the need for resilient, diverse, and secure supply chains to ensure U.S. economic prosperity and national security. Such supply chains are needed to address conditions that can reduce critical manufacturing capacity and the availability and integrity of critical goods, products, and services. In relevant part, E.O. 14017 directs that within 100 days, the Secretary of Defense (as the National Defense Stockpile Manager pursuant to the *Strategic and Critical Materials Stock Piling Act* (50 U.S.C. 98 *et seq.*)), in consultation with the heads of appropriate agencies, shall submit a report identifying risks in the supply chain for strategic and critical materials and policy recommendations to address these risks.

This notice requests comments and information from the public to assist the DoD in preparing the report required by E.O. 14017. In developing this report, the Secretary will consult with the heads of appropriate agencies, and will be advised by all relevant DoD Components.

Written Comments

The DoD is particularly interested in comments and information directed to the policy objectives listed in E.O. 14017 as they affect the U.S. and global supply chains for strategic and critical materials. The Department is seeking input, from both consumers and producers of strategic and critical materials and downstream products containing these materials, as well as from those with relevant expertise, on the following topics:

i. Increasing transparency in strategic and critical material supply chains;

ii. Diversifying sources of supply for strategic and critical materials, including domestic sources and foreign allies/partners;

iii. Diversifying production sources, such as primary extraction, co-production, and to include reclamation from mine, industrial, and end-of-life products;

iv. Promoting environmental, health and safety, labor, fair trade and a level playing field in global markets;

v. Establishing and strengthen manufacturing of value-added products, containing strategic and critical materials, which support the U.S. economy;

vi. Methods to reduce exposure to price volatility and supply shocks in strategic and critical material supply chains;

vii. Availability of material and manufacturing process substitutes for at-risk strategic and critical materials;

viii. The availability of skilled labor and other personnel to sustain a competitive strategic and critical materials ecosystem, including the domestic education and manufacturing workforce skills;

ix. The availability of manufacturing capabilities, such as single points of failure in supply chains or nonexistent, threatened, or single-point-of-failure capabilities, or single or dual suppliers;

x. The spectrum of risk to supply disruption, taking into account the duration (*i.e.,* short, medium, long), geographic scope (local, regional, global), intensity (magnitude of aggregate supply disruption), ability to meet projected demand at a specific supply chain node, and the probability of the disruption event;

xi. The spectrum of risk to the development and maintenance of sustainable supply chains, such as violations of human rights and forced labor;

xii. Research, development, and demonstration priorities to support production or and an advanced manufacturing base for strategic and critical materials;

xiii. Policy recommendations or suggested executive, legislative, regulatory action to foster more resilient supply chains for strategic and critical materials while promoting stewardship of affected communities and the environment;

xiv. Recommendations for long term research, development and demonstration (RD&D) investments necessary for reimagining a more sustainable and secure US critical materials supply chain of the future; or

xv. Any additional comments relevant to the assessment of strategic and critical materials required by E.O. 14017.

The DoD encourages commenters, when addressing the elements above, to

structure their comments using the same text as identifiers for the areas of inquiry to which their comments respond to assist the DoD in more easily reviewing and summarizing the comments received in response to these specific comment areas. For example, a commenter submitting comments responsive to (i), ''Increasing transparency in critical minerals and strategic material supply chains'', would use that same text as a heading in the public comment followed by the commenter's specific comments in this area. The Department encourages the use of an Executive Summary at the beginning of all comments and information to affect a more efficient departmental review of the submitted documents.

Requirements for Written Comments

The *http://www.regulations.gov* website allows users to provide comments by filling in a ''Type Comment'' field, or by attaching a document using an ''Upload File'' field. The DoD prefers that comments be provided in an attached document. The Department prefers submissions in Microsoft Word (.doc files) or Adobe Acrobat (.pdf files). If the submission is in an application format other than Microsoft Word or Adobe Acrobat, please indicate the name of the application in the ''Type Comment'' field. Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter within the comments. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file, so that the submission consists of one file instead of multiple files. Comments (both public comments and non-confidential versions of comments containing business confidential information) will be placed in the docket and open to public inspection. Comments may be viewed on *http://www.regulations.gov* by entering docket number DoD–2021–OS–0022 in the search field on the home page.

All filers should name their files using the name of the person or entity submitting the comments. Anonymous comments are also accepted. Communications from agencies of the United States Government will not be made available for public inspection.

Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission. The non-confidential version of the submission will be placed in the public file on *http://www.regulations.gov.* For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC''. Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The non-confidential version must be clearly marked ''PUBLIC''. The file name of the non-confidential version should begin with the character ''P''. The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or rebuttal comments. If a public hearing is held in support of this assessment, a separate **Federal Register** notice will be published providing the date and information about the hearing. The Office of the Deputy Assistant Secretary of Defense (Industrial Policy) does not maintain a separate public inspection facility.

Dated: April 6, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–07539 Filed 4–12–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Reopening; Eligibility Designations and Applications for Waiving Eligibility Requirements; Programs Under Parts A and F of Title III and Programs Under Title V of the Higher Education Act of 1965, as Amended (HEA)

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) reopens the process for designation of eligible institutions and notice inviting applications (NIA) for waivers of eligibility requirements for fiscal year (FY) 2021 due to the ongoing COVID–19 pandemic and other circumstances affecting the Nation's institutions of higher education. We are extending the deadline for the transmittal of applications until April 16, 2021. All other information in the NIA remains the same.

DATES: *Deadline for Transmittal of Applications:* April 16, 2021.

FOR FURTHER INFORMATION CONTACT: Jason Cottrell, Ph.D., U.S. Department of Education, 400 Maryland Avenue SW, Room 2B127, Washington, DC 20202. Telephone: (202) 453–7530 or (202) 262–1833. Email: *Jason.Cottrell@ed.gov;* or Christopher Smith, Institutional Service, U.S. Department of Education, 400 Maryland Avenue SW, Room 2B108, Washington, DC 20202. Telephone: (202) 453–7946 or (202) 262–7141. Email: *Christopher.Smith@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On March 4, 2021, the Department published in the **Federal Register** (86 FR 12665) the NIA for waivers of eligibility requirements for FY 2021, for the following programs:

1. Programs authorized under title III, part A of the HEA: Strengthening Institutions Program (Part A SIP), Alaska Native and Native Hawaiian-Serving Institutions (Part A ANNH), Predominantly Black Institutions (Part A PBI), Native American-Serving Nontribal Institutions (Part A NASNTI), and Asian American and Native American Pacific Islander-Serving Institutions (Part A AANAPISI).

2. Programs authorized under title III, part F of the HEA: Hispanic-Serving Institutions STEM and Articulation (Part F HSI STEM and Articulation), Predominantly Black Institutions (Part F PBI), Alaska Native and Native Hawaiian-Serving Institutions (Part F ANNH), Native American-Serving Nontribal Institutions (Part F NASNTI), and Asian American and Native American Pacific Islander-Serving Institutions (Part F AANAPISI).

3. Programs authorized under title V of the HEA: Developing Hispanic-Serving Institutions (HSI) and Promoting Postbaccalaureate Opportunities for Hispanic Americans (PPOHA).

We are reopening the competition until April 16, 2021 to allow applicants more time to prepare and submit their applications due to the ongoing COVID–19 pandemic and other circumstances affecting the Nation's institutions of higher education, including multiple natural disasters around the Nation, and other localized campus hardships impacting higher education communities. All other information in the NIA remains the same.

Accessible Format: On request to one of the program contact persons listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the

requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Michelle Asha Cooper,

Acting Assistant Secretary for Postsecondary Education.

[FR Doc. 2021–07588 Filed 4–9–21; 11:15 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2021–SCC–0017]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Pell Grant Reporting Under the Common Origination and Disbursement (COD) System

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before May 13, 2021.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox. Comments may also be sent to *ICDocketmgr@ed.gov.*

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, (202) 377–4018.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Pell Grant Reporting under the Common Origination and Disbursement (COD) System.

OMB Control Number: 1845–0039.

Type of Review: Extension without change of a currently approved collection.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 6,609,456.

Total Estimated Number of Annual Burden Hours: 462,662.

Abstract: The Federal Pell Grant (Pell Grant) program is a student financial assistance program authorized under the Higher Education Act of 1965, as amended (HEA). The program provides grant assistance to an eligible student attending an institution of higher education. The institution determines the student's award and disburses program funds on behalf of the Department of Education (the Department). Institutions are required to report student Pell Grant payment information to the Department electronically. Electronic reporting is conducted through the Common Origination and Disbursement (COD) system. The COD system is used by institutions to request, report, and reconcile grant funds received from the Pell Grant program. The Department uses the information collected in the COD system to aid in ensuring compliance with fiscal and administrative requirements under the HEA for the Pell Grant program and under 34 CFR 690 for the Pell Grant program regulations.

Dated: April 7, 2021.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2021–07484 Filed 4–12–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Personnel Development To Improve Services and Results for Children With Disabilities—Interdisciplinary Preparation in Special Education, Early Intervention, and Related Services for Personnel Serving Children With Disabilities Who Have High-Intensity Needs

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2021 for Personnel Development to Improve Services and Results for Children with Disabilities—Interdisciplinary Preparation in Special Education, Early Intervention, and Related Services for Personnel Serving Children with Disabilities who have High-Intensity Needs, Assistance Listing Number 84.325K. This notice relates to the approved information collection under OMB control number 1820–0028.

DATES:

Applications Available: April 13, 2021.

Deadline for Transmittal of Applications: June 22, 2021.

Deadline for Intergovernmental Review: August 23, 2021.

Pre-Application Webinar Information: The Office of Special Education Programs (OSEP) will conduct a pre-application informational webinar specific to 84.325K on April 26, 2021,

at 2:00 p.m., Eastern time. A recording of the webinar will be available at *www2.ed.gov/fund/grant/apply/osep/new-osep-grants.html* within five days after the pre-application webinar.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT:

For Focus Area A: Sunyoung Ahn, U.S. Department of Education, 400 Maryland Avenue SW, Room 5012A, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–6460. Email: *Sunyoung.Ahn@ed.gov.*

For Focus Area B: LaTisha Putney, U.S. Department of Education, 400 Maryland Avenue SW, Room 5060D, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–6172. Email: *LaTisha.Putney@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of this program are to (1) help address State-identified needs for personnel preparation in special education, early intervention, related services, and regular education to work with children, including infants, toddlers, and youth with disabilities; and (2) ensure that those personnel have the necessary skills and knowledge, derived from practices that have been determined through scientifically based research, to be successful in serving those children.

Priorities: This competition includes one absolute priority and two competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(v), the absolute priority and Competitive Preference Priority 2 are from allowable activities specified in the statute (see sections 662 and 681 of the Individuals with Disabilities Education Act (20 U.S.C. 1462 and 1481)). Competitive Preference Priority 1 is from the Department's Administrative Priorities for Discretionary Grant Programs published in the **Federal Register** on March 9, 2020 (85 FR 13640) (Administrative Priorities).

Absolute Priority: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Interdisciplinary Preparation in Special Education, Early Intervention, and Related Services for Personnel Serving Children with Disabilities who have High-Intensity Needs.

Background:

The purpose of this priority is to increase the number and improve the quality of personnel who are fully credentialed to serve children, including infants, toddlers, and youth with disabilities who have high-intensity needs.[1] Under this priority, the Department will fund high-quality interdisciplinary[2] projects that prepare special education, early intervention, and related services[3] personnel at the master's degree, educational specialist degree, or clinical doctoral degree levels for professional practice in a variety of education settings, including natural environments (the home and community settings in which children with and without disabilities participate), early learning programs, classrooms, schools, and distance learning environments. The competition will also prepare personnel who have the knowledge and skills to support each child with a disability in meeting high expectations and to partner with other providers, families, and administrators in meaningful and effective collaborations.

State demand for fully credentialed special education, early intervention, and related services personnel to serve children, including infants, toddlers, and youth with disabilities exceeds the available supply, particularly in high-need schools[4] (Boe et al., 2013). These shortages can negatively affect the quality of services provided to children, including infants, toddlers, and youth with disabilities and their families (Boe et al., 2013). These shortages limit the field's ability to ensure that each child has the opportunity to meet challenging objectives and receive an education that addresses individualized needs and is both meaningful and appropriately ambitious, which is essential for preparing them for the future.

The need for personnel with the knowledge and skills to serve children, including infants and toddlers, and youth with disabilities who have high-intensity needs is even greater because specialized or advanced preparation is required to collaboratively design and deliver evidence-based[5] instruction and intensive individualized intervention(s) in person and through distance learning technologies in natural environments, classrooms, and schools that address the needs of these individuals (Boe et al., 2013; Browder et al., 2014; McLeskey & Brownell, 2015). Although children, including infants and toddlers, and youth with disabilities who have high-intensity needs may require the combined expertise of numerous professionals (including special

[1] For the purposes of this priority, ''high-intensity needs'' refers to a complex array of disabilities (*e.g.,* multiple disabilities, significant cognitive disabilities, significant physical disabilities, significant sensory disabilities, significant autism, significant emotional disabilities, or significant learning disabilities, including dyslexia) or the needs of children with these disabilities requiring intensive, individualized intervention(s) (*i.e.,* that are specifically designed to address persistent learning or behavior difficulties, implemented with greater frequency and for an extended duration than is commonly available in a typical classroom or early intervention setting, or which require personnel to have knowledge and skills in identifying and implementing multiple evidence-based interventions).

[2] For the purposes of this priority, ''interdisciplinary'' refers to preparing scholars from two or more graduate degree programs in either (a) special education or early intervention and one or more related services through shared coursework, group assignments, and extensive and coordinated field or clinical experiences; or (b) two or more related services through shared coursework, group assignments, and extensive and coordinated field or clinical experiences. Different graduate degree programs across more than one institution of higher education may partner to develop an interdisciplinary project.

For the purpose of this priority, ''interdisciplinary'' does not include: (a) Individual scholars who receive two or more graduate degrees; (b) one graduate degree program that prepares scholars with different areas of focus; (c) one graduate degree program that offers interdisciplinary content but does not prepare scholars from two or more degree programs together; or (d) one graduate degree program in special education, early intervention, and related services partnering with a graduate degree program other than special education, early intervention, or related services. Programs in which scholars receive only a certificate or endorsement without a graduate degree are not eligible.

[3] For the purposes of this priority, ''related services'' includes the following: Speech-language pathology and audiology services; interpreting services; psychological services; applied behavior analysis; physical therapy and occupational therapy; recreation, including therapeutic recreation; social work services; counseling services, including rehabilitation counseling; and orientation and mobility services.

[4] For the purposes of this priority, ''high-need school'' refers to a public elementary or secondary school that is a ''high-need local educational agency (LEA),'' ''high-poverty,'' ''implementing a comprehensive support and improvement plan,'' or ''implementing a targeted support and improvement plan'' as defined in footnotes 9, 10, 11, and 12, respectively.

[5] For the purposes of this priority, ''evidence-based'' means, at a minimum, evidence that demonstrates a rationale (as defined in 34 CFR 77.1), where a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

education, early intervention, and related services providers), it is often difficult for personnel from varied professional backgrounds to work together because they lack shared information, understanding, and experience.

Interdisciplinary approaches to personnel preparation provide scholars with experience working and learning in team environments similar to those in which they are likely to work once employed (Smith, 2010). That is, when providing early intervention or special education services under the IDEA, personnel serving children, including infants and toddlers, and youth with disabilities work on interdisciplinary teams with parents, general and special education teachers, early interventionists, and related service providers with the expertise to design, implement, and evaluate instruction, intervention plans, individualized family service plans, and individualized education programs based on the unique learning and developmental needs of each child. To enable personnel to provide efficient, high-quality, integrated services both in person and through distance learning technologies, personnel preparation programs need to embed content, practices, and extensive field or clinical experiences into preservice training that is aligned with the interdisciplinary team-based approaches in which graduates are likely to work. This priority aims to fund interdisciplinary projects that will provide such preparation.

Priority:

The purpose of this priority is to increase the number and improve the quality of personnel who are fully credentialed to serve children, including infants and toddlers, and youth with disabilities who have high-intensity needs—especially in areas of chronic personnel shortage. The priority will fund high-quality interdisciplinary projects that prepare special education, early intervention, and related services personnel at the master's degree, educational specialist degree, or clinical doctoral degree levels for professional practice in natural environments, early learning programs, classrooms, school settings, and in distance learning environments serving children, including infants and toddlers, and youth with disabilities.

Specifically, an applicant must propose an interdisciplinary project supporting scholars [6] from two or more graduate degree programs in either (a) special education or early intervention and one or more related services; or (b) two or more related services.

An interdisciplinary project is a project that delivers core content through shared coursework, group assignments, and extensive and coordinated field and clinical experiences as part of two or more master's degree, educational specialist degree, or clinical doctoral degree programs for scholars. Not all requirements (*e.g.,* courses and field or clinical experiences) of each participating graduate degree program must be shared across all degree programs participating in the interdisciplinary project, but the interdisciplinary project must: (a) Identify the competencies needed to promote high expectations and address the individualized needs of children with disabilities who have high-intensity needs using an interdisciplinary approach to service delivery; (b) outline how the project will build capacity in those areas through shared coursework, group assignments, and extensive and coordinated field or clinical experiences for scholars supported by the proposed project; and (c) identify the aspects of each graduate degree program that are shared across all participating degree programs and those that remain unique to each.

Projects may include individuals who are in degree programs (*e.g.,* general education, early childhood education, administration) and who are cooperating with, but not funded as scholars by, the applicant's proposed interdisciplinary project. These individuals may participate in the shared coursework, group assignments, extensive and coordinated field or clinical experiences, and other opportunities required of scholars and funded by the project (*e.g.,* speaker series, monthly seminars) if doing so does not diminish the benefit for project-funded scholars (*e.g.,* by reducing funds available for scholar support or limiting opportunities for scholars to participate in project activities).

Personnel preparation degree programs that prepare all scholars to be dually certified can qualify under this priority by partnering with at least one additional graduate degree program in related services.

Personnel preparation programs that prepare individuals to be educational interpreters for the deaf at the bachelor's degree level can qualify under this priority and are exempted from (a) the interdisciplinary requirement and (b) the requirement for two or more graduate degree programs. All other priority requirements specified for graduate programs will apply to the bachelor's program. While interdisciplinary projects are not required for educational interpreters, they are encouraged.

Focus Areas:

Within this absolute priority, the Secretary intends to support interdisciplinary projects under the following two focus areas: (A) Preparing Personnel to Serve Infants, Toddlers, and Preschool-Age Children with Disabilities who have High-Intensity Needs; and (B) Preparing Personnel to Serve School-Age Children with Disabilities who have High-Intensity Needs.

Applicants must identify the specific focus area (*i.e.,* A or B) under which they are applying as part of the competition title on the application cover sheet (SF 424, line 12). Applicants may not submit the same proposal under more than one focus area. Applicants may submit different proposals in different focus areas.

Focus Area A: Preparing Personnel to Serve Infants, Toddlers, and Preschool-Age Children with Disabilities who have High-Intensity Needs. This focus area is for interdisciplinary projects that deliver core content through shared coursework, group assignments, and extensive and coordinated field or clinical experiences for scholars across two or more graduate degree programs in either: (a) Early intervention or early childhood special education and related services for infants, toddlers, and preschool-age children with disabilities or developmental delays who have high-intensity needs; or (b) two or more related services to serve infants, toddlers, and preschool-age children with disabilities who have high-intensity needs.

[6] For the purposes of this priority, ''scholar'' is limited to an individual who: (a) Is pursuing a master's, educational specialist degree, or clinical doctoral graduate degree in special education, early intervention, or related services (as defined in this notice); (b) receives scholarship assistance as authorized under section 662 of IDEA (34 CFR 304.3(g)); (c) will be eligible for a license, endorsement, or certification from a State or national credentialing authority following completion of the graduate degree program identified in the application; and (d) will be able to be employed in a position that serves children with disabilities for a minimum of 51 percent of their time or case load. See *https://pdp.ed.gov/OSEP/Home/Regulation* for more information.

Scholars from each graduate degree program participating in the proposed interdisciplinary project must receive scholar support and be eligible to fulfill service obligation requirements following graduate degree program completion. Scholars from each graduate degree program participating in this project must complete the requirements of their unique graduate degree program and receive different graduate degrees. Individuals pursuing degrees in general education or early childhood education do not qualify as ''scholars'' eligible for scholarship assistance.

Early intervention personnel are those who are prepared to provide services to infants and toddlers with disabilities ages birth to three, and early childhood personnel are those who are prepared to provide services to children with disabilities ages three through five (and in States where the age range is other than ages three through five, we defer to the State's certification for early childhood special education). In States where certification in early intervention is combined with certification in early childhood special education, applicants may propose a combined early intervention and early childhood special education personnel preparation project under this focus area.

Note: OSEP may fund out of rank order high-quality applications from Historically Black Colleges and Universities (HBCUs)[7] and Tribal Colleges and Universities (TCUs). OSEP also may fund out of rank order high-quality applications to ensure that projects are funded across both Focus Area A and Focus Area B.

Focus Area B: Preparing Personnel to Serve School-Age Children with Disabilities who have High-Intensity Needs. This focus area is for interdisciplinary projects that deliver core content through shared coursework, group assignments, and extensive and coordinated field or clinical experiences to scholars across two or more graduate degree programs in either: (a) Special education and related services for school-age children with disabilities who have high-intensity needs; or (b) two or more related services to serve school-age children with disabilities who have high-intensity needs.

Note: OSEP may fund out of rank order high-quality applications from HBCUs and TCUs. OSEP also may fund out of rank order high-quality applications to ensure that projects are funded across both Focus Area A and Focus Area B.

Focus Areas A and B:

Applicants may use up to the first 12 months of the performance period and up to $100,000 of the first budget period for planning without enrolling scholars. Applicants must clearly provide sufficient justification for requesting program planning time and include the goals, objectives, and intended outcomes of program planning in year one, a description of the proposed strategies and activities to be supported, and a timeline for the work; such as—

(1) Outlining or updating coursework, group assignments, or extensive and coordinated field or clinical experiences needed to support interdisciplinary preparation for special education, early intervention, or related services personnel serving children with disabilities who have high-intensity needs;

(2) Building capacity (*e.g.,* hiring of a field supervisor, providing professional development for field supervisors, and training for faculty);

(3) Purchasing needed resources (*e.g.,* additional teaching supplies or specialized equipment to enhance instruction); or

(4) Establishing relationships with programs or schools to serve as sites for field or clinical experiences needed to support delivery of the proposed interdisciplinary project.

Additional Federal funds may be requested for scholar support and other grant activities occurring in year one of the project, provided that the total request for year one does not exceed the maximum award available for one budget period of 12 months (*i.e.,* $250,000).

Note: Applicants proposing projects to develop, expand, or add a new area of emphasis to special education, early intervention, or related services programs must provide, in their applications, information on how these new areas will be sustained in their programs once Federal funding ends.

Note: Project periods under this priority may be up to 60 months. Projects should be designed to ensure that all proposed scholars successfully complete the program within 60 months of the start of the project. The Secretary may reduce continuation awards for any project in which scholars are not on track to complete the program by the end of that period.

To be considered for funding under this absolute priority, all program applicants must meet the requirements contained in this priority.

To meet the requirements of this priority an applicant must—

(a) Demonstrate, in the narrative section of the application under ''Significance,'' how—

(1) The project addresses national, State, regional, or district shortages of personnel who are fully qualified to serve children with disabilities, ages birth through 21, who have high-intensity needs. To address this requirement, the applicant must—

(i) Present data on the quality of each special education, early intervention, or related services personnel preparation degree program participating in the project, in areas such as: The average amount of time it takes for scholars to complete the program; the percentage of program graduates who receive a license, endorsement, or certification related to special education, related services, or early intervention services; the percentage of program graduates finding employment related to their preparation after graduation; the effectiveness of program graduates in providing special education, early intervention, or related services, which could include data on the learning and developmental outcomes of children with disabilities they serve; the percentage of program graduates who maintain employment for two or more years in the area for which they were prepared; and the percentage of employers who rate the preparation of scholars who complete their degree program as adequate or higher; and

(ii) If available for the degree programs participating in the proposed project, present data on the quality of their interdisciplinary approaches to the preparation of special education, early intervention, or related services personnel; and

Note: Data on the quality of a personnel preparation program should be no older than five years prior to the start date of the project proposed in the application. When reporting percentages, the denominator (*i.e.,* total number of scholars or program graduates) must be provided.

(2) The project will increase the number of personnel who demonstrate the competencies[8] needed to—

(i) Promote high expectations;

(ii) Differentiate instruction;

(iii) Provide intensive individualized instruction and intervention(s);

(iv) Provide instruction or intervention(s) in person and through distance learning technologies; and

(v) Collaborate with diverse stakeholders using an interdisciplinary team-based approach to address the individualized needs of children with disabilities who have high-intensity needs, ages birth through 21, and designed to achieve improvements in learning or developmental outcomes (*e.g.,* academic, social, emotional, behavioral), and support the successful

[7] For the purposes of this priority, ''Historically Black College or University'' is as defined under section 322 of the Higher Education Act of 1965, as amended.

[8] For the purposes of this priority, ''competencies'' means what a person knows and can do—the knowledge, skills, and dispositions necessary to effectively function in a role (National Professional Development Center on Inclusion, 2011). These competencies should ensure that personnel are able to use challenging academic standards, child achievement and functional standards, and assessments to improve instructional practices, services, learning and developmental outcomes (*e.g.,* academic, social, emotional, behavioral), and college- and career-readiness of children with disabilities.

transition from early childhood to elementary, elementary to secondary, or transition to postsecondary education and the workforce. To address this requirement, the applicant must—

(A) Identify the competencies that special education, early intervention, or related services personnel need to—

(*1*) Promote high expectations;

(*2*) Differentiate instruction;

(*3*) Provide intensive individualized instruction and intervention(s);

(*4*) Provide instruction or intervention(s) in person and through distance learning technologies; and

(*5*) Collaborate with parents, families, and diverse stakeholders using an interdisciplinary team-based approach designed to improve learning and developmental outcomes; ensure access to and progress in academic achievement standards or alternate academic achievement standards, as appropriate; lead to successful transition to college and career for children with disabilities, including children with disabilities who have high-intensity needs; and maximize the use of effective technology, including assistive technology, to deliver instruction, interventions, and services;

(B) Identify the competencies needed by members of interdisciplinary teams to promote high expectations and improve early childhood, educational, and employment outcomes for children with disabilities who have high-intensity needs;

(C) Identify the competencies that personnel need to support inclusion of children with disabilities who have high-intensity needs in the least restrictive and natural environments to the maximum extent appropriate by intentionally promoting high expectations and participation in learning and social activities to foster development, learning, academic achievement, friendships with peers, and sense of belonging;

(D) Identify how scholars will be prepared to develop, implement, and evaluate evidence-based instruction and evidence-based interventions delivered in person and through distance learning technologies that improve outcomes for children with disabilities who have high-intensity needs in a variety of settings (*e.g.,* natural environments; public schools, including charter schools; private schools, including parochial schools; and other nonpublic education settings, including home education); and

(E) Provide a conceptual framework for the proposed interdisciplinary personnel preparation project, including any empirical support for project activities designed to promote the acquisition of the identified competencies (see paragraph (a)(2) of the requirements for this priority) needed by special education, early intervention, or related services personnel, and how these competencies relate to the proposed project;

(b) Demonstrate, in the narrative section of the application under ''Quality of project services,'' how the project—

(1) Will conduct its planning activities, if the applicant will use any of the allowable first 12 months of the project period for planning;

(2) Will recruit and retain high-quality scholars into each of the graduate degree programs participating in the project and ensure equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. To meet this requirement, the applicant must describe—

(i) Criteria the applicant will use to identify high-quality applicants for admission into each of the graduate degree programs participating in the project;

(ii) Recruitment strategies the applicant will use to attract high-quality applicants, including specific recruitment strategies targeting high-quality applicants from traditionally underrepresented groups, including underrepresented people of color and individuals with disabilities; and

(iii) The approach, including mentoring, monitoring, and accommodations, the applicant will use to support scholars to complete their respective degree programs;

(3) Reflects current evidence-based practices, including practices in the areas of literacy and numeracy development, assessment, behavior, instructional practices, distance learning technologies and pedagogy, and inclusive strategies, as appropriate, and is designed to prepare scholars in the identified competencies. To address this requirement, the applicant must describe how the project will—

(i) Incorporate current evidence-based practices (including relevant research citations) that improve outcomes for children with disabilities who have high-intensity needs into (a) the required coursework and extensive field or clinical experiences for each graduate degree program participating in the project; and (b) the shared coursework, group assignments, and extensive and coordinated field or clinical experiences required for the interdisciplinary portions of the project; and

(ii) Use evidence-based professional development practices for adult learners to instruct scholars through both in-person and online courses and field or clinical experiences;

(4) Is of sufficient quality, intensity, and duration to prepare scholars in the identified competencies. To address this requirement, the applicant must describe how—

(i) The components of (a) each graduate degree program participating in the project; and (b) the shared coursework, group assignments, and extensive and coordinated field or clinical experiences required for the interdisciplinary portions of the proposed project will support scholars' acquisition and enhancement of the identified competencies;

(ii) The components of (a) each graduate degree program participating in the project; and (b) the shared coursework, group assignments, and extensive and coordinated field or clinical experiences required for the interdisciplinary portions of the proposed project will be integrated to allow scholars, in collaboration with other team members, to use their knowledge and skills in designing, implementing, and evaluating practices supported by evidence to address the learning and developmental needs of children with disabilities who have high-intensity needs;

(iii) Scholars will be provided with ongoing guidance and feedback during training; and

(iv) The proposed project will provide ongoing induction opportunities and mentoring support to graduates of each graduate degree program participating in the project;

(5) Will engage in meaningful and effective collaboration with appropriate partners representing diverse stakeholders, including—

(i) High-need schools, which may include high-need local educational agencies (LEAs),[9] high-poverty schools,[10] schools identified for comprehensive support and

[9] For the purposes of this priority, ''high-need LEA'' means an LEA (a) that serves not fewer than 10,000 children from families with incomes below the poverty line; or (b) for which not less than 20 percent of the children are from families with incomes below the poverty line.

[10] For the purposes of this priority, ''high-poverty school'' means a school in which at least 50 percent of students are from low-income families as determined using one of the measures of poverty specified under section 1113(a)(5) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). For middle and high schools, eligibility may be calculated on the basis of comparable data from feeder schools. Eligibility as a high-poverty school under this definition is determined on the basis of the most currently available data.

improvement,[11] and schools implementing a targeted support and improvement plan [12] for children with disabilities; early childhood and early intervention programs located within the geographic boundaries of a high-need LEA; and early childhood and early intervention programs located within the geographical boundaries of an LEA serving the highest percentage of schools identified for comprehensive support and improvement or implementing targeted support and improvement plans in the State. The purpose of these partnerships is to provide extensive field or clinical practice for scholars aimed at developing the identified competencies as members of interdisciplinary teams; and

(ii) Other personnel preparation programs on campus or at partnering universities for the purpose of sharing resources, supporting program development and delivery, and addressing personnel shortages;

(6) Will use technology, as appropriate, to promote scholar learning and professional practice, enhance the efficiency of the project, collaborate with partners, and facilitate ongoing mentoring and support for scholars;

(7) Will ensure that scholars understand how to use technology to support children's in-person and distance learning and children's use of educational and assistive technology; and

(8) Will align with and use resources, as appropriate, available through technical assistance centers, which may include centers funded by the Department;

Note: Use the ''Find a Center or Grant'' link at *https://osepideasthatwork.org* for information about OSEP-funded technical assistance centers.

(c) Demonstrate, in the narrative section of the application under ''Quality of the project evaluation,'' how—

(1) The applicant will use comprehensive and appropriate methodologies to evaluate how well the goals or objectives of the proposed project have been met, including the project processes and outcomes;

(2) The applicant will collect, analyze, and use data related to specific and measurable goals, objectives, and outcomes of the project. To address this requirement, the applicant must describe how—

(i) Scholar competencies and other project processes and outcomes will be measured for formative evaluation purposes, including proposed instruments, data collection methods, and possible analyses; and

(ii) It will collect and analyze data on the quality of services provided by scholars who complete the graduate degree programs involved in this interdisciplinary project and are employed in the field for which they were trained, including data on the learning and developmental outcomes (*e.g.,* academic, social, emotional, behavioral, meeting college- and career-ready standards), and on growth toward these outcomes, of the children with disabilities who have high-intensity needs;

Note: Following the completion of the project period, grantees are encouraged to engage in ongoing data collection activities.

(3) The methods of evaluation will produce quantitative and qualitative data for objective performance measures that are related to the outcomes of the proposed project; and

(4) The methods of evaluation will provide performance feedback and allow for periodic assessment of progress towards meeting the project outcomes. To address this requirement, the applicant must describe how—

(i) Results of the evaluation will be used as a basis for improving the proposed project to prepare special education, early intervention, or related services personnel to provide (a) focused instruction; and (b) intensive individualized intervention(s) in an interdisciplinary team-based approach to improve outcomes of children with disabilities who have high-intensity needs; and

(ii) The grantee will report the evaluation results to OSEP in its annual and final performance reports;

(d) Demonstrate, in the narrative under ''Project Assurances'' or in the applicable appendices, that the following program requirements are met. The applicant must—

(1) Provide scholar support for participants from two or more graduate degree programs partnering in the proposed interdisciplinary personnel preparation project. Consistent with 34 CFR 304.30, each scholar must (a) receive support for no less than one academic year, and (b) be eligible to fulfill service obligation requirements following degree program completion. Funding across degree programs may be applied differently;

(2) Include in Appendix B of the application—

(i) Table(s) that summarize the required program of study for each degree program and that clearly delineate the shared coursework, group assignments, and extensive and coordinated field or clinical experiences required of all project scholars to support interdisciplinary practice;

(ii) Course syllabi for all coursework in the major of each degree program and all shared courses, group assignments, and extensive coordinated field or clinical experiences required of project scholars; and

(iii) Learning outcomes for proposed coursework;

(3) Ensure that a comprehensive set of completed syllabi, including syllabi created or revised as part of a project planning year, are submitted to OSEP by the end of year one of the grant;

(4) Ensure that efforts to recruit a diverse range of scholars, including diversity of race, ethnicity, or national origin, are consistent with applicable law. For instance, grantees may engage in focused outreach and recruitment to increase the diversity of the applicant pool prior to the selection of scholars;

(5) Ensure that the project will meet all requirements in 34 CFR 304.23, particularly those related to (a) informing all scholarship recipients of their service obligation commitment and (b) disbursing scholar support. Failure by a grantee to properly meet these requirements would be a violation of the grant award that could result in sanctions, including the grantee being liable for returning any misused funds to the Department;

(6) Ensure that prior approval from the OSEP project officer will be obtained before admitting additional scholars beyond the number of scholars proposed in the application and before transferring a scholar to another OSEP-funded grant;

(7) Ensure that the project will meet the statutory requirements in section 662(e) through (h) of IDEA;

(8) Ensure that at least 65 percent of the total award over the project period (*i.e.,* up to 5 years) will be used for scholar support. Applicants proposing

[11] For the purposes of this priority, ''school implementing a comprehensive support and improvement plan'' means a school identified for comprehensive support and improvement by a State under section 1111(c)(4)(D) of the ESEA that includes (a) not less than the lowest performing 5 percent of all schools in the State receiving funds under Title I, Part A of the ESEA; (b) all public high schools in the State failing to graduate one third or more of their students; and (c) public schools in the State described under section 1111(d)(3)(A)(i)(II) of the ESEA.

[12] For the purposes of this priority, ''school implementing a targeted support and improvement plan'' means a school identified for targeted support and improvement by a State that has developed and is implementing a school-level targeted support and improvement plan to improve student outcomes based on the indicators in the statewide accountability system as defined in section 1111(d)(2) of the ESEA.

to use year one for program development may budget for less than 65 percent of the total requested budget over the 5 years for scholar support; such applicants must ensure that 65 percent of the total award minus funds allocated for program development will be used for scholar support;

(9) Ensure that the institution of higher education (IHE) at which scholars are enrolled in the program will not require those scholars to work (*e.g.,* as graduate assistants) as a condition of receiving support (*e.g.,* tuition, stipends) from the proposed project, unless the work is specifically related to the acquisition of scholars' competencies or the requirements for completion of their personnel preparation program. This prohibition on work as a condition of receiving support does not apply to the service obligation requirements in section 662(h) of IDEA;

(10) Ensure that the budget includes attendance of the project director at a three-day project directors' meeting in Washington, DC, or virtually, during each year of the project;

(11) Ensure that the project director, key personnel, and, as appropriate, scholars will actively participate in the cross-project collaboration, advanced trainings, and cross-site learning opportunities (*e.g.,* webinars, briefings) organized by OSEP. This network will be used to build capacity of participants, increase the impact of funding, and promote innovative and interdisciplinary service delivery models across projects;

(12) Ensure that if the project maintains a website, relevant information and documents are in a format that meets government or industry-recognized standards for accessibility; and

(13) Ensure that annual data will be submitted on each scholar who receives grant support (OMB Control Number 1820–0686). The primary purposes of the data collection are to track the service obligation fulfillment of scholars who receive funds from OSEP grants and to collect data for program performance measure reporting under the Government Performance and Results Modernization Act of 2010 (GPRA). Applicants are encouraged to visit the Personnel Development Program Data Collection System (DCS) website at *https://pdp.ed.gov/osep* for further information about this data collection requirement. Typically, data collection begins in January of each year, and grantees are notified by email about the data collection period for their grant, although grantees may submit data as needed, year round. This data collection must be submitted electronically by the grantee and does not supplant the annual grant performance report required of each grantee for continuation funding (see 34 CFR 75.590). Data collection includes the submission of a signed, completed Pre-Scholarship Agreement and Exit Certification for each scholar funded under an OSEP grant (see paragraph (5) of these requirements).

Competitive Preference Priorities: Within this absolute priority, we give competitive preference to applications that address the following priorities. Under 34 CFR 75.105(c)(2)(i), we award an additional 3 points to an application that meets Competitive Preference Priority 1, and an additional 2 points to an application that meets Competitive Preference 2. The maximum amount of competitive preference priority points an application can receive under this competition is 5. Applicants should indicate in the abstract which, if any, competitive preference priorities are addressed.

These priorities are:

Competitive Preference Priority 1—Applications from New Potential Grantees (0 or 3 points).

(a) Under this priority, an applicant must demonstrate that the applicant has not had an active discretionary grant under the 84.325K program from which it seeks funds, including through membership in a group application submitted in accordance with 34 CFR 75.127–75.129, five years before the deadline date for submission of applications under the program.

(b) For the purpose of this priority, a grant or contract is active until the end of the grant's or contract's project or funding period, including any extensions of those periods that extend the grantee's or contractor's authority to obligate funds.

Competitive Preference Priority 2—Preparing Nontraditional Scholars (0 or 2 points).

Projects that are designed to intentionally recruit, prepare, and support nontraditional scholars [13] to obtain their degree in early intervention, special education, or related services.

References

Boe, E.E., deBettencourt, L., Dewey, J.F., Rosenberg, M.S., Sindelar, P.T., & Leko, C.D. (2013). Variability in demand for special education teachers: Indicators, explanations, and impacts. *Exceptionality, 21*(2), 103–125.

Browder, D.M., Wood, L., Thompson, J., & Ribuffo, C. (2014). *Evidence-based practices for students with severe disabilities* (Document No. IC–3). *http://ceedar.education.ufl.edu/tool/innovation-configurations/.*

Individuals with Disabilities Education Act, 20 U.S.C. 1400, *et seq.* (2004).

McLeskey, J., & Brownell, M. (2015). *High-leverage practices and teacher preparation in special education* (Document No. PR–1). *http://ceedar.education.ufl.edu/wp-content/uploads/2016/05/High-Leverage-Practices-and-Teacher-Preparation-in-Special-Education.pdf.*

National Professional Development Center on Inclusion. (August, 2011). *Competencies for early childhood educators in the context of inclusion: Issues and guidance for States.* The University of North Carolina, FPG Child Development Institute.

Smith, J. (2010). An interdisciplinary approach to preparing early intervention professionals: A university and community collaborative initiative. *Teacher Education and Special Education, 33*(2), 131–142.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the absolute priority and Competitive Preference Priority 2 in this notice.

Program Authority: 20 U.S.C. 1462 and 1481.

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 304. (e) The Administrative Priorities.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

[13] For the purpose of this priority, ''nontraditional scholars'' refer to individuals who are career switchers, para-educators, former members of the military, returning to the workforce, or returning from the Peace Corps, and who hold a bachelor's degree in an area other than in education or related services.

Estimated Available Funds: $8,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2022 from the list of unfunded applications from this competition.

Estimated Range of Awards: $200,000–$250,000.

Estimated Average Size of Awards: $225,000.

Maximum Award: We will not make an award exceeding $250,000 for a single budget period of 12 months.

Estimated Number of Awards: 32.

Project Period: Up to 60 months.

Note: The Department is not bound by any estimates in this notice.

III. Eligibility Information

1. *Eligible Applicants:* IHEs and private nonprofit organizations.

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. a. *Cost Sharing or Matching:* Cost sharing or matching is not required for this competition.

b. *Indirect Cost Rate Information:* This program uses a training indirect cost rate. This limits indirect cost reimbursement to an entity's actual indirect costs, as determined in its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. For more information regarding training indirect cost rates, see 34 CFR 75.562. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application. Under 34 CFR 75.708(e), a grantee may contract for supplies, equipment, and other services in accordance with 2 CFR part 200.

4. *Other General Requirements:*

a. Recipients of funding under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

b. Applicants for, and recipients of, funding must, with respect to the aspects of their proposed project relating to the absolute priority, involve individuals with disabilities, or parents of individuals with disabilities ages birth through 26, in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 50 pages and (2) use the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the abstract (follow the guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the appendices. However, the recommended page limit does apply to all of the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are as follows:

(a) *Significance (10 points).*

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The extent to which the proposed project will prepare personnel for fields in which shortages have been demonstrated; and

(ii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement.

(b) *Quality of project services (45 points).*

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In determining the quality of the project services, the Secretary considers the following factors:

(i) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice;

(ii) The extent to which the training or professional development services to be provided by the proposed project are

of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services;

(iii) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services; and

(iv) The extent to which the proposed activities constitute a coherent, sustained program of training in the field.

(c) *Quality of the project evaluation (25 points).*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project;

(ii) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable;

(iii) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible; and

(iv) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

(d) *Quality of project personnel, quality of the management plan, and adequacy of resources (20 points).*

(1) The Secretary considers the quality of the project personnel, the quality of the management plan, and the adequacy of resources for the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of key project personnel;

(ii) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks;

(iii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project;

(iv) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization; and

(v) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications.

4. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions, and under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

5. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

6. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in

alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115—232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:* For the purposes of the Government Performance and Results Act of 1993 (GPRA) and reporting under 34 CFR 75.110, the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Personnel Development to Improve Services and Results for Children with Disabilities program. These measures include: (1) The percentage of preparation programs that incorporate scientifically or evidence-based practices into their curricula; (2) the percentage of scholars completing the preparation program who are knowledgeable and skilled in evidence-based practices that improve outcomes for children with disabilities; (3) the percentage of scholars who exit the preparation program prior to completion due to poor academic performance; (4) the percentage of scholars completing the preparation program who are working in the area(s) in which they were prepared upon program completion; (5) the Federal cost per scholar who completed the preparation program; (6) the percentage of scholars who completed the preparation program and are employed in high-need districts; and (7) the percentage of scholars who completed the preparation program and who are rated effective by their employers.

In addition, the Department will gather information on the following outcome measures: The number and percentage of scholars proposed by the grantee in their application that were actually enrolled and making satisfactory academic progress in the current academic year; the number and percentage of enrolled scholars who are on track to complete the training program by the end of the project's original grant period; and the percentage of scholars who completed the preparation program and are employed in the field of special education for at least two years.

Grantees may be asked to participate in assessing and providing information on these aspects of program quality.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.*

Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

David Cantrell,

Deputy Director, Office of Special Education Programs. Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2021–07506 Filed 4–12–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Activities for Traditionally Underserved Populations

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2021 for Activities for Traditionally Underserved Populations—Assistance Listing Number 84.315C—to make awards to minority entities and Indian Tribes to improve services under the Rehabilitation Act of 1973, as amended (Rehabilitation Act), especially services provided to individuals from minority backgrounds. This notice relates to the approved information collection under OMB control number 1820–0018.

DATES:

Applications Available: April 13, 2021.

Deadline for Transmittal of Applications: June 14, 2021.

Date of Pre-Application Meeting: The Office of Special Education and Rehabilitative Services (OSERS) will post a PowerPoint presentation that provides general information about the Rehabilitation Services Administration's (RSA) discretionary grants and a PowerPoint presentation specifically about Activities for Traditionally Underserved Populations at *https://ncrtm.ed.gov/RSAGrantInfo.aspx.* OSERS will conduct a pre-application meeting specific to this competition via conference call to respond to questions. Information about the pre-application meeting will be available at *https://ncrtm.ed.gov/RSAGrantInfo.aspx* prior to the date of the call. OSERS invites you to send questions to *84.315C@ed.gov* in advance of the pre-application meeting. The teleconference information, including the 84.315C pre-application meeting summary of questions and answers, will be available at *https://ncrtm.ed.gov/RSAGrantInfo.aspx* within six days after the pre-application meeting.

Deadline for Intergovernmental Review: August 11, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Kristen Rhinehart-Fernandez, U.S. Department of Education, 400 Maryland Avenue SW, Room 5094, Potomac Center Plaza, Washington, DC 20202–2800. Telephone (202) 245–6103. Email: *84.315C@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: Activities for Traditionally Underserved Populations are designed to improve the quality, access, delivery of services, and the outcomes of those services under the Rehabilitation Act, especially services provided to individuals with disabilities from minority backgrounds, and to increase the capacity of minority entities and Indian Tribes to participate in activities funded under the Rehabilitation Act.

Priority: This priority is from the notice of final priority and requirements (NFP) for this program published elsewhere in this issue of the **Federal Register**.

Absolute Priority: For FY 2021, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Improving the Delivery of Vocational Rehabilitation Services to, and the Employment Outcomes of, Individuals with Disabilities from Minority Backgrounds.

This priority funds a five-year cooperative agreement to focus on changing the status quo and improving outcomes for individuals with disabilities from minority backgrounds through providing cultural competency training and promoting application for vocational rehabilitation (VR) leadership and staff, collecting and analyzing relevant data, evaluating cultural competency training, and disseminating evidence-based practices. VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies need to be adequately prepared to effectively meet the needs of individuals with disabilities, especially those from minority backgrounds.

Project Activities:

To be considered for funding under this priority, applicants must, at a minimum, propose a project that will conduct the following activities in a culturally appropriate manner:

(a) Collect and analyze data, including from RSA–911 data [1] and other relevant sources, about the minority populations and subpopulations identified in the application. Data may include, but is not limited to, employment outcomes, earnings, retention, length of time in VR, challenges or barriers to employment and retention, education, and other relevant data, as available;

(b) Share the data about the identified minority populations and subpopulations with RSA, State VR agencies, RSA VR technical assistance centers, and other relevant partners and stakeholders;

(c) Develop new or modify existing cultural competency training curricula for VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies. To satisfy this requirement, the curricula must—-

(1) Contain knowledge, critical awareness, and skills development that confront structural and systemic racism;

(2) Address:

(i) Actions that lead to change, such as full inclusion and participation in the mainstream of society, an individual's right to pursue a meaningful career, respect for self-determination and informed choice, and competitive employment;

(ii) Exploration of unconscious and conscious biases, privilege, stereotypes, prejudicial attitudes, and the dynamics of oppression on an individual; and

(iii) Examination of microaggressions, service culture, policies and practices, and lack of trust in the State VR agency;

(3) Incorporate principles of person-centered planning;

[1] The RSA–911 collects a variety of participant characteristics (sex, age, race, disability, health insurance, education level, etc.), barriers to employment (ex-offender, homeless, single parent, etc.), services provided (career, training, and other services), duration of VR case, employment status at the time of exit from the program, and employment status post-exit.

(4) Incorporate culturally appropriate and culturally sensitive training methods;

(5) Include evidence-based [2] content, to the extent possible; and

(6) Include other critical content, as determined by the project;

(d) Gather input and feedback from a diverse group of stakeholders and subject matter experts to inform the curricula, competencies, training and application, and evaluation, including RSA, State VR agencies, and other relevant partners;

(e) Require, as part of the training, that participants develop action plans to continue applying the knowledge, practices, and awareness gained from the training in their respective work settings;

(f) Create two cohorts to pilot the cultural competency training by the end of the first year and evaluate the results. The cohorts must be comprised of VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies. For the first cohort, the grantee must collect pre- and post-assessments and feedback from participants. After the first cohort, the grantee must make revisions and improvements to the training curricula and competencies, as necessary. The grantee must then test the training in a second cohort to determine if the revisions and improvements worked.

(g) Deliver cultural competency training to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies in years two, three, four, and five. To meet this requirement, the grantee will—

(1) Conduct outreach to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies so that they are aware of, and can participate in, cultural competency training;

(2) Offer training using a variety of methods such as a traditional classroom setting, distance learning facilitated by qualified instructors, regional trainings, and through other delivery methods, as appropriate, to meet the needs of the targeted audience;

(3) Use an online learning platform that is user friendly, compatible with most mobile devices and State VR agency platforms, and meets government and industry-recognized standards for accessibility and cybersecurity;

(4) Use grant funds to offset costs associated with travel for participants, as needed;

(5) Conduct an assessment before and after providing training for each participant to establish baseline knowledge, and assess strengths and specific areas for improvement, attainment, and application of skills, and any issues or challenges to be addressed post-training to ensure improved delivery of VR services to the minority populations and subpopulations identified in the application;

(6) Assess participant progress towards completing their action plans and provide coaching to address issues or challenges, as needed; and

(7) Offer continuing education units (CEUs), Commission on Rehabilitation Counseling Credit (CRCC), Certified Rehabilitation Counselor (CRC) credit, a certificate of completion, or another form of documentation or verification, as appropriate, to participants that successfully complete the training and fulfill their action plans.

(h) Enable State VR agencies to apply cultural competency practices to various activities of State VR agencies. In Assume Nothing! A Monograph from the 38th Institute on Rehabilitation Issues to Address Underserved Populations, Including Individuals Who Are Deaf-Blind (2014), several recommendations were offered to help State VR agencies remove attributes of service design and delivery that may result in inequality. In line with those recommendations, to meet this requirement, applicants must—

(1) Examine reasons for successful and unsuccessful closures among minority VR program participants and identify disparities between minority and non-minority participants; and collaborate and share data on the disparities between minority and non-minority participants with State VR agencies and the VR–TA Center-Quality Management (VRTAC–QM) and VR TA Center-Quality Employment (VRTAC–QE), which began on October 1, 2020, to inform their work with State VR agency personnel to ensure that management decisions are established that support sustainable changes in the way outreach, intake, and VR services are provided based on the cultural competency training VR personnel receive;

(2) Select two of the following focus areas—

(i) Update or revise existing policies and procedures or develop new action plans to strengthen and improve delivery of services in a culturally appropriate and culturally sensitive manner;

(ii) Establish new partnerships and strengthen existing partnerships with community rehabilitation providers, workforce programs, and other relevant local community agencies and organizations (*i.e.,* agencies and organizations that provide services related to behavior and mental health, substance dependence, and intellectual developmental disabilities) to better meet the needs of individuals with disabilities from minority backgrounds;

(iii) Develop business engagement activities for individuals with disabilities from minority backgrounds;

(iv) Create opportunities to involve participants from minority populations, or subpopulations, as appropriate, in the establishment of policies and procedures that encourage collaboration between State VR agencies and other State agencies;

(v) Develop opportunities for staff development and retention designed to provide new and existing VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel from minority populations and subpopulations with peer-to-peer mentorship, as well as guidance and support they may need to be successful; and

(vi) Any other activity that improves delivery of services to and outcomes for individuals with disabilities from minority backgrounds;

(3) Develop products, offer communities of learning, conduct webinars, and offer other training and technical assistance delivery methods, as appropriate, related to (1) and (2) above; and

(4) Follow up with State VR agencies to support the sustainability of cultural competency practices;

(i) Gather input and feedback from a diverse group of stakeholders and subject matter experts to inform the training curricula, application of cultural competency practices in each selected area of focus, the evaluation, the products developed, and the collaborative work with RSA, State VR agencies, and other relevant partners;

[2] For the purpose of this priority, ''evidence-based'' means the proposed project component is supported, at a minimum, by evidence that demonstrates a rationale (as defined in 34 CFR 77.1), where a key project component included in the project's logic model (as defined in 34 CFR 77.1) is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes (as defined in 34 CFR 77.1).

(j) Evaluate the project. To satisfy this requirement, the grantee must—

(1) Assess whether cultural competency training provided to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies contributed to improvements in the delivery of services to and employment outcomes for individuals with disabilities from minority backgrounds;

(2) Assess whether the application of cultural competency practices led to improvements in policies, approaches, and behaviors in State VR agencies;

(3) Through voluntary focus groups, use of a unique identifier, or another approach that adheres to participant confidentiality requirements in 34 CFR 361.38, gather input and feedback from VR program participants who identify as members of the minority populations or subpopulations described in the application about their experiences to assess whether the cultural competency training and application of cultural competency practices contributed to improvements in the delivery of service; and

(4) Develop a plan for an evaluation that includes, but is not limited to, approaches and methodologies, timelines, instruments, or tools that will be used, a timeline for the evaluation and measurement benchmarks, and a process for gathering feedback from VR counselors and paraprofessionals, human resource and professional development specialists, VR management and leadership personnel, and State VR agencies for continuous improvement throughout years two, three, four, and five of the project;

(k) Develop and maintain a state-of-the-art archiving and dissemination platform, or modify an existing platform, that is open and available to all VR counselors and paraprofessionals, human resource and professional development specialists, VR management and leadership personnel, and State VR agencies. To meet this requirement, the grantee must—

(1) Ensure the archiving and dissemination platform provides a central location for all materials related to the project, such as data collection, reports, training curricula, audiovisual materials, webinars, communities of learning, examples of evidence-based and promising practices related to the selected areas of focus, and other relevant material;

(2) Ensure that all materials developed by the project are accessible to individuals with disabilities in accordance with section 504 of the Rehabilitation Act and title II of the Americans with Disabilities Act, as applicable;

(3) Disseminate information about the project, including products such as outreach, training curricula, presentations, reports, outcomes, and other relevant information through RSA's National Clearinghouse of Rehabilitation Training Materials (NCRTM) (*https://ncrtm.ed.gov/*);

(4) In the final year budget period, ensure the archiving and dissemination platform can be sustained or coordinate with RSA to transition the platform to the NCRTM so that it may be archived and accessible to all after the grant ends;

(5) Disseminate, to all State VR agencies, RSA-funded Rehabilitation Long-Term Training projects and TA Centers, Department-funded programs, and Federal partners, as applicable, the training material for incorporation into existing curricula, as well as products, analysis of data collected, evidence-based and promising practices, and lessons learned. To satisfy this requirement, the grantee must—

(i) Develop participant guides, implementation materials, toolkits, manuals, and other relevant material for instructors, facilitators, State VR agency directors, and human resource and professional development specialists to effectively deliver cultural competency training, in their respective organizations; and

(ii) Provide outreach to and support State VR agencies, RSA-funded Rehabilitation Long-Term Training projects and TA Centers, Department-funded programs, and Federal partners, as applicable, in incorporating or expanding cultural competency training and in applying cultural competency practices across selected focus areas.

Application Requirements: The following application requirements are from the NFP published elsewhere in this issue of the **Federal Register**.

Application Requirements:

To be considered for funding under this priority, applicants must, at a minimum, propose a project that will conduct the following activities in a culturally appropriate manner. The Department encourages innovative approaches to meet these requirements. Applicants must—

(a) Demonstrate, in the narrative section of the application under ''Significance of the Proposed Project,'' the minority populations and subpopulations that will be addressed by this project. To meet this requirement, applicants must—

(1) Describe the disparities that exist with respect to VR services and employment outcomes for individuals with disabilities from minority backgrounds, identify education and training needs and any challenges to obtaining education and employment, and present any relevant data;

(2) Describe how the project proposes to improve VR services for, and employment outcomes of, individuals with disabilities from the identified minority backgrounds and subpopulations;

(3) Describe how data about the identified minority populations and subpopulations will be collected and analyzed to inform the field and the training curricula;

(4) Demonstrate how the proposed project will increase the number of VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel trained in providing culturally competent VR services. To meet this requirement, applicants must—

(i) Describe the cultural competencies that VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel must demonstrate to provide high-quality services to individuals with disabilities from minority backgrounds; and

(ii) Present information about potential challenges or difficulties to effectively provide cultural competency training and to apply cultural competency practices and any evidence-based practices or strategies that may be used to address these challenges;

(b) Demonstrate, in the narrative section of the application under ''Quality of Project Design,'' how the proposed project will meet the requirements and intended outcomes of this priority. To meet this requirement, applicants must—

(1) Describe the plan for implementing the project, including key activities, timelines, milestones, and measurable intended project outcomes. The plan should contain adequate time to develop and pilot the training curricula, as well as develop content to support the selected areas of focus. The plan should also build in alternative ways to deliver training and conduct participant follow-up, in the event that convening face-to-face is not possible due to health and safety concerns;

(2) Describe how the proposed project will gather input and feedback from a diverse group of stakeholders and subject matter experts to inform the curricula, training and application, and evaluation, including communication and coordination with RSA, State VR

agencies, and other relevant partners. The plan must include alternative forms of communication if in-person meetings are not permitted due to health safety and concerns;

(3) Describe how the proposed project will provide outreach to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies so that they are aware of, and can participate in, cultural competency training;

(4) Describe how cultural competency training will be provided to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies and related agencies, which must include—

(i) Proposed methods, frequency, and duration of the training;

(ii) A proposed methodology for determining training topics;

(iii) A description of how the training needs of recipients, including their ability to respond effectively to the training will be assessed;

(iv) Proposed coaching techniques that may be provided to VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel working in State VR agencies or related agencies to address issues or challenges, as needed;

(v) A proposed training module or an outline of a training module to demonstrate how VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel would be trained. The module or outline is a required attachment in the application and must include, at a minimum—

(A) The goals and objectives of the training module;

(B) A description of what participants should know and be able to do as a result of successfully completing the module or presentation;

(C) Up-to-date resources, publications, and other materials that may be used to develop the training module or outline;

(D) Exercises that will provide an opportunity for application of the subject matter;

(E) A description of how participant knowledge, skills, and abilities will be measured; and

(F) A description of how the outcomes and impact of the cultural competency training will be measured;

(5) Describe how the project will incorporate current research and evidence-based and promising practices, including research about adult learning principles and implementation science, in the development of culturally competent training curricula and enable State VR agencies to apply cultural competency practices to various activities of State VR agencies;

(6) Describe how the project will examine reasons for successful and unsuccessful closures among individuals with disabilities from minority backgrounds, identify disparities between minority and non-minority participants, and describe how this information will be shared with State VR agencies and the VRTAC–QM and VRTAC–QE in ways that will inform their work with State VR agency personnel to ensure that management decisions are established that support sustainable changes in the way outreach, intake, and VR services are provided based on the cultural competency training VR personnel receive;

(7) Select two focus areas from the list described in the priority and develop products, offer communities of learning, conduct webinars, and offer other training and technical assistance delivery methods that are of high quality and of sufficient intensity and duration to achieve the intended outcomes of the proposed project. To meet this requirement, applicants must describe—

(i) Knowledge, skills, and experience in each of the selected areas of focus;

(ii) Methods, frequency, and duration of the activities;

(iii) Proposed methodology for determining selected areas of focus; and

(iv) How follow-up will be provided to State VR agencies to support the sustainability of cultural competency practices within the selected areas of focus; and

(8) Describe how the proposed project will use accessible technology to achieve the intended project outcomes.

(c) Demonstrate, in the narrative section of the application under ''Adequacy of Project Resources,'' how the proposed costs are reasonable in relation to the anticipated results and benefits. In order to meet this requirement, applicants must—

(1) Describe any proposed consultants or contractors named in the application, their areas of expertise, and provide rationale to demonstrate the need;

(2) Describe costs associated with technology, including, but not limited to, maintaining an online learning platform, state-of-the-art archiving and dissemination platform, and communication tools (*i.e.,* Microsoft Teams, Zoom, Google, Amazon Chime, Skype, etc.) ensuring all products and services are accessible to individuals with disabilities in accordance with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, as applicable;

(3) Designate funds to travel to Washington, DC, or for virtual conferences and meetings when the in-person meetings are not possible due to health and safety concerns, in the beginning of the second year of the project for a one and one half day meeting to present an analysis of the pilots, training curricula, delivering additional activities in the selected focus areas, and plans for outreach, dissemination, and evaluation of the project; and

(4) Designate funds to travel to Washington, DC, or virtual conferences and meetings when in-person meetings are not possible due to health and safety concerns, in the final year of the project for a one and one half day meeting to present an analysis of data collected, outcomes, results of the evaluation, evidence-based and promising practices, and lessons learned;

(d) Demonstrate, in the narrative section of the application under ''Quality of Project Personnel,'' how—

(1) The proposed project will encourage applications for employment from persons who are members of groups that have historically been underrepresented based on race, color, national origin, gender, age, or disability, as appropriate;

(2) The proposed key project personnel will demonstrate the qualifications and experience to provide the training required under this priority and to achieve the project's intended outcomes, including how the proposed project personnel have a degree of knowledge and understanding of cultural factors sufficient to ensure the delivery of training in a culturally appropriate manner; and

(3) The proposed project personnel will demonstrate knowledge and experience working with the VR profession, especially in the provision of services to individuals from minority backgrounds and in working with VR counselors, paraprofessionals, human resource and professional development specialists, and State VR agencies;

(e) Demonstrate, in the narrative section of the application under ''Quality of the Management Plan,'' how the applicant will ensure that—

(1) The project's intended outcomes, including the evaluation, will be achieved on time and within budget, through—

(i) Clearly defined responsibilities of key project personnel, consultants, and contractors, as applicable;

(ii) Procedures to track and ensure completion of the action steps, timelines, and milestones established for key project activities, requirements, and deliverables;

(iii) Internal monitoring processes to ensure that the project is being implemented in accordance with the established application, cooperative agreement, once developed, and project plan; and

(iv) Internal financial management controls to ensure accurate and timely obligations, drawdowns, and reporting of grant funds, as well as monitoring contracts, in accordance with the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 CFR part 200 and the terms and conditions of the Federal award;

(2) The allocation of key project personnel, consultants, and contractors, as applicable, including levels of effort of key personnel that are appropriate and adequate to achieve the project's intended outcomes, including an assurance that key personnel will have enough availability to ensure timely communications with stakeholders and RSA;

(3) The products and services are of high quality, relevance, and usefulness, in both content and delivery; and

(4) The proposed project will benefit from a diversity of perspectives, including those of State and local personnel, individuals with disabilities from minority backgrounds, providers, researchers, and policy makers, among others, in its development and operation.

Program Authority: 29 U.S.C. 718(b)(2)(B).

Note: The project will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in the Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, and 86. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The NFP.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: $905,240 in the first year and $910,490 in years two, three, four, and five.

Maximum Award: We will not make an award exceeding $910,490 for a single budget period of 12 months.

Note: This amount will be reduced by an estimated $5,250 in the first year of the award to support peer review for this competition. This amount may change, depending on the final peer review cost.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* Minority entities and Indian Tribes.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contain requirements and information on how to submit an application.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the Activities for Traditionally Underserved Populations program, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Note: The Executive order does not apply to Indian Tribes.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 45 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210, have a maximum score of 100 points, and are as follows:

(a) *Significance.* (20 points)

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The likelihood that the proposed project will result in system change or improvement; and

(ii) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand, services that address the needs of the target population.

(b) *Quality of the project design.* (30 points)

(1) The Secretary considers the quality of the project design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable;

(ii) The extent to which the design for implementing and evaluating the proposed project will result in information to guide replication of project activities or strategies, including information about the effectiveness of the approach or strategies employed by the project;

(iii) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance;

(iv) The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice;

(v) The extent to which the proposed project will establish linkages with other appropriate agencies and organizations providing services to the target population; and

(vi) The extent to which performance feedback and continuous improvement are integral to the design of the proposed project.

(c) *Adequacy of resources.* (15 points)

(1) The Secretary considers the adequacy of resources for the proposed project.

(2) In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

(i) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization;

(ii) The extent to which the budget is adequate to support the proposed project; and

(iii) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(d) *Quality of project personnel.* (15 points)

(1) The Secretary considers the quality of the personnel who will carry out the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of key project personnel; and

(ii) The qualifications, including relevant training and experience, of project consultants or subcontractors.

(e) *Quality of the management plan.* (20 points)

(1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestone for accomplishing project tasks;

(ii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project; and

(iii) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions, and under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115—232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit semiannual and annual performance reports that provide the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* The Government Performance and Results Act of 1993 (GPRA) directs Federal departments and agencies to improve the effectiveness of their programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals.

For the purposes of GPRA and Department reporting under 34 CFR 75.110, we have established the following program measures:

Measure 1: Number and percentage of participants (State VR agency personnel) who successfully complete cultural competency training, including completion of action plans.

Measure 2: Based on the State VR agencies that received training, the number and percentage of individuals with disabilities from minority backgrounds determined eligible to receive VR services.

Measure 3: Based on the State VR agencies that received training, the number and percentage of individuals with disabilities from minority backgrounds that received VR services.

Measure 4: Based on the State VR agencies that received training, the number and percentage of individuals with disabilities from minority backgrounds employed at the time of exit.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Test Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit

your search to documents published by the Department.

David Cantrell,

Deputy Director, Office of Special Education Programs. Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2021–07525 Filed 4–9–21; 4:15 pm]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Inviting Applications for Funds Under the Higher Education Emergency Relief Fund (HEERF), Section 314(a)(2); Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA) for Institutions of Higher Education That Meet the Criteria for the Strengthening Institutions Program (SIP)

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary is announcing the availability of new HEERF grant funding under section 314(a)(2) of the CRRSAA for eligible institutions of higher education (institutions) under the SIP, Assistance Listing Number 84.425M, to address needs directly related to the coronavirus. The Secretary invites applications from eligible institutions that did not previously receive funding under section 18004(a)(2) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) HEERF SIP program and that are included in the CRRSAA Section 314(a)(2) SIP Allocation Table (*www2.ed.gov/offices/list/ope/crrsaa.html*). This notice relates to the approved information collection under OMB control number 1840–0843.

DATES: *Applications Available:* April 13, 2021.

Deadline for Transmittal of Applications: Applications will be accepted on a rolling basis until July 12, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Karen Epps, U.S. Department of Education, 400 Maryland Avenue SW, room 250–64, Washington, DC 20202. Telephone: The Department of Education HEERF Call Center at (202) 377–3711. Email: *HEERF@ed.gov.* Please also visit our HEERF II website at: *https://www2.ed.gov/about/offices/list/ope/crrsaa.html.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

Background: On December 27, 2020, the President signed the CRRSAA into law (Pub. L. 116–260). This law makes available approximately $22.7 billion for institutions under the HEERF, with funding appropriated for the existing (a)(1), (a)(2), and (a)(3) programs previously authorized under section 18004 of the CARES Act, as well as funding for a new (a)(4) program authorized under the CRRSAA.

With this notice, the Secretary is announcing the availability of HEERF grant funds under the CRRSAA section 314(a)(2) SIP (Assistance Listing number 84.425M).

The institutions eligible for funding under SIP include institutions that are generally eligible to apply for the SIP under Title III, part A of the Higher Education Act of 1965, as amended (HEA), and that are listed on the CRRSAA Section 314(a)(2) SIP Allocation Table.

Allocations for SIP will be calculated according to the formula in section 314(a)(2)(A) of the CRRSAA. Under CRRSAA section 314(c), grant awards under these programs may be used to (1) defray expenses associated with coronavirus (including lost revenue, reimbursement for expenses already incurred, technology costs associated with a transition to distance education, faculty and staff trainings, and payroll); (2) carry out student support activities authorized by the HEA that address needs related to coronavirus; and (3) provide financial aid grants to students (including students exclusively enrolled in distance education), which may be used for any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care), or child care. In making financial aid grants to students, an institution must prioritize grants to students with exceptional need, such as students who receive Pell Grants. Institutions are urged to make financial aid grants to students to the maximum extent possible.

Section 314(d)(8) of the CRRSAA provides that institutions that previously received SIP grants under section 18004(a)(2) of the CARES Act are not required to submit new or revised applications to receive funding under the CRRSAA section 314(a)(2) SIP program. As a result, the Department will award supplemental funds to eligible institutions that previously received a section 18004(a)(2) award under the CARES Act, Assistance Listing Number 84.425M (identified by a Grant Award Number beginning with P425M20). No action is required by eligible institutions to receive these supplemental awards. The project director identified on the most current Grant Award Notification (GAN) will automatically receive an email indicating a supplemental award has been made to your institution. Please note that drawing down any amount of these supplemental funds constitutes an institution's acceptance of the new terms and conditions under the CRRSAA and a new Supplemental Agreement, which are included as attachments to this notice for reference.

Institutions that have not yet complied with the reporting requirements of the HEERF grant program may receive delayed supplemental (a)(2) awards and/or may receive awards with a restriction on the ability to draw down those awarded funds (stop payment status) until the institution has satisfied its HEERF reporting obligations.

Institutions that did not receive a CARES Act section 18004(a)(2) SIP award but that are on the Department's published CRRSAA Section 314(a)(2) SIP Allocation Table may apply for and receive section 314(a)(2) SIP grant awards. Pursuant to CRRSAA section 314(f), an institution must apply for funds within 90 days of the publication of this notice.

Program Authority: Section 314 of the CRRSAA, 2021.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

II. Award Information

Type of Award: Formula grants.

Estimated Available Funds: Approximately $241,718,519 will be used to make awards under this program.

Grant Period: Institutions must expend funds received under this program within 12 months of obligation of the funds by the Department.

III. Eligibility Information

1. *Eligible Applicants:* Public and private nonprofit institutions, as defined in sections 101 and 102(c) of the HEA, that are eligible for SIP under part A of title III of the HEA and that appear on the Section 314(a)(2) SIP Allocation Table.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* Subgrantees are not allowed under this program.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to submit their applications using *Grants.gov*. To register to use *Grants.gov*, please visit their ''How to Apply for Grants'' web page (*www.grants.gov/applicants/apply-for-grants.html*), or call their Applicant Support helpdesk at 1–800–518–4726.

Each completed application for the SIP portions must consist of—

- A complete SF–424;
- Supplemental Information for the SF–424;
- The Certification and Agreement for an Award under Section 314(a)(2) (Purple C&A); and
- The Required Notification of Endowment Excise Tax Paid (if applicable).

Note: The applicant must submit the corresponding Certificate and Agreement for the funds requested. Each Certificate and Agreement must be completed and include the correct OPEID and DUNS number of the institution for which you are requesting funds. Each grantee will receive the amount calculated for them and listed in the Department's published Section 314(a)(2) SIP Allocation Table.

2. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. However, under 34 CFR 79.8(a), we waive intergovernmental review in order to make timely awards.

3. *Funding Restrictions:* Funding restrictions are specified in each grantee's Certification and Agreement or Supplemental Agreement.

4. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* In general, to do business with the Department of Education, you must—

(a) Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

(b) Register both your DUNS number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

(c) Provide your DUNS number and TIN on your SAM application; and

(d) Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following website: *http://fedgov.dnb.com/webform.* A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active. The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days. Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a *SAM.gov* Tip Sheet, which you can find at: *www2.ed.gov/fund/grant/apply/sam-faqs.html.*

V. Award Administration Information

1. *Award Notices:* If you receive a grant award under this program, we will send you a Grant Award Notification (GAN), or we may send you an email containing a link to access an electronic version of your GAN.

2. *Reporting:* Reporting requirements are specified in each program's Certification and Agreement or Supplemental Agreement. For transparency and reporting purposes, institutions must continue to publish quarterly on their institutional websites and submit annually to the Department certain reporting requirements, and the Secretary may adjust those requirements to reflect evolving needs. The Department continues to update its interactive Education Stabilization Fund online portal to provide transparency to the public.

VI. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Tiwanda Burse,

Deputy Assistant Secretary for Management & Planning, Office of Postsecondary Education. Delegated authority to perform functions and duties of the Assistant Secretary for the Office of Postsecondary Education.

Appendix—Coronavirus Response and Relief Supplemental Appropriations Act, 2021

Certification and Agreement for an Award Under Section 314 (a)(2) (CFDAs 84.425 J, K, L, M)

Grant Funds for a Section 314(a)(2) Award

The terms, conditions, and requirements governing your institution's (Recipient's) use of these supplemental grant funds awarded pursuant to section 314(a)(2) of the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA) (Pub. L. 116–260) (award or grant)

by the U.S. Department of Education (Department) are governed by section 314 of CRRSAA and the following terms and conditions of this Certification and Agreement (C&A):

Use of Grant Funds

1. Section 314(a)(2) of CRRSAA authorizes the Secretary to make additional awards under parts A and B of title III, parts A and B of title V, and subpart 4 of part A of title VII of the Higher Education Act of 1965, as amended (''HEA''), to address needs directly related to the coronavirus. These awards are in addition to awards made in section 314(a)(1) of CRRSAA and have been allocated by the Secretary proportionally to such programs based on the relative share of funding appropriated to such programs in the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94).

2. Pursuant to section 314(c) of CRRSAA, Recipient may use this award to defray expenses associated with the coronavirus (including lost revenue, reimbursement for expenses already incurred, technology costs associated with a transition to distance education, faculty and staff trainings, and payroll); carry out student support activities authorized by the HEA that address needs related to the coronavirus; and make financial aid grants to students, which may be used for any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care), or child care.

3. Recipient acknowledges that no supplemental grant funds may be used to fund contractors for the provision of pre-enrollment recruitment activities; marketing or recruitment; endowments; capital outlays associated with facilities related to athletics, sectarian instruction, or religious worship; senior administrator or executive salaries, benefits, bonuses, contracts, incentives; stock buybacks, shareholder dividends, capital distributions, and stock options; or any other cash or other benefit for a senior administrator or executive.

4. The Secretary urges Recipient to devote the maximum amount of funds possible to financial aid grants to students. The Secretary urges Recipient to take strong measures to ensure that financial aid grants to students are made to the maximum extent possible.

5. Recipient must notify the Department within 30 days of making a determination that it is required to remit payment to the Internal Revenue Service for the excise tax paid on investment income of private colleges and universities under section 4968 of the Internal Revenue Code of 1986 for tax year 2019 via the Required Notification of Endowment Excise Tax Paid form provided as an attachment to this GAN, pursuant to section 314(d)(6) of CRRSAA. Recipient acknowledges that if it was required to remit payment to the Internal Revenue Service for this excise tax paid, and if it is not an institution that has been designated as an eligible work college under HEA section 448, 20 U.S.C. 1087–58:

a. Recipient must use its remaining available funds only for financial aid grants to students consistent with CRRSAA section 314(c)(3), or for sanitation, personal protective equipment, or other expenses associated with the general health and safety of the campus environment related to the qualifying emergency, unless a waiver of this condition has been requested by Recipient and until approved by the Secretary under CRRSAA section 314(d)(6)(B), and subject to other applicable requirements in section 314.

6. If Recipient is a Historically Black College and University, Tribally Controlled College and University, or a Minority Serving Institution, then consistent with section 314(d)(1) of CRRSAA, Recipient may use prior awards provided under Titles III, V, and VII of the HEA to prevent, prepare for, and respond to coronavirus. Should Recipient avail itself of this flexibility, it must maintain appropriate records and cost documentation as required by 2 CFR 200.302 and 200.333 to separately account for prior award funds used to prevent, prepare for, and respond to coronavirus.

Grant Administration

7. Recipient acknowledges that consistent with 2 CFR 200.305, it must minimize the time between drawing down funds from G5 and paying incurred obligations (liquidation). Recipient further acknowledges that if it draws down funds and does not pay the incurred obligations (liquidates) within 3 calendar days it may be subject to heightened scrutiny by the Department, Recipient's auditors, and/or the Department's Office of the Inspector General (OIG). Recipient further acknowledges that returning funds pursuant to mistakes in drawing down excessive grant funds in advance of need may also be subject to heightened scrutiny by the Department, Recipient's auditors, and/or the Department's OIG. Finally, Recipient acknowledges that it must maintain drawn down grant funds in an interest-bearing account, and any interest earned on all Federal grant funds above $500 (all Federal grants together) during an institution's fiscal year must be returned (remitted) to the Federal government via a process described here: *https://www2.ed.gov/documents/funding-101/g5-returning-interest.pdf.*

8. Recipient may charge indirect costs to supplemental funds made available under this award consistent with its negotiated indirect cost rate agreement. If Recipient does not have a current negotiated indirect cost rate with its cognizant agency for indirect costs, it may appropriately charge the *de minimis* rate of ten percent of Modified Total Direct Costs (MTDC). Recipient may also charge reasonable direct administrative costs to the supplemental funds made available under this award.

9. Recipient acknowledges that any obligation under this grant (pre-award costs pursuant to 2 CFR 200.458) must have been incurred on or after December 27, 2020, the date of the enactment of CRRSAA.

10. Recipient must promptly and to the greatest extent practicable expend all grant funds from this award within the period of performance (2 CFR 200.77) specified in Box 6 of this Grant Award Notification (GAN).

11. Recipient must, to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus pursuant to section 315 of CRRSAA.

12. Recipient acknowledges that its failure to draw down any amount of its supplemental grant funds within 90 days of the date of this supplemental award will constitute nonacceptance of the terms, conditions, and requirements of this Supplemental Agreement and of these supplemental grant funds. In such event, the Department, in its sole discretion, may choose to deobligate these supplemental grant funds or take other appropriate administrative action, up to and including terminating the grant award pursuant to 2 CFR 200.340.

Reporting and Accountability

13. Recipient must promptly and timely report to the Department on the use of funds no later than 6 months after the date of this supplemental award in a manner to be specified by the Secretary pursuant to section 314(e) of CRRSAA. Recipient must also promptly and timely provide a detailed accounting of the use of funds provided by this supplemental award in such manner and with such subsequent frequency as the Secretary may require. Recipient will comply with any other applicable reporting requirements including those in section 15011(b)(2) of Division B of the CARES Act. Recipient acknowledges the Department may require additional or more frequent reporting to be specified by the Secretary.

14. Recipient must comply with all requirements of the Single Audit Act Amendments of 1996, 31 U.S.C. 7501, *et seq.* (Single Audit Act) and all applicable auditing standards. Considering that the HEERF grant program is a new program not previously audited or subjected to Department oversight, and the inherent risk that comes with a new program, the Department strongly suggests that the HEERF grant program be audited as a major program in the first fiscal year(s) that the institution received a HEERF grant.

15. Recipient acknowledges it is under a continuing affirmative duty to inform the Department if Recipient is to close or terminate operations as an institution or merge with another institution. In such cases, Recipient must promptly notify in writing the assigned education program specialist contact in Box 3. Additionally, Recipient must promptly notify the assigned education program officer if the Recipient's Authorized Representative changes.

16. Recipient must cooperate with any examination of records with respect to the advanced funds by making records and authorized individuals available when requested, whether by (i) the Department and/or its OIG; or (ii) any other Federal agency, commission, or department in the lawful exercise of its jurisdiction and authority. Recipient must retain all financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award for a period of three years from the date of submission of the final expenditure report pursuant to 2 CFR 200.334.

17. Recipient acknowledges that failure to comply with this Supplemental Agreement,

its terms and conditions, and/or all relevant provisions and requirements of CRRSAA or any other applicable law may result in Recipient's liability under the False Claims Act, 31 U.S.C. 3729, *et seq.;* OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; 18 U.S.C. 1001, as appropriate; and all of the laws and regulations referenced in the ''Applicable Law'' section of this Supplemental Agreement, below.

Applicable Law

18. Recipient must comply with all applicable assurances in OMB Standard Forms (SF) SF–424B and SF–424D (Assurances for Non-Construction and Assurances for Construction Programs), including the assurances relating to the legal authority to apply for assistance; access to records; conflict of interest; nondiscrimination; Hatch Act provisions; labor standards; Single Audit Act; and the general agreement to comply with all applicable Federal laws, executive orders, and regulations.

19. Recipient certifies that with respect to the certification regarding lobbying in Department Form 80–0013, no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making or supplementing of Federal grants under this program; Recipient must complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' when required (34 CFR part 82, Appendix B).

20. Recipient must comply with the provisions of all applicable acts, regulations and assurances; the following provisions of *Education Department General Administrative Regulations* (EDGAR) 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99; the *OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)* in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Institution Name: _____
Authorized Representative (typed name): _____
Authorized Representative Title: _____
DUNS Number: _____
OPE ID: _____
Date: _____

Paperwork Burden Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The valid OMB control number for this information collection is XXX–XXX. Public reporting burden for this collection of information is estimated to average 5 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this collection is required to obtain or retain benefit (section 314(a)(1) of the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (Pub. L. 116–260)). If you have any comments concerning the accuracy of the time estimate, suggestions for improving this individual collection, or if you have comments or concerns regarding the status of your individual form, application or survey, please contact Karen Epps, 400 Maryland Avenue SW, Washington, DC 20202 directly.

OMB Number: XXXX–XXXX
Expiration Date: XX/XX/XXXX

[FR Doc. 2021–07661 Filed 4–9–21; 4:15 pm]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Inviting Applications for Funds Under the Higher Education Emergency Relief Fund (HEERF), Section 314(a)(2); Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA) for Institutions of Higher Education That Meet the Criteria for the Minority Serving Institutions (MSIs) Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary is announcing the availability of new HEERF grant funding under section 314(a)(2) of the CRRSAA for eligible institutions of higher education (institutions) under the Minority Serving Institutions (MSIs) program, Assistance Listing Number 84.425L, to address needs directly related to the coronavirus. The Secretary invites applications from eligible institutions that did not previously receive funding under section 18004(a)(2) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) HEERF MSI program and that are included in the CRRSAA Section 314(a)(2) MSI Allocation Table (*www.ed2.ed.gov/about/offices/list/ope/crrsaa.html*). The institutions eligible for funding under this part include institutions that generally would be eligible to apply for the following grant programs under the Higher Education Act of 1965, as amended (HEA), and that are listed on the CRRSAA Section 314(a)(2) MSI Allocation Table: Title V, part A Developing Hispanic-Serving Institutions; Title V, part B Promoting Post-baccalaureate Opportunities for Hispanic Americans; and certain Title III, part A programs for Minority Serving Institutions, which are the Strengthening Asian American and Native American Pacific Islander-Serving Institutions (AANAPISI), Strengthening Alaska Native and Native Hawaiian-Serving Institutions (ANNH), Strengthening Native American-Serving Nontribal Institutions (NASNTI), and Strengthening Predominantly Black Institutions (PBI) programs. This notice relates to the approved information collection under OMB control number 1840–0843.

DATES:

Applications Available: April 13, 2021.

Deadline for Transmittal of Applications: Applications will be accepted on a rolling basis until July 12, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the

Federal Register on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Karen Epps, U.S. Department of Education, 400 Maryland Avenue SW, Room 250–64, Washington, DC 20202. Telephone: The Department of Education HEERF Call Center at (202) 377–3711. Email: *HEERF@ed.gov.* Please also visit our HEERF II website at: *https://www2.ed.gov/about/offices/list/ope/crrsaa.html.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

Background: On December 27, 2020, the President signed the CRRSAA into law (Pub. L. 116–260). This law makes available approximately $22.7 billion for institutions under the HEERF, with funding appropriated for the existing (a)(1), (a)(2), and (a)(3) programs previously authorized under section 18004 of the CARES Act, as well as funding for a new (a)(4) program authorized under the CRRSAA.

With this notice, the Secretary is announcing the availability of HEERF grant funds under the CRRSAA section 314(a)(2) MSI program (Assistance Listing Number 84.425L).

Eligible institutions are institutions of higher education, as defined in sections 101 and 102(c) of the HEA, 20 U.S.C. 1001 and 1002(c). Allocations for these programs will be calculated according to the formula in section 314(a)(2)(A) of the CRRSAA. Under CRRSAA section 314(c), grant awards under these programs may be used to (1) defray expenses associated with coronavirus (including lost revenue, reimbursement for expenses already incurred, technology costs associated with a transition to distance education, faculty and staff trainings, and payroll); (2) carry out student support activities authorized by the HEA that address needs related to coronavirus; and (3) provide financial aid grants to students (including students exclusively enrolled in distance education), which may be used for any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care), or child care. In making financial aid grants to students, an institution must prioritize grants to students with exceptional need, such as students who receive Pell Grants. Institutions are urged to make financial aid grants to students to the maximum extent possible.

Section 314(d)(8) of the CRRSAA provides that institutions that previously received grants under section 18004(a)(2) of the CARES Act are not required to submit new or revised applications to receive funding under the CRRSAA section 314(a)(2) MSI program. As a result, the Department will award supplemental funds to eligible institutions that previously received a section 18004(a)(2) award under the CARES Act, Assistance Listing Number 84.425L (identified by a Grant Award beginning with P425L20). No action is required by eligible institutions to receive these supplemental awards. The project director identified on the most current Grant Award Notification (GAN) will automatically receive an email indicating a supplemental award has been made to your institution. Please note that drawing down any amount of these supplemental funds constitutes an institution's acceptance of the new terms and conditions under the CRRSAA and a new Supplemental Agreement, which are included as an attachment to this notice for reference.

Institutions that have not yet complied with the reporting requirements of the HEERF grant program may receive delayed supplemental (a)(2) awards and/or may receive awards with a restriction on the ability to draw down those awarded funds (stop payment status) until the institution has satisfied its HEERF reporting obligations.

Institutions that did not receive a CARES Act section 18004(a)(2) MSI award but that are on the Department's published CRRSAA Section 314(a)(2) MSI Allocation Table may apply for and receive section 314(a)(2) MSI grant awards. Pursuant to CRRSAA section 314(f), an institution must apply for funds within 90 days of the publication of this notice.

Program Authority: Section 314 of the CRRSAA, 2021.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

II. Award Information

Type of Award: Formula grants.

Estimated Available Funds: Approximately $439,994,312 will be used to make awards under this program.

Grant Period: Institutions must expend funds received under this program within 12 months of obligation of the funds by the Department.

III. Eligibility Information

1. *Eligible Applicants:* Public and private nonprofit institutions, as defined in sections 101 and 102(c) of the HEA, that are eligible for certain programs under part A of title III and parts A and B of title V of the HEA.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* Subgrantees are not allowed under this program.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to submit their applications using *Grants.gov*. To register to use *Grants.gov*, please visit their ''How to Apply for Grants'' web page (*www.grants.gov/applicants/apply-for-grants.html*), or call their Applicant Support helpdesk at 1–800–518–4726.

Each completed application for the MSI portion must consist of—

- A complete SF–424;
- Supplemental Information for the SF–424;
- The Certification and Agreement for an Award under Section 314(a)(2) (Purple C&A); and
- The Required Notification of Endowment Excise Tax Paid (if applicable).

Note: The applicant must submit the corresponding Certificate and Agreement for the funds requested. Each Certificate and Agreement must be completed and include the correct OPEID and DUNS number of the institution for which you are requesting funds. Each grantee will receive the amount calculated for them and listed in the Department's published Section 314(a)(2) MSI Allocation Table.

2. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. However, under 34 CFR 79.8(a), we waive intergovernmental review in order to make timely awards.

3. *Funding Restrictions:* Funding restrictions are specified in each program's Certification and Agreement or Supplemental Agreement.

4. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* In general, to do business with the Department of Education, you must—

(a) Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

(b) Register both your DUNS number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

(c) Provide your DUNS number and TIN on your SAM application; and

(d) Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following website: *http://fedgov.dnb.com/webform.* A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active. The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days. Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a *SAM.gov* Tip Sheet, which you can find at: *www2.ed.gov/fund/grant/apply/sam-faqs.html.*

V. Award Administration Information

1. *Award Notices:* If you receive a grant award under this program, we will send you a Grant Award Notification (GAN), or we may send you an email containing a link to access an electronic version of your GAN.

2. *Reporting:* Reporting requirements are specified in each program's Certification and Agreement or Supplemental Agreement. For transparency and reporting purposes, institutions must continue to publish quarterly on their institutional websites and submit annually to the Department certain reporting requirements, and the Secretary may adjust those requirements to reflect evolving needs. The Department continues to update its interactive Education Stabilization Fund online portal to provide transparency to the public.

VI. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Tiwanda Burse,

Deputy Assistant Secretary for Management & Planning, Office of Postsecondary Education. Delegated authority to perform functions and duties of the Assistant Secretary for the Office of Postsecondary Education.

Appendix—Coronavirus Response and Relief Supplemental Appropriations Act, 2021

Certification and Agreement for an Award under Section 314(a)(2) (CFDAs 84.425 J, K, L, M)

Grant Funds for a Section 314(a)(2) Award

The terms, conditions, and requirements governing your institution's (Recipient's) use of these supplemental grant funds awarded pursuant to section 314(a)(2) of the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA) (Pub. L. 116–260) (award or grant) by the U.S. Department of Education (Department) are governed by section 314 of CRRSAA and the following terms and conditions of this Certification and Agreement (C&A):

Use of Grant Funds

1. Section 314(a)(2) of CRRSAA authorizes the Secretary to make additional awards under parts A and B of title III, parts A and B of title V, and subpart 4 of part A of title VII of the Higher Education Act of 1965, as amended (''HEA''), to address needs directly related to the coronavirus. These awards are in addition to awards made in section 314(a)(1) of CRRSAA and have been allocated by the Secretary proportionally to such programs based on the relative share of funding appropriated to such programs in the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94).

2. Pursuant to section 314(c) of CRRSAA, Recipient may use this award to defray expenses associated with the coronavirus (including lost revenue, reimbursement for expenses already incurred, technology costs associated with a transition to distance education, faculty and staff trainings, and payroll); carry out student support activities authorized by the HEA that address needs related to the coronavirus; and make financial aid grants to students, which may be used for any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care), or child care.

3. Recipient acknowledges that no supplemental grant funds may be used to fund contractors for the provision of pre-enrollment recruitment activities; marketing or recruitment; endowments; capital outlays associated with facilities related to athletics, sectarian instruction, or religious worship; senior administrator or executive salaries, benefits, bonuses, contracts, incentives; stock buybacks, shareholder dividends, capital distributions, and stock options; or any other cash or other benefit for a senior administrator or executive.

4. The Secretary urges Recipient to devote the maximum amount of funds possible to financial aid grants to students. The Secretary urges Recipient to take strong measures to ensure that financial aid grants to students are made to the maximum extent possible.

5. Recipient must notify the Department within 30 days of making a determination that it is required to remit payment to the Internal Revenue Service for the excise tax paid on investment income of private colleges and universities under section 4968 of the Internal Revenue Code of 1986 for tax year 2019 via the Required Notification of Endowment Excise Tax Paid form provided as an attachment to this GAN, pursuant to section 314(d)(6) of CRRSAA. Recipient acknowledges that if it was required to remit payment to the Internal Revenue Service for this excise tax paid, and if it is not an institution that has been designated as an eligible work college under HEA section 448, 20 U.S.C. 1087–58:

a. Recipient must use its remaining available funds only for financial aid grants to students consistent with CRRSAA section 314(c)(3), or for sanitation, personal protective equipment, or other expenses associated with the general health and safety of the campus environment related to the qualifying emergency, unless a waiver of this condition has been requested by Recipient and until approved by the Secretary under CRRSAA section 314(d)(6)(B), and subject to other applicable requirements in section 314.

6. If Recipient is a Historically Black College and University, Tribally Controlled College and University, or a Minority Serving Institution, then consistent with section 314(d)(1) of CRRSAA, Recipient may use prior awards provided under Titles III, V, and VII of the HEA to prevent, prepare for, and respond to coronavirus. Should Recipient avail itself of this flexibility, it must maintain appropriate records and cost documentation as required by 2 CFR 200.302 and 200.333 to separately account for prior award funds used to prevent, prepare for, and respond to coronavirus.

Grant Administration

7. Recipient acknowledges that consistent with 2 CFR 200.305, it must minimize the time between drawing down funds from G5 and paying incurred obligations (liquidation). Recipient further acknowledges that if it draws down funds and does not pay the incurred obligations (liquidates) within 3 calendar days it may be subject to heightened scrutiny by the Department, Recipient's auditors, and/or the Department's Office of the Inspector General (OIG). Recipient further acknowledges that returning funds pursuant to mistakes in drawing down excessive grant funds in advance of need may also be subject to heightened scrutiny by the Department, Recipient's auditors, and/or the Department's OIG. Finally, Recipient acknowledges that it must maintain drawn down grant funds in an interest-bearing account, and any interest earned on all Federal grant funds above $500 (all Federal grants together) during an institution's fiscal year must be returned (remitted) to the Federal government via a process described here: *https://www2.ed.gov/documents/funding-101/g5-returning-interest.pdf.*

8. Recipient may charge indirect costs to supplemental funds made available under this award consistent with its negotiated indirect cost rate agreement. If Recipient does not have a current negotiated indirect cost rate with its cognizant agency for indirect costs, it may appropriately charge the *de minimis* rate of ten percent of Modified Total Direct Costs (MTDC). Recipient may also charge reasonable direct administrative costs to the supplemental funds made available under this award.

9. Recipient acknowledges that any obligation under this grant (pre-award costs pursuant to 2 CFR 200.458) must have been incurred on or after December 27, 2020, the date of the enactment of CRRSAA.

10. Recipient must promptly and to the greatest extent practicable expend all grant funds from this award within the period of performance (2 CFR 200.77) specified in Box 6 of this Grant Award Notification (GAN).

11. Recipient must, to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus pursuant to section 315 of CRRSAA.

12. Recipient acknowledges that its failure to draw down any amount of its supplemental grant funds within 90 days of the date of this supplemental award will constitute nonacceptance of the terms, conditions, and requirements of this Supplemental Agreement and of these supplemental grant funds. In such event, the Department, in its sole discretion, may choose to deobligate these supplemental grant funds or take other appropriate administrative action, up to and including terminating the grant award pursuant to 2 CFR 200.340.

Reporting and Accountability

13. Recipient must promptly and timely report to the Department on the use of funds no later than 6 months after the date of this supplemental award in a manner to be specified by the Secretary pursuant to section 314(e) of CRRSAA. Recipient must also promptly and timely provide a detailed accounting of the use of funds provided by this supplemental award in such manner and with such subsequent frequency as the Secretary may require. Recipient will comply with any other applicable reporting requirements including those in section 15011(b)(2) of Division B of the CARES Act. Recipient acknowledges the Department may require additional or more frequent reporting to be specified by the Secretary.

14. Recipient must comply with all requirements of the Single Audit Act Amendments of 1996, 31 U.S.C. 7501, *et seq.* (Single Audit Act) and all applicable auditing standards. Considering that the HEERF grant program is a new program not previously audited or subjected to Department oversight, and the inherent risk that comes with a new program, the Department strongly suggests that the HEERF grant program be audited as a major program in the first fiscal year(s) that the institution received a HEERF grant.

15. Recipient acknowledges it is under a continuing affirmative duty to inform the Department if Recipient is to close or terminate operations as an institution or merge with another institution. In such cases, Recipient must promptly notify in writing the assigned education program specialist contact in Box 3. Additionally, Recipient must promptly notify the assigned education program officer if the Recipient's Authorized Representative changes.

16. Recipient must cooperate with any examination of records with respect to the advanced funds by making records and authorized individuals available when requested, whether by (i) the Department and/or its OIG; or (ii) any other Federal agency, commission, or department in the lawful exercise of its jurisdiction and authority. Recipient must retain all financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award for a period of three years from the date of submission of the final expenditure report pursuant to 2 CFR 200.334.

17. Recipient acknowledges that failure to comply with this Supplemental Agreement, its terms and conditions, and/or all relevant provisions and requirements of CRRSAA or any other applicable law may result in Recipient's liability under the False Claims Act, 31 U.S.C. 3729, *et seq.;* OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; 18 U.S.C. 1001, as appropriate; and all of the laws and regulations referenced in the ''Applicable Law'' section of this Supplemental Agreement, below.

Applicable Law

18. Recipient must comply with all applicable assurances in OMB Standard Forms (SF) SF–424B and SF–424D (Assurances for Non-Construction and Assurances for Construction Programs), including the assurances relating to the legal authority to apply for assistance; access to records; conflict of interest; nondiscrimination; Hatch Act provisions; labor standards; Single Audit Act; and the general agreement to comply with all applicable Federal laws, executive orders, and regulations.

19. Recipient certifies that with respect to the certification regarding lobbying in Department Form 80–0013, no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making or supplementing of Federal grants under this program; Recipient must complete and submit Standard Form–LLL, ''Disclosure Form to Report Lobbying,'' when required (34 CFR part 82, Appendix B).

20. Recipient must comply with the provisions of all applicable acts, regulations and assurances; the following provisions of *Education Department General Administrative Regulations* (EDGAR) 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99; the *OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)* in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Institution Name: _____
Authorized Representative (typed name): _____
Authorized Representative Title: _____
DUNS Number: _____

OPE ID: _____
Date: _____

Paperwork Burden Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The valid OMB control number for this information collection is XXX–XXX. Public reporting burden for this collection of information is estimated to average 5 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this collection is required to obtain or retain benefit (section 314(a)(1) of the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (Pub. L. 116–260)). If you have any comments concerning the accuracy of the time estimate, suggestions for improving this individual collection, or if you have comments or concerns regarding the status of your individual form, application or survey, please contact Karen Epps, 400 Maryland Avenue SW, Washington, DC 20202 directly.

OMB Number: XXXX–XXXX
Expiration Date: XX/XX/XXXX

[FR Doc. 2021–07658 Filed 4–9–21; 4:15 pm]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of Open Virtual Meeting.

SUMMARY: This notice announces an online virtual meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act requires that public notice of this online virtual meeting be announced in the **Federal Register**.

DATES: Wednesday, May 19, 2021; 1:00 p.m.–5:00 p.m.

ADDRESSES: This meeting will be held virtually via Webex. To attend, please contact Menice Santistevan by email, *Menice.Santistevan@em.doe.gov*, no later than 5:00 p.m. MT on Monday, May 17, 2021.

To Sign Up for Public Comment: Please contact Menice Santistevan by email, *Menice.Santistevan@em.doe.gov*, no later than 5:00 p.m. MT on Monday, May 17, 2021.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board (NNMCAB), 94 Cities of Gold Road, Santa Fe, NM 87506. Phone (505) 995–0393 or email: *Menice.Santistevan@em.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

- Overview and Approval of Agenda
- Approval of March 17, 2021 Minutes
- Old Business
  - Report from NNMCAB Chair and Vice Chair
  - Report from NNMCAB Committee Chairs
- New Business
- Proposal to Update New Mexico Water Quality Standards: Copper Site-Specific Water Quality Criteria for the Pajarito Plateau
- Public Comment Period
- Presentation on Surface, Groundwater and Soil Sampling Program
- Update from EM Los Alamos Field Office and NNMCAB Deputy Designated Federal Officer
- Update from N3B
- Update from New Mexico Environment Department
- Future Presentation Requests

Public Participation: The online virtual meeting is open to the public. Written statements may be filed with the Board either before or within five days after the meeting by sending them to Menice Santistevan at the aforementioned email address. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or telephone number listed above. Minutes and other Board documents are on the internet at: *https://www.energy.gov/em/nnmcab/meeting-materials.*

Signed in Washington, DC on April 8, 2021.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2021–07555 Filed 4–12–21; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[See Item Specific ICR Titles Provided in the Text; FRL–10022–42–OAR]

Proposed Information Collection Request; Comment Request; 41 Source Categories

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency is planning to submit the below listed information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. These are proposed extensions of the currently approved ICRs. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before June 14, 2021.

ADDRESSES: Submit your comments, referencing the Docket ID numbers provided for each item in the text, online using *https://www.regulations.gov/* (our preferred method), by email to *a-and-r-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

The EPA's policy is that all relevant comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information or other information whose disclosure is restricted by statute. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and

faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Mr. Muntasir Ali, Sector Policies and Programs Division, (D243–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919)–541–0833; email address: *Ali.Muntasir@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *https://www.regulations.gov/* or in person at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *https://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, the EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. Burden is defined at 5 CFR 1320.03(b). EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

General Abstract: For the first ICR in this notice (item (1) below), regulated entities are required to submit initial notifications when an aerosol coating is manufactured and notification of changes in the initial report, to report formulation data and exemptions claimed, and to maintain records. In addition, regulated entities are required to submit triennial reports that include formulation data and VOC usage. The reports required enable the EPA to determine compliance with the national VOC emission standards for aerosol coatings. For the remaining listed ICRs in this notice, owners and operators of affected facilities are required to comply with reporting and record keeping requirements for the general provisions of 40 CFR part 60, subpart A or part 63, subpart A, as well as the applicable specific standards. This includes submitting initial notifications, performance tests and periodic reports and results, and maintaining records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These reports are used by EPA to determine compliance with the standards.

(1) *Docket ID Number:* EPA–HQ–OAR–2006–0971; National Volatile Organic Compound Emission Standards for Aerosol Coatings (40 CFR part 59, subpart E) (Renewal); EPA ICR Number 2289.05; OMB Control Number 2060–0617; Expiration date November 30, 2021.

Respondents: Manufacturers, distributors, and importers of aerosol coatings.

Respondent's obligation to respond: Mandatory (40 CFR part 59, subpart E).

Estimated number of respondents: 65.

Frequency of response: Annually, triennially.

Estimated Annual burden: 12,259 hours.

Estimated Annual cost: $855,113, includes no annualized capital or operations & maintenance (O&M) costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(2) *Docket ID Number:* EPA–HQ–OAR–2021–0085; New Source Performance Standards (NSPS) for New Residential Wood Heaters (40 CFR part 60, subpart AAA) (Renewal); EPA ICR Number 1176.14; OMB Control Number 2060–0161; Expiration date March 31, 2022.

Respondents: Residential wood heaters.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart AAA).

Estimated number of respondents: 45.

Frequency of response: Annually.

Estimated Annual burden: 4,320 hours.

Estimated Annual cost: $1,210,000, includes $740,000 annualized capital or operations & maintenance (O&M) costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(3) *Docket ID Number:* EPA–HQ–OAR–2021–0087; National Emission Standards for Hazardous Air Pollutants (NESHAP) for Benzene Waste Operations (40 CFR part 61, subpart FF) (Renewal); EPA ICR Number 1541.13; OMB Control Number 2060–0183; Expiration date March 31, 2022.

Respondents: Facilities that generate waste containing benzene.

Respondent's obligation to respond: Mandatory (40 CFR part 61, subpart FF).

Estimated number of respondents: 270.

Frequency of response: Quarterly and annually.

Estimated Annual burden: 19,500 hours.

Estimated Annual cost: $2,130,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(4) *Docket ID Number:* EPA–HQ–OAR–2021–0089; NESHAP for Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks (40 CFR part 63, subpart N) (Renewal); EPA ICR Number 1611.13; OMB Control Number 2060–0327; Expiration date March 31, 2022.

Respondents: Hard and decorative chromium electroplating and chromium anodizing tanks.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart N).

Estimated number of respondents: 1,343.

Frequency of response: Quarterly, semiannually, and annually.

Estimated Annual burden: 242,000 hours.

Estimated Annual cost: $46,900,000, includes $20,400,000 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(5) *Docket ID Number:* EPA–HQ–OAR–2021–0090; NESHAP for Flexible Polyurethane Foam Product (40 CFR part 63, subpart III) (Renewal); EPA ICR Number 1783.10; OMB Control Number 2060–0357; Expiration date March 31, 2022.

Respondents: Flexible polyurethane foam production facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart III).

Estimated number of respondents: 12.

Frequency of response: Semiannually and annually.

Estimated Annual burden: 869 hours.

Estimated Annual cost: $94,700, includes no annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(6) *Docket ID Number:* EPA–HQ–OAR–2021–0091; NESHAP for Pesticide Active Ingredient Production (40 CFR part 63, subpart MMM) (Renewal); EPA ICR Number 1807.10; OMB Control Number 2060–0370; Expiration date March 31, 2022.

Respondents: Pesticide active ingredient production facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart MMM)

Estimated number of respondents: 18.

Frequency of response: Quarterly and semiannually.

Estimated Annual burden: 12,100 hours.

Estimated Annual cost: $1,350,000, includes $26,500 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(7) *Docket ID Number:* EPA–HQ–OAR–2021–0093; NESHAP for Ferroalloys Production: Ferromanganese and Silicomanganese (40 CFR part 63, subpart XXX) (Renewal); EPA ICR Number 1831.08; OMB Control Number 2060–0391; Expiration date March 31, 2022.

Respondents: Facilities that produce ferroalloys.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart XXX).

Estimated number of respondents: 2.

Frequency of response: Quarterly, semiannually, and annually.

Estimated Annual burden: 1,170 hours.

Estimated Annual cost: $133,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is a projected increase in burden due to incorporation of burden from previously promulgated rule amendments.

(8) *Docket ID Number:* EPA–HQ–OAR–2021–0108; NESHAP for Metal Coil Surface Coating Plants (40 CFR part 63, subpart SSSS) (Renewal); EPA ICR Number 1957.11; OMB Control Number 2060–0487; Expiration date March 31, 2022.

Respondents: Metal coil surface coating facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart SSSS).

Estimated number of respondents: 48.

Frequency of response: Semiannually and occasionally.

Estimated Annual burden: 16,100 hours.

Estimated Annual cost: $1,820,000, includes $57,600 annualized capital or O&M costs.

Changes in Estimates: There is a projected increase in burden due to incorporation of burden from previously promulgated rule amendments.

(9) *Docket ID Number:* EPA–HQ–OAR–2021–0111; NESHAP for Industrial, Commercial, and Institutional Boilers and Process Heaters (40 CFR part 63, subpart DDDDD) (Renewal); EPA ICR Number 2028.12; OMB Control Number 2060–0551; Expiration date March 31, 2022.

Respondents: Industrial, commercial, and institutional boilers and process heaters.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart DDDDD).

Estimated number of respondents: 2,012.

Frequency of response: Semiannually, annually, biennially, and five-year.

Estimated Annual burden: 199,000 hours.

Estimated Annual cost: $196,000,000, includes $131,000,000 annualized capital or O&M costs.

Changes in Estimates: There is a projected increase in burden due to an increase in the number of sources subject to the regulation.

(10) *Docket ID Number:* EPA–HQ–OAR–2021–0112; NESHAP for Printing, Coating and Dyeing of Fabrics and Other Textiles (40 CFR part 63, subpart OOOO) (Renewal); EPA ICR Number 2071.10; OMB Control Number 2060–0522; Expiration date March 31, 2022.

Respondents: Printing, coating, slashing, dyeing, or finishing of fabric and other textiles facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart OOOO).

Estimated number of respondents: 43.

Frequency of response: Semiannually.

Estimated Annual burden: 7,248 hours.

Estimated Annual cost: $160,000, includes $110,000 annualized capital or O&M costs.

Changes in Estimates: There is a projected decrease in burden following implementation of previously promulgated rule amendments.

(11) *Docket ID Number:* EPA–HQ–OAR–2021–0113; NESHAP for Coal- and Oil-fired Electric Utility Steam Generating Units (40 CFR part 63, subpart UUUUU) (Renewal); EPA ICR Number 2137.10; OMB Control Number 2060–0567; Expiration date March 31, 2022.

Respondents: Coal- and oil-fired electric utility steam generating units.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart UUUUU).

Estimated number of respondents: 322.

Frequency of response: Semiannually.

Estimated Annual burden: 284,000 hours.

Estimated Annual cost: $132,000,000, includes $104,000,000 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(12) *Docket ID Number:* EPA–HQ–OAR–2021–0114; NESHAP for Gasoline Distribution Bulk Terminals, Bulk Plants, Pipeline Facilities and Gasoline Dispensing Facilities (40 CFR part 63, subparts BBBBBB and CCCCCC) (Renewal); EPA ICR Number 2237.06; OMB Control Number 2060–0620; Expiration date March 31, 2022.

Respondents: Gasoline distribution facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subparts BBBBBB and CCCCCC).

Estimated number of respondents: 19,120.

Frequency of response: Semiannually.

Estimated Annual burden: 214,000 hours.

Estimated Annual cost: $23,500,000, includes $110,000 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(13) *Docket ID Number:* EPA–HQ–OAR–2021–0115; NESHAP for Paint Stripping and Miscellaneous Surface Coating at Area Sources (40 CFR part 63, subpart HHHHHH) (Renewal); EPA ICR Number 2268.06; OMB Control Number 2060–0607; Expiration date March 31, 2022.

Respondents: Paint stripping operations using methylene chloride (MeCl)-containing paint strippers, motor vehicle and mobile equipment surface coating operations, and miscellaneous surface coating operations.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart HHHHHH).

Estimated number of respondents: 39,812.

Frequency of response: Initially and annually.

Estimated Annual burden: 169,000 hours.

Estimated Annual cost: $18,500,000, includes $117,000 annualized capital or O&M costs.

Changes in Estimates: There is a projected increase in burden due to an increase in the number of sources subject to the regulation.

(14) *Docket ID Number:* EPA–HQ–OAR–2021–0116; NESHAP for Plating and Polishing Area Sources (40 CFR part 63, subpart WWWWWW) (Renewal); EPA ICR Number 2294.06; OMB Control Number 2060–0623; Expiration date March 31, 2022.

Respondents: Plating and polishing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart WWWWWW).

Estimated number of respondents: 2,900.

Frequency of response: Annually.

Estimated Annual burden: 67,700 hours.

Estimated Annual cost: $7,410,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(15) *Docket ID Number:* EPA–HQ–OAR–2021–0084; NESHAP for Mercury (40 CFR part 61, subpart E) (Renewal); EPA ICR Number 0113.14; OMB Control Number 2060–0097; Expiration date April 30, 2022.

Respondents: Mercury ore processing facilities, mercury cell chlor-alkali plants, sludge incineration plants, and sludge drying plants.

Respondent's obligation to respond: Mandatory (40 CFR part 61, subpart E).

Estimated number of respondents: 107.

Frequency of response: Semiannually and annually.

Estimated Annual burden: 20,600 hours.

Estimated Annual cost: $2,260,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(16) *Docket ID Number:* EPA–HQ–OAR–2021–0086; NESHAP for Coke Oven Batteries (40 CFR part 63, subpart L) (Renewal); EPA ICR Number 1362.12; OMB Control Number 2060–0253; Expiration date April 30, 2022.

Respondents: Coke oven batteries.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart L).

Estimated number of respondents: 19.

Frequency of response: Semiannually.

Estimated Annual burden: 79,800 hours.

Estimated Annual cost: $8,730,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(17) *Docket ID Number:* EPA–HQ–OAR–2021–0092; NESHAP for Steel Pickling, HCI Process Facilities and Hydrochloric Acid Regeneration Plants (40 CFR part 63, subpart CCC) (Renewal); EPA ICR Number 1821.10; OMB Control Number 2060–0419; Expiration date April 30, 2022.

Respondents: Steel pickling, HCl process facilities and hydrochloric acid regeneration plants

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart CCC)

Estimated number of respondents: 100.

Frequency of response: Semiannually.

Estimated Annual burden: 35,000 hours.

Estimated Annual cost: $3,840,000, includes $10,600 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(18) *Docket ID Number:* EPA–HQ–OAR–2021–0094; NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards (40 CFR part 63, subpart YY) (Renewal); EPA ICR Number 1871.11; OMB Control Number 2060–0420; Expiration date April 30, 2022.

Respondents: Polycarbonate, acrylic and modacrylic fiber, acetal resin, and hydrogen fluoride production facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart YY).

Estimated number of respondents: 7.

Frequency of response: Semiannually.

Estimated Annual burden: 2,910 hours.

Estimated Annual cost: $361,000, includes $43,100 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(19) *Docket ID Number:* EPA–HQ–OAR–2021–0106; NESHAP for Paper and Other Web Coating (40 CFR part 63, subpart JJJJJ) (Renewal); EPA ICR Number 1951.10; OMB Control Number 2060–0511; Expiration date April 30, 2022.

Respondents: Paper and other web coating facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart JJJJJ)

Estimated number of respondents: 170.

Frequency of response: Semiannually.

Estimated Annual burden: 17,300 hours.

Estimated Annual cost: $2,735,000, includes $765,000 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(20) *Docket ID Number:* EPA–HQ–OAR–2021–0107; NESHAP for Metal Furniture Surface Coating (40 CFR part 63, subpart RRRR) (Renewal); EPA ICR Number 1952.10; OMB Control Number 2060–0518; Expiration date April 30, 2022.

Respondents: Metal furniture surface coating facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart RRRR).

Estimated number of respondents: 16.

Frequency of response: Semiannually.

Estimated Annual burden: 190,000 hours.

Estimated Annual cost: $17,200,000, includes $700,000 annualized capital or O&M costs.

Changes in Estimates: There is a projected decrease in burden following implementation of previously promulgated rule amendments.

(21) *Docket ID Number:* EPA–HQ–OAR–2021–0109; NESHAP for Reinforced Plastic Composites Production (40 CFR part 63, subpart WWWW) (Renewal); EPA ICR Number 1976.10; OMB Control Number 2060–0509; Expiration date April 30, 2022.

Respondents: Reinforced plastic composites production facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart WWWW)

Estimated number of respondents: 448.

Frequency of response: Semiannually.

Estimated Annual burden: 38,125 hours.

Estimated Annual cost: $3,749,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is a projected decrease in burden following implementation of previously promulgated rule amendments.

(22) *Docket ID Number:* EPA–HQ–OAR–2021–0110; NESHAP for Coke Oven Pushing, Quenching, and Battery Stacks (40 CFR part 63, subpart CCCCC) (Renewal); EPA ICR Number 1995.08; OMB Control Number 2060–0521; Expiration date April 30, 2022.

Respondents: Coke oven batteries.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart CCCCC).

Estimated number of respondents: 16.

Frequency of response: Quarterly and semiannually.

Estimated Annual burden: 27,200 hours.

Estimated Annual cost: $3,240,000, includes $143,000 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(23) *Docket ID Number:* EPA–HQ–OAR–2021–0101; NESHAP for Integrated Iron and Steel Manufacturing (40 CFR part 63, subpart FFFFF) (Renewal); EPA ICR Number 2003.10; OMB Control Number 2060–0517; Expiration date April 30, 2022.

Respondents: Sinter plants, blast furnaces, and basic oxygen process furnace shops at integrated iron and steel manufacturing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart FFFFF).

Estimated number of respondents: 11.

Frequency of response: Semiannually.

Estimated Annual burden: 6,500 hours.

Estimated Annual cost: $800,000, includes $50,300 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(24) *Docket ID Number:* EPA–HQ–OAR–2021–0102; NESHAP for Flexible Polyurethane Foam Fabrication (40 CFR part 63, subpart MMMMM) (Renewal); EPA ICR Number 2027.11; OMB Control Number 2060–0516; Expiration date April 30, 2022.

Respondents: Flexible polyurethane foam fabrication facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart MMMMM)

Estimated number of respondents: 18.

Frequency of response: Semiannually.

Estimated Annual burden: 22,200 hours.

Estimated Annual cost: $2,560,000, includes $34,500 annualized capital or O&M costs.

Changes in Estimates: There is a projected decrease in burden due to anticipated shutdown of existing sources.

(25) *Docket ID Number:* EPA–HQ–OAR–2021–0104; NESHAP for Refractory Products Manufacturing (40 CFR part 63, subpart SSSSS) (Renewal); EPA ICR Number 2040.11; OMB Control Number 2060–0515; Expiration date April 30, 2022.

Respondents: Refractory products manufacturing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart SSSSS).

Estimated number of respondents: 8.

Frequency of response: Semiannually.

Estimated Annual burden: 306 hours.

Estimated Annual cost: $37,800, includes $3,040 annualized capital or O&M costs.

Changes in Estimates: There is a projected decrease in burden due to anticipated shutdown of existing sources.

(26) *Docket ID Number:* EPA–HQ–OAR–2021–0121; NESHAP for Industrial, Commercial, and Institutional Boilers Area Sources (40 CFR part 63, subpart JJJJJJ) (Renewal); EPA ICR Number 2253.05; OMB Control Number 2060–0668; Expiration date April 30, 2022.

Respondents: Industrial, commercial, and institutional boilers designed to burn biomass, coal, or liquid fuels.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart JJJJJJ).

Estimated number of respondents: 100,344.

Frequency of response: Annually and biennially.

Estimated Annual burden: 1,830,000 hours.

Estimated Annual cost: $340,000,000, includes $132,000,000 annualized capital or O&M costs.

Changes in Estimates: There is a projected increase in burden due to an increase in the number of sources subject to the regulation.

(27) *Docket ID Number:* EPA–HQ–OAR–2021–0122; NESHAP for Nine Metal Fabrication and Area Finishing Source (40 CFR part 63, subpart XXXXXX) (Renewal); EPA ICR Number 2298.06; OMB Control Number 2060–0622; Expiration date April 30, 2022.

Respondents: Metal fabrication and finishing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart XXXXXX).

Estimated number of respondents: 5,800.

Frequency of response: Annually.

Estimated Annual burden: 39,000 hours.

Estimated Annual cost: $4,440,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(28) *Docket ID Number:* EPA–HQ–OAR–2021–0125; NESHAP for Polyvinyl Chloride and Copolymer Production (40 CFR part 63, subpart HHHHHHH) (Renewal); EPA ICR Number 2432.07; OMB Control Number 2060–0666; Expiration date April 30, 2022.

Respondents: Polyvinyl chloride and copolymer production facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart HHHHHHH).

Estimated number of respondents: 15.

Frequency of response: Semiannually.

Estimated Annual burden: 338,000 hours.

Estimated Annual cost: $45,500,000, includes $7,060,000 annualized capital or O&M costs.

Changes in Estimates: There is a projected decrease in burden due to anticipated shutdown of existing sources.

(29) *Docket ID Number:* EPA–HQ–OAR–2021–0096; NESHAP for Asbestos (40 CFR part 61, subpart M) (Renewal); EPA ICR Number 0111.16; OMB Control Number 2060–0101; Expiration date May 31, 2022.

Respondents: Demolition and renovation facilities; asbestos waste disposal; asbestos milling, manufacturing and fabricating; the use of asbestos on roadways; asbestos waste converting facilities; and the use of asbestos insulation and sprayed-on materials.

Respondent's obligation to respond: Mandatory (40 CFR part 61, subpart M).

Estimated number of respondents: 9,687.

Frequency of response: Quarterly, semiannually, and annually.

Estimated Annual burden: 287,000 hours.

Estimated Annual cost: $32,700,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is a projected increase in burden due to an increase in the number of sources subject to the regulation.

(30) *Docket ID Number:* EPA–HQ–OAR–2021–0098; NESHAP for the Surface Coating of Large Household and Commercial Appliances (40 CFR part 63, subpart NNNN) (Renewal); EPA ICR Number 1954.10; OMB Control Number 2060–0457; Expiration date May 31, 2022.

Respondents: Large household and commercial appliance surface coating facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart NNNN)

Estimated number of respondents: 10.

Frequency of response: Semiannually.

Estimated Annual burden: 3,870 hours.

Estimated Annual cost: $429,000, includes $5,400 annualized capital or O&M costs.

Changes in Estimates: There is a projected decrease in burden following implementation of previously promulgated rule amendments.

(31) *Docket ID Number:* EPA–HQ–OAR–2021–0100; NESHAP for Rubber Tire Manufacturing (40 CFR part 63, subpart XXXX) (Renewal); EPA ICR Number 1982.05; OMB Control Number 2060–0449; Expiration date May 31, 2022.

Respondents: Rubber processing, tire production, tire cord production, and puncture sealant application facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart XXXX)

Estimated number of respondents: 23.

Frequency of response: Semiannually and annually.

Estimated Annual burden: 6,520 hours.

Estimated Annual cost: $910,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is a projected decrease in burden due to anticipated shutdown of existing sources.

(32) *Docket ID Number:* EPA–HQ–OAR–2021–0103; NESHAP for Asphalt Processing and Asphalt Roofing Manufacturing (40 CFR part 63, subpart LLLLL) (Renewal); EPA ICR Number 2029.09; OMB Control Number 2060–0520; Expiration date May 31, 2022.

Respondents: Asphalt processing and asphalt roofing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart LLLLL)

Estimated number of respondents: 8.

Frequency of response: Semiannually.

Estimated Annual burden: 3,970 hours.

Estimated Annual cost: $472,000, includes $20,000 annualized capital or O&M costs.

Changes in Estimates: There is a projected increase in burden due to incorporation of burden from previously promulgated rule amendments.

(33) *Docket ID Number:* EPA–HQ–OAR–2021–0105; NESHAP for Semiconductor Manufacturing (40 CFR part 63, subpart BBBBB) (Renewal); EPA ICR Number 2042.08; OMB Control Number 2060–0519; Expiration date May 31, 2022.

Respondents: Semiconductor manufacturing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart BBBBB).

Estimated number of respondents: 1.

Frequency of response: Semiannually.

Estimated Annual burden: 41 hours.

Estimated Annual cost: $5,270, includes $550 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(34) *Docket ID Number:* EPA–HQ–OAR–2021–0123; NESHAP for Chemical Manufacturing Area Sources (40 CFR part 63, subpart VVVVVV) (Renewal); EPA ICR Number 2323.08; OMB Control Number 2060–0621; Expiration date May 31, 2022.

Respondents: Chemical manufacturing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart VVVVVV).

Estimated number of respondents: 528.

Frequency of response: Semiannually.

Estimated Annual burden: 10,200 hours.

Estimated Annual cost: $2,650,000, includes $1,490,000 annualized capital or O&M costs.

Changes in Estimates: There is a projected increase in burden due to an increase in the number of sources subject to the regulation.

(35) *Docket ID Number:* EPA–HQ–OAR–2021–0124; NESHAP for Aluminum, Copper, and Other Non-Ferrous Foundries (40 CFR part 63, subpart ZZZZZZ) (Renewal); EPA ICR Number 2332.06; OMB Control Number 2060–0630; Expiration date May 31, 2022.

Respondents: Aluminum, copper, and other non-ferrous metals foundries.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart ZZZZZZ).

Estimated number of respondents: 318.

Frequency of response: Semiannually.

Estimated Annual burden: 11,900 hours.

Estimated Annual cost: $1,360,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(36) *Docket ID Number:* EPA–HQ–OAR–2021–0126; Title: NESHAP for Polyvinyl Chloride and Copolymers Production Area Sources (40 CFR part 63, subpart DDDDDD) (Renewal); EPA ICR Number 2454.06; OMB Control Number 2060–0684; Expiration date May 31, 2022.

Respondents: Polyvinyl chloride and copolymer production facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart DDDDDD).

Estimated number of respondents: 4.

Frequency of response: Semiannually.

Estimated Annual burden: 92,300 hours.

Estimated Annual cost: $1,360,000, includes no annualized capital or O&M costs.

Changes in Estimates: There is a projected decrease in burden due to anticipated shutdown of existing sources.

(37) *Docket ID Number:* EPA–HQ–OAR–2021–0118; NESHAP for Mercury Cell Chlor-Alkali Plants (40 CFR part 63, subpart IIIII) (Renewal); EPA ICR Number 2046.11; OMB Control Number 2060–0542; Expiration date June 30, 2022.

Respondents: Mercury cell chlor-alkali facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart IIIII).

Estimated number of respondents: 2.

Frequency of response: Semiannually.

Estimated Annual burden: 3,760 hours.

Estimated Annual cost: $444,000, includes $16,400 annualized capital or O&M costs.

Changes in Estimates: There is a projected decrease in burden due to anticipated shutdown of existing sources.

(38) *Docket ID Number:* EPA–HQ–OAR–2021–0119; NESHAP for Taconite Iron Ore Processing (40 CFR part 63 subpart RRRRR) (Renewal); EPA ICR Number 2050.10; OMB Control Number 2060–0538; Expiration date June 30, 2022.

Respondents: Taconite iron ore processing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63 subpart RRRRR).

Estimated number of respondents: 8.

Frequency of response: Semiannually.

Estimated Annual burden: 483 hours.

Estimated Annual cost: $576,000, includes $521,000 annualized capital or O&M costs.

Changes in Estimates: There is a projected increase in burden due to an increase in the number of sources subject to the regulation.

(39) *Docket ID Number:* EPA–HQ–OAR–2021–0120; NESHAP for Primary Magnesium Refining (40 CFR part 63, subpart TTTTT) (Renewal); EPA ICR Number 2098.11; OMB Control Number 2060–0536; Expiration date June 30, 2022.

Respondents: Primary magnesium refining facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart TTTTT).

Estimated number of respondents: 1.

Frequency of response: Semiannually.

Estimated Annual burden: 611 hours.

Estimated Annual cost: $70,900, includes $1,200 annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

(40) *Docket ID Number:* EPA–HQ–OAR–2021–0097; NESHAP for Municipal Solid Waste Landfills (40 CFR part 63, subpart AAAA) (Renewal); EPA ICR Number 1938.08; OMB Control Number 2060–0505; Expiration date July 31, 2022.

Respondents: Municipal solid waste landfills.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart AAAA).

Estimated number of respondents: 1,151.

Frequency of response: Semiannually.

Estimated Annual burden: 35,200 hours.

Estimated Annual cost: $3,170,000, includes $10,800 annualized capital or O&M costs.

Changes in Estimates: There is a projected increase in burden due to an increase in the number of sources subject to the regulation.

(41) *Docket ID Number:* EPA–HQ–OAR–2021–0099; NESHAP for Wet-Formed Fiberglass Mat Production (40 CFR part 63, subpart HHHH) (Renewal); EPA ICR Number 1964.10; OMB Control Number 2060–0496; Expiration date September 30, 2022.

Respondents: Wet-formed fiberglass mat production facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart HHHH).

Estimated number of respondents: 7.

Frequency of response: Semiannually.

Estimated Annual burden: 1,470 hours.

Estimated Annual cost: $95,500, includes no annualized capital or O&M costs.

Changes in Estimates: There is no change in burden from the previous ICR.

Dated: April 5, 2021.

Penny Lassiter,

Director, Sector Policies and Programs Division.

[FR Doc. 2021–07562 Filed 4–12–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2015–0467; FRL–10022–36–ORD]

Board of Scientific Counselors (BOSC) Safe and Sustainable Water Resources Subcommittee Meeting—May 2021

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: The Environmental Protection Agency (EPA), Office of Research and Development (ORD), gives notice of a series of virtual meetings of the Board of Scientific Counselors (BOSC) Safe and Sustainable Water Resources (SSWR) Subcommittee to discuss water treatment and infrastructure.

DATES: 1. The initial meeting will be held over two days via videoconference:

a. Wednesday, May 26, 2021, from 12 p.m. to 5 p.m. (EDT); and

b. Thursday, May 27, 2021, from 12 p.m. to 5 p.m. (EDT).

Attendees must register by May 25, 2021.

2. A BOSC deliberation will be held on June 22, 2021, from 11 a.m. to 2 p.m. (EDT).

Attendees must register by June 21, 2021.

3. A final summary teleconference will be held on June 29, 2021, from 11 a.m. to 2 p.m. (EDT). Attendees must register by June 28, 2021.

Meeting times are subject to change. This series of meetings is open to the public. Comments must be received by May 25, 2021, to be considered by the subcommittee. Requests for the draft agenda or making a presentation at the meeting will be accepted until May 25, 2021.

ADDRESSES: Instructions on how to connect to the videoconference will be provided upon registration at: *https://www.eventbrite.com/e/us-epa-bosc-safe-and-sustainable-water-resources-subcommittee-meeting-tickets-142587379691.*

Submit your comments to Docket ID No. EPA–HQ–ORD–2015–0467 by one of the following methods:

- *www.regulations.gov:* Follow the online instructions for submitting comments.
- Note: Comments submitted to the *www.regulations.gov* website are anonymous unless identifying information is included in the body of the comment.
- *Email:* Send comments by electronic mail (email) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2015–0467.
- Note: Comments submitted via email are not anonymous. The sender's email will be included in the body of the comment and placed in the public docket which is made available on the internet.

Instructions: All comments received, including any personal information provided, will be included in the public docket without change and may be made available online at *www.regulations.gov.* Information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute will not be included in the public docket, and should not be submitted through *www.regulations.gov* or email. For additional information about the EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/dockets/.*

Public Docket: Publicly available docket materials may be accessed *Online* at *www.regulations.gov.*

Copyrighted materials in the docket are only available via hard copy. The telephone number for the ORD Docket Center is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer (DFO), Tom Tracy, via phone/voicemail at: (202) 564–6518; or via email at: *tracy.tom@epa.gov.*

Any member of the public interested in receiving a draft agenda, attending the meeting, or making a presentation at the meeting should contact Tom Tracy no later than May 25, 2021.

SUPPLEMENTARY INFORMATION: The Board of Scientific Counselors (BOSC) is a federal advisory committee that provides advice and recommendations to EPA's Office of Research and Development on technical and management issues of its research programs. The meeting agenda and materials will be posted to *https://www.epa.gov/bosc.*

Proposed agenda items for the meeting include, but are not limited to, the following: Water treatment and infrastructure.

Information on Services Available: For information on translation services, access, or services for individuals with disabilities, please contact Tom Tracy at (202) 564–6518 or *tracy.tom@epa.gov.* To request accommodation of a disability, please contact Tom Tracy at least ten days prior to the meeting to give the EPA adequate time to process your request.

Authority: Pub. L. 92–463, 1, Oct. 6, 1972, 86 Stat. 770.

Mary Ross,

Director, Office of Science Advisor, Policy and Engagement.

[FR Doc. 2021–07480 Filed 4–12–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2021–0233; 10022–32–OAR]

Proposed Baseline Approval of the Contact-Handled Transuranic Waste Characterization Program Implemented at the Department of Energy's Savannah River Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability; opening of a 45-day public comment period.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is announcing the availability of, and soliciting public comments on, the proposed ''baseline'' approval of the contact-handled (CH) transuranic (TRU) debris waste characterization program implemented by the Central Characterization Program (CCP) at the U.S. Department of Energy's (DOE) Savannah River Site (SRS), in Aiken, South Carolina. The inspections supporting this proposed baseline approval took place from November 30 through December 2, 2020, remotely and at SRS. The EPA identified no findings or concerns and proposes to approve the SRS CH TRU debris waste characterization program.

The EPA's report documenting the inspection results and proposed baseline approval is available for review in the public docket listed in the **ADDRESSES** section of this document. Until the Agency finalizes its baseline approval decision, the DOE Carlsbad Field Office may not certify SRS' waste characterization program and the site may not ship transuranic waste to the Waste Isolation Pilot Plant for disposal.

DATES: Comments must be received on or before May 28, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2021–0233, to the *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not electronically submit any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit: *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Edward Feltcorn (202–343–9422) or Jerry Ellis (202–564–2766), Radiation Protection Division, Center for Waste Management and Regulations, Mail Code 6608T, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460; email addresses: *feltcorn.ed@epa.gov* or *ellis.jerry@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to the EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the files on the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number EPA–HQ–OAR–2021–0233 and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions: The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Background

The DOE operates the Waste Isolation Pilot Plant (WIPP) facility near Carlsbad in southeastern New Mexico as a deep geologic repository for disposal of defense-related TRU radioactive waste. TRU waste contains more than 100 nanocuries of alpha-emitting TRU isotopes, with half-lives greater than twenty years, per gram of waste. Much of the existing TRU waste, which may also be contaminated with hazardous chemicals, consists of items contaminated during the production of nuclear weapons, such as debris waste (rags, equipment, tools) and solid waste (sludges, soil).

Section 8(d)(2) of the WIPP Land Withdrawal Act (LWA) of 1992 provided that the EPA would certify whether the WIPP facility will comply with the Agency's final disposal regulations, later codified at 40 CFR part 191, subparts B and C. On May 13, 1998, the Agency announced its final compliance certification to the Secretary of Energy (published May 18, 1998; 63 FR 27354), certifying that the WIPP will comply with the disposal regulations. The EPA's certification of the WIPP was subject to various conditions, including conditions concerning quality assurance and waste characterization relating to EPA inspections, evaluations and approvals of the site-specific TRU waste characterization programs to ensure compliance with various EPA regulatory requirements, including those at 40 CFR 194.8, 194.22(a)(2)(i), 194.22(c)(4), 194.24(c)(3) and 194.24(c)(5). In addition, under the LWA, the initial WIPP certification was subject to quinquennial (every five years) recertification by the Agency.

The EPA's inspection and approval processes for waste generator sites, including quality assurance and waste characterization programs, are described at 40 CFR 194.8. The Agency has discretion in establishing technical priorities, the ability to accommodate variation in the site's waste characterization capabilities, and flexibility in scheduling site waste characterization inspections.

In accordance with the conditions in the WIPP compliance certification and relevant regulatory provisions, including 40 CFR 194.8, the EPA conducts ''baseline'' inspections at waste generator sites, as well as subsequent inspections to confirm continued compliance. As part of a baseline inspection, the EPA evaluates each waste characterization process component (equipment, procedures and personnel training and experience) for adequacy and appropriateness in characterizing TRU waste intended for disposal at the WIPP. During the inspection, the site demonstrates its capabilities to characterize TRU waste(s) and its ability to comply with the regulatory limits and tracking requirements under § 194.24. The baseline inspection can result in approval with limitations and conditions or may require follow-up inspection(s) before approval. Within the approval documentation, the EPA specifies what subsequent program changes should be reported to the Agency, referred to as Tier 1 (T1) or Tier 2 (T2) changes, depending largely on the anticipated effect of the changes on data quality.

A T1 designation requires that the DOE Carlsbad Field Office (CBFO) provide to the EPA documentation on proposed changes to the approved components of an individual site-specific waste characterization process (such as radioassay equipment), which the Agency must approve before the change can be implemented. Tier 2 designated changes are minor changes to the approved components of individual waste characterization processes (such as visual examination procedures) which must also be reported to the EPA, but the site may implement such changes without awaiting Agency approval. After receiving notification of T1 changes, the EPA may choose to inspect the site to

evaluate technical adequacy. The inspections conducted to evaluate T1 or T2 changes are under the authority of the EPA's WIPP compliance certification conditions and regulations, including 40 CFR 194.8 and 194.24(h). In addition to follow-up inspections, the EPA may opt to conduct continued compliance inspections at TRU waste sites with a baseline approval under the authority of the WIPP compliance certification regulations, including § 194.24(h).

In accordance with 40 CFR 194.8, the EPA issues a **Federal Register** notice proposing a baseline compliance decision, dockets the inspection report for public review, and seeks public comment on the proposed decision for a minimum period of 45 days. The report describes the waste characterization processes the Agency inspected at the site, as well as their compliance with 40 CFR 194.8 and 194.24 requirements.

A. Proposed Baseline Decision

This notice announces the EPA's proposed baseline approval of the CH TRU waste characterization program implemented by the CCP at the DOE's SRS in Aiken, South Carolina. In accordance with 40 CFR 194.8(b), the EPA conducted Baseline Inspection No. SRS–CCP–CH–Baseline–2020 on November 30 through December 2, 2020, remotely and at SRS. Upon EPA's final approval, DOE may emplace SRS–CCP CH TRU waste in the WIPP.

SRS was constructed during the early 1950s to produce the basic materials used in the fabrication of nuclear weapons, primarily tritium and plutonium-239, in support of the national defense program. Its main focus has been to develop technical solutions to support national security and to counter national and international threats. Site activities support national needs in the areas of nuclear weapons, nonproliferation and assessments, military technologies and applications, energy and infrastructure assurance, and homeland security.

The EPA had initially approved a CH TRU waste characterization program at SRS in July 2006. The DOE suspended waste characterization activities at SRS in February 2016. On October 1, 2020, the DOE's CBFO informed the Agency that SRS–CCP resumed waste characterization activities; CBFO then notified the EPA that SRS–CCP would be ready for an inspection in November 2020. The EPA then concluded that a new baseline inspection and approval would be necessary.

The EPA is proposing to approve the SRS–CCP waste characterization program implemented to characterize CH TRU waste as documented in the accompanying inspection report. Specifically, the proposed approval includes:

(1) The Acceptable Knowledge process for characterizing SRS CH TRU waste.

(2) The nondestructive assay systems for measuring the radioactivity in SRS CH TRU waste.

(3) The Visual Examination nondestructive examination process to identify waste material parameters (WMPs) and the physical form of SRS CH TRU waste.

(4) The Real-Time Radiography (RTR) nondestructive examination process to identify WMPs and the physical form of SRS CH TRU waste using the RTR2 unit.

Any changes to the waste characterization activities after the date of the baseline inspection must be reported to and, if applicable, approved by the EPA according to Table 1 below. All T1 changes must be submitted for approval before their implementation and will be evaluated by the EPA. Upon approval, the Agency will post the results of the evaluations in the EPA's general WIPP docket at *regulations.gov* (Docket No. EPA–HQ–OAR–2001–0012). SRS–CCP must submit T2 changes at the end of the fiscal year quarter in which they were implemented.

The EPA's final approval decision regarding the SRS–CCP CH waste characterization program will be conveyed to the DOE separately by letter following the EPA's review of public comments received in response to this notice and proposed approval discussed in the inspection report. This information will be provided through the EPA's WIPP docket provided for this action at *regulations.gov* (Docket No. EPA–HQ–OAR–2021–0233), in accordance with 40 CFR 194.8(b)(3). A summary table of the status of all WIPP-related EPA inspections can also be found on the EPA website at *https://www.epa.gov/radiation/waste-isolation-pilot-plant-wipp-inspections,* and any interested party can get these and other WIPP updates via the Agency's WIPP–NEWS website (*https://www.epa.gov/radiation/wipp-news*). Individuals may also subscribe to the WIPP–NEWS email listserv using the instructions on the website.

TABLE 1—TIERING OF CONTACT-HANDLED TRANSURANIC WASTE CHARACTERIZATION PROCESSES IMPLEMENTED BY SRS–CCP

[November 30–December 2, 2020, SRS baseline inspection]

Process elements	SRS–CCP CH waste characterization process—T1 changes	SRS–CCP CH waste characterization process—T2 changes *
Acceptable Knowledge	Implementation of payload management	Submission of a list of active SRS–CCP CH AK Experts and Site Project Managers. Notification to the EPA upon availability of or substantive modification ** to: • AK summary reports (*e.g.,* CCP–AK–SRS–4). • AK accuracy reports (annually, at a minimum). • Waste stream profile forms and any associated change notices. • Site AK procedures requiring CBFO approval.***
Nondestructive Assay	New equipment or substantive physical modifications ** to approved equipment. Extension of or changes to approved calibration ranges for approved equipment.	Submission of a list of SRS–CCP NDA operators, expert analysts and independent technical reviewers that performed work during the previous quarter. Relocation of the MILCC6 from its current location at SRS. Notification to the EPA upon substantive modification ** to: • Software for approved equipment. • Operating ranges upon CBFO approval. • Site NDA procedures requiring CBFO approval.***
Visual Examination	Any use of Visual Examination for CH wastes	None.
Real-time Radiography	RTR by any process other than CCP–TP–053	New RTR equipment operated in accordance with procedure CCP–TP–053. Relocation of approved RTR8 from its current location at SRS.

TABLE 1—TIERING OF CONTACT-HANDLED TRANSURANIC WASTE CHARACTERIZATION PROCESSES IMPLEMENTED BY SRS–CCP—Continued

[November 30–December 2, 2020, SRS baseline inspection]

Process elements	SRS–CCP CH waste characterization process—T1 changes	SRS–CCP CH waste characterization process—T2 changes *
		Submission of a list of SRS–CCP RTR operators and independent technical reviewers that performed work during the previous quarter. Notification to the EPA upon substantive modification ** to site RTR procedures requiring CBFO approval.***

* SRS–CCP will report all unmarked T2 changes to the EPA every three months.

** "Substantive modification" refers to a change with the potential to affect SRS–CCP's CH waste characterization processes or documentation of them, excluding changes that are solely related to the environment, safety and health; nuclear safety; or the Resource Conservation and Recovery Act; or that are editorial in nature or are required to address administrative concerns. The EPA may request copies of new references that the DOE adds during a document revision.

*** Site procedures include any procedures used by SRS–CCP personnel that require Carlsbad Field Office (CBFO) approval. This includes SRS–CCP-specific procedures as well as applicable CCP-wide procedures.

III. Availability of the Baseline Inspection Report and Proposed Approval for Public Comment

The EPA has placed the report discussing the results of the inspection of the CH TRU waste characterization program at SRS in the public docket as described in the **ADDRESSES** section of this document. In accordance with 40 CFR 194.8, the Agency is providing the public 45 days to comment on this and other documents and the EPA's proposed decision to approve the SRS CH TRU waste characterization program. The Agency will accept public comment on this notice and supplemental information as described in Section I above. At the end of the public comment period, the EPA will evaluate all relevant public comments and, as the Agency may deem appropriate and necessary, revise the report and proposed decision or take other appropriate action. If the EPA concludes that there are no unresolved issues after the public comment period, the Agency will issue an approval letter and the final report. The letter of approval will authorize the DOE to use the approved waste characterization processes to characterize CH TRU waste at SRS.

Information on the approval decision will be filed in the official public docket opened for this action on *www.regulations.gov,* Docket ID No. EPA–HQ–OAR–2021–0233 (as listed in the **ADDRESSES** section of this document).

Jonathan Edwards,

Director, Office of Radiation and Indoor Air.

[FR Doc. 2021–07485 Filed 4–12–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064–0006; –0015; –0019; –0097]

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its obligations under the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to take this opportunity to comment on the renewal of the existing information collections described below (OMB Control No. 3064–0006; –0015; –0019; –0097).

DATES: Comments must be submitted on or before June 14, 2021.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *https://www.FDIC.gov/regulations/laws/federal.*
- *Email: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Manny Cabeza (202–898–3767), Regulatory Counsel, MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street NW building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Manny Cabeza, Regulatory Counsel, 202–898–3767, *mcabeza@fdic.gov,* MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Proposal to renew the following currently approved collections of information:

1. *Title:* Interagency Biographical and Financial Report.

OMB Number: 3064–0006.

Form Number: 6200/06.

Affected Public: Individuals or households; business or other for profit; Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response (hours)	Estimated annual burden (hours)
Interagency Biographical and Financial Report.	Reporting	Mandatory	517	On Occasion	4.5	2,327

Total Estimated Annual Burden: 2,327 hours.

General Description of Collection: The Interagency Biographical and Financial Report is submitted to the FDIC by: (1) Each individual director, officer, or individual or group of shareholders acting in concert that will own or control 10 percent or more, of a proposed or operating depository institution applying for FDIC deposit insurance; (2) a person proposing to acquire control of an insured state nonmember bank, state savings association (FDIC-supervised institution) and certain parent companies of such entities; (3) each proposed new director or proposed new chief executive officer of an FDIC supervised institution which has undergone a change in control within the preceding twelve months; and (4) each proposed new director or senior executive officer of an FDIC-supervised institution that is not in compliance with all minimum capital requirements, is in troubled condition, or otherwise is required to provide such notice. The information collected is used by the FDIC to evaluate the general character and financial condition of individuals who will be involved in the management or control of financial institutions, as required by statute. In order to lessen the burden on applicants, the FDIC cooperates with the other federal banking agencies to the maximum extent possible in processing the various applications.

2. *Title:* Interagency Bank Merger Application.

OMB Number: 3064–0015.

Form Number: 6220/01.

Affected Public: Individuals or households; business or other for profit.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response (hours)	Estimated annual burden (hours)
Interagency Bank Merger Act Application—Affiliated Transactions.	Reporting	Mandatory	137	On Occasion	19	2,603
Interagency Bank Merger Act Application—Nonaffiliated Transactions.	Reporting	Mandatory	83	On Occasion	31	2,573

Total Estimated Annual Burden: 5,176 hours.

General Description of Collection: The Interagency Bank Merger Act Application form is used by the FDIC, the Board of Governors of the Federal Reserve System, and the Office of the Comptroller of the Currency for applications under section 18(c) of the Federal Deposit Insurance Act (FDIA), as amended (12 U.S.C. 1828(c)). The application is used for a merger, consolidation, or other combining transaction between nonaffiliated parties as well as to effect a corporate reorganization between affiliated parties (affiliate transaction). An affiliate transaction refers to a merger transaction or other business combination (including a purchase and assumption) between institutions that are commonly controlled (for example, between a depository institution and an affiliated interim institution). There are different levels of burden for nonaffiliate and affiliate transactions. Applicants proposing affiliate transactions are required to provide less information than applicants involved in the merger of two unaffiliated entities. If depository institutions are not controlled by the same holding company, the merger transaction is considered a nonaffiliate transaction.

3. *Title:* Interagency Notice of Change in Control.

OMB Number: 3064–0019.

Form Number: 6822/01.

Affected Public: Individuals, insured state nonmember banks, and insured state savings associations.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response (hours)	Estimated annual burden (hours)
Interagency Notice of Change in Control	Recordkeeping	Mandatory	18	On Occasion	30.5	549

Total Estimated Annual Burden: 549 hours.

General Description of Collection: Section 7(j) of the FDIA (12 U.S.C. 1817(j)) and sections 303.80–88 of the FDIC Rules and Regulations (12 CFR 303.80 *et seq.*) require that any person proposing to acquire control of an insured depository institution and certain parent companies thereof provide 60 days prior written notice of the proposed acquisition to the appropriate federal banking agency. Such written notice which pertains to the acquisition of control of an FDIC supervised institution and certain parent companies thereof is filed with the regional director of the FDIC region in which the bank is located. The FDIC reviews the information reported in the Notice to assess, in part, any anticompetitive and monopolistic effects of the proposed acquisition, to determine if the financial condition of any acquiring person or the future prospects of the institution might jeopardize the financial stability of the institution or prejudice the interests of the depositors of the institution, and to determine whether the competence, experience, or integrity of any acquiring person, or of any of the proposed management personnel, indicates that it would not be in the interest of the depositors of the institution, or in the interest of the public, to permit such persons to control the bank. The FDIC must also make an independent determination of the accuracy and completeness of all of the information required to be filed in conjunction with a Notice.

1. *Title:* Interagency Notice of Change in Control.

OMB Number: 3064–0097.

Form Number: 6822/02.

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response (hours)	Estimated annual burden (hours)
Interagency Notice of Change in Director or Executive Officer.	Reporting	Mandatory	107	On Occasion	2	214

Total Estimated Annual Burden: 214 hours.

General Description of Collection: Section 32 of the FDIA (12 U.S.C. 1831i) requires an insured depository institution or depository institution holding company under certain circumstances to notify the appropriate federal banking agency of the proposed addition of any individual to the board of directors or the employment of any individual as a senior executive officer of such institution at least 30 days before such addition or employment becomes effective. Section 32 of the FDIA also provides that the FDIC may disapprove an individual's service as a director or senior executive officer of certain state nonmember banks or state savings associations if, upon assessing the individual's competence, experience, character, and integrity, it is determined that the individual's service would not be in the best interest of the depositors of the institution or the public. The Interagency Notice of Change in Director or Senior Executive Officer, with the information contained in the Interagency Biographical and Financial Report (described above) as an attachment, is used by the FDIC to collect information relevant to assess the individual's competence, experience, character, and integrity.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on April 7, 2021.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021–07498 Filed 4–12–21; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—PAR 18–812, NIOSH Member Conflict Review.

Date: June 24, 2021.

Time: 1:00 p.m.–4:00 p.m., EDT.

Place: Teleconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Michael Goldcamp, Ph.D., Scientific Review Officer, Office of Extramural Programs, National Institute for Occupational Safety and Health, CDC, 1095 Willowdale Road, Morgantown, West Virginia 26506, Telephone (304) 285–5951; *MGoldcamp@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2021–07487 Filed 4–12–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–718–721, CMS–724, CMS–2088–17 and CMS–1763]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by *May 13, 2021.*

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Business Proposal Forms for Quality Improvement Organizations (QIOs); *Use:* The submission of proposal information by current quality improvement associations (QIOs) and other bidders, on the appropriate forms, will satisfy our need for meaningful, consistent, and verifiable data with which to evaluate contract proposals. We use the data collected on the forms associated with this information collection request to negotiate QIO contracts. We will be able to compare the costs reported by the QIOs on the cost reports to the proposed costs noted on the business proposal forms. Subsequent contract and modification negotiations will be based on historic cost data. The business proposal forms will be one element of the historical cost data from which we can analyze future proposed costs. In addition, the business proposal format will standardize the cost proposing and pricing process among all QIOs. With well-defined cost centers and line items, proposals can be compared among QIOs for reasonableness and appropriateness. *Form Number:* CMS–718–721 (OMB control number: 0938–0579); *Frequency:* Annually; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 58; *Total Annual Responses:* 58; *Total Annual Hours:* 2,320. (For policy questions regarding this collection contact Benjamin Bernstein at 410–786–6570.)

2. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection; *Title of Information Collection:* Medicare/Medicaid Psychiatric Hospital Survey Data and Supporting Regulations; *Use:* The CMS–724 form is used to collect data that assists us in program planning and evaluation and in maintaining an accurate database on providers participating in the psychiatric hospital program. Specifically, we use the information collected on this form in evaluating the Medicare psychiatric hospital program. The form is also used for audit purposes; determining patient population and characteristics of the hospital; and survey term composition. *Form Number:* CMS–724 (OMB control number: 0938–0378); *Frequency:* Annually; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 19; *Total Annual Responses:* 191; *Total Annual Hours:* 96. (For policy questions regarding this collection contact Caroline Gallaher at 410–786–8705.)

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Community Mental Health Center Cost Report *Use:* CMS requires the Form CMS–2088–17 to determine a provider's reasonable cost incurred in furnishing medical services to Medicare beneficiaries and reimbursement due to or from a provider. In addition, CMHCs may receive reimbursement through the cost report for Medicare reimbursable bad debts. CMS uses the Form CMS–2088–17 for rate setting; payment refinement activities, including market basket analysis; Medicare Trust Fund projections; and to support program operations. The primary function of the cost report is to determine provider reimbursement for services rendered to Medicare beneficiaries. Each CMHC submits the cost report to its contractor for reimbursement determination.

Section 1874A of the Act describes the functions of the contractor. CMHCs must follow the principles of cost reimbursement, which require they maintain sufficient financial records and statistical data for proper determination of costs. The S series of worksheets collects the provider's location, CBSA, date of certification, operations, and unduplicated census days. The A series of worksheets collects the provider's trial balance of expenses for overhead costs, direct patient care services, and non-revenue generating cost centers. The B series of worksheets allocates the overhead costs to the direct patient care and non-revenue generating cost centers using functional statistical bases. The Worksheet C computes the apportionment of costs between Medicare beneficiaries and other patients. The D series of worksheets are Medicare specific and calculate the reimbursement settlement for services rendered to Medicare beneficiaries. The Worksheet F collects the provider's revenues and expenses data from the provider's income statement. *Form Number:* CMS–2088–17 (OMB control number: 0938–0378); *Frequency:* Annually; *Affected Public:* Private Sector, Business or other for-profits, Not-for-profits institutions; *Number of Respondents:* 184; *Total Annual Responses:* 184; *Total Annual Hours:* 16,560. (For policy questions regarding this collection contact Jill Keplinger at 410–786–4550.)

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Request for Termination of Premium-Hospital and or Supplementary Medical Insurance; *Use:* Form CMS–1763 provides the necessary information to process the enrollee's request for termination of Part B and/or premium Part A coverage.

Sections 1818(c)(5), 1818A(c)(2)(B) and 1838(b)(1) of the Act and corresponding regulations at 42 CFR 406.28(a) and 407.27(c) require that a Medicare enrollee wishing to voluntarily terminate Part B and/or premium Part A coverage file a written request with CMS or SSA. The statute and regulations also specify when coverage ends based upon the date the request for termination is filed.

Form CMS–1763 collects the information necessary to process Medicare enrollment terminations. The Request for Termination of Premium

Hospital and/or Supplementary Medical Insurance (Form CMS–1763) provides a standardized means to satisfy the requirements of law, as well as allow both agencies to protect the individual from an inappropriate decision. *Form Number:* CMS–1763 (OMB control number: 0938–0025); *Frequency:* Annually; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 114,215; *Total Annual Responses:* 114,215; *Total Annual Hours:* 19,074. (For policy questions regarding this collection contact Carla Patterson at 410–786–1000.)

Dated: April 7, 2021.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2021–07478 Filed 4–12–21; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10757]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by June 14, 2021.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: CMS–P–0015A, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10757 CLIA Collection of Information Requirements Related to SARS–CoV–2 Test Results Reporting

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved information collection; *Title of Information Collection:* CLIA Collection of Information Requirements Related to SARS–CoV–2 Test Results Reporting; *Use:* In order to be in compliance with the new CLIA mandatory SARS–CoV–2 test results reporting requirements, laboratories will need to develop a mechanism to track, collect, and report test results as well as update policies and procedures. In addition, Accreditation Organizations (AOs) and Exempt States (ESs) will need to update laboratory standards to reflect the reporting requirements and update policies and procedures related to reporting laboratories that do not report test results as required.

The CDC has an information collection request (OMB Control Number 0920–1299) in order to collect laboratory data related to the COVID–19 Pandemic Response. The CMS package (ICR) is for laboratory implementation and CMS monitoring of compliance with the CMS–3401–IFC CLIA-certified laboratory reporting requirements.

The information collected by the Centers for Medicare and Medicaid Services (CMS) or its designee, such as a CMS agent or CMS approved laboratory accreditation organization, when conducting inspections will be used to determine a laboratory's compliance with the CLIA SARS–CoV–2 test result reporting requirements. During an on-site survey, the Condition-level laboratory requirement at 42 CFR 493.41and 493.1100(a) are assessed for compliance. The information is used by CMS in determining appropriate Civil Money Penalties (CMPs) when laboratories fail to report as required. *Form Number:* CMS–10757 (OMB control number: 0938–1391); *Frequency:* Daily; *Affected Public:* Private Sector Not-for-profit institutions and State, Local and Tribal Governments; *Number of Respondents:* 77,033; *Total Annual Responses:* 308,114; *Total Annual Hours:* 1,386,873 (For policy questions regarding this collection contact Sarah Bennett at 410–786–3354.)

Dated: April 8, 2021.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2021–07559 Filed 4–12–21; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–1076]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Formal Dispute Resolution: Scientific and Technical Issues Related to Pharmaceutical Current Good Manufacturing Practice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by May 13, 2021.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0563. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Formal Dispute Resolution: Scientific and Technical Issues Related to Pharmaceutical Current Good Manufacturing Practice

OMB Control Number 0910–0563—Extension

Section 562 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360bbb–1) directs FDA to establish adequate dispute resolution (DR) procedures to ensure appropriate review of scientific controversies between FDA and members of regulated industry, including possible review by a scientific advisory committee. To implement this provision, we amended the general appeal regulation applicable across all FDA components (§ 10.75 (21 CFR 10.75)) to provide for advisory committee review (§ 10.75(b)(2)). At the same time and consistent with the mandates of section 562 of the FD&C Act, we adopted an approach whereby specific implementation procedures regarding scientific controversy associated with review of certain FDA decisions are detailed in center-issued guidance.

Accordingly, we developed the guidance for industry ''Formal Dispute Resolution: Scientific and Technical Issues Related to Pharmaceutical Current Good Manufacturing Practice.'' We intend that the guidance inform manufacturers of veterinary and human drugs, including human biological drug products, on how to resolve disputes about scientific and technical issues relating to current good manufacturing practice (CGMP).

Disputes related to scientific and technical issues may arise during FDA inspections of pharmaceutical manufacturers to determine compliance with CGMP requirements or during FDA's assessment of corrective actions undertaken as a result of such inspections. The guidance recommends procedures that we believe encourage open and prompt discussion of disputes and lead to their resolution. The guidance describes procedures for raising such disputes to the Office of Regulatory Affairs, and Center levels and procedures for requesting review by the DR panel. The guidance is available on our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* along with additional information regarding the resolution of scientific disputes at FDA.

We estimate only a nominal burden for the information collection and assume that one manufacturer will submit one request annually for tier-one DR and that it will take manufacturers approximately 30 hours to prepare and submit each tier-one DR request. Since our last request for OMB approval of the information collection, we have received no tier-two DRs.

In the **Federal Register** of December 9, 2020 (85 FR 79186), we published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Requests for tier-one DR	1	1	1	30	30

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimated burden for the information collection reflects a decrease of 38 hours and a decrease of 1 request. This adjustment corresponds to a decrease in the number of submissions we have received over the last few years.

Dated: April 8, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–07549 Filed 4–12–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–N–0318]

Development Considerations of Antimicrobial Drugs for the Treatment of Gonorrhea; Public Workshop; Request for Comments

AGENCY: Food and Drug Administration, National Institute of Allergy and Infectious Diseases, Centers for Disease Control and Prevention, HHS.

ACTION: Notice of public workshop; request for comments.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we), the National Institute of Allergy and Infectious Diseases (NIAID), and the Centers for Disease Control and Prevention (CDC) are announcing the following public workshop entitled ''Development Considerations of Antimicrobial Drugs for the Treatment of Gonorrhea.'' The purpose of the public workshop is to discuss the nonclinical and clinical pharmacology data and clinical trial design considerations regarding developing antimicrobial drugs for the treatment of gonorrhea.

DATES: The public workshop will be held virtually on April 23, 2021, from 9 a.m. to 5 p.m., Eastern Time. Submit either electronic or written comments on this public workshop by June 1, 2021. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public workshop will be held in virtual format only.

You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before June 1, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of June 1, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2021–N–0318 for ''Development Considerations of Antimicrobial Drugs for the Treatment of Gonorrhea.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Lori Benner and/or Antoinette Ziolkowski, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 6221, Silver Spring, MD 20993–0002, 301–796–1300.

I. Background

FDA, NIAID, and CDC are announcing a public workshop regarding the development considerations of antimicrobial drugs for the treatment of gonorrhea. As such, discussions will focus on the current state of diagnosis and treatment of gonorrhea and nonclinical and clinical trial design considerations for drug development.

II. Topics for Discussion at the Public Workshop

The workshop will focus on discussing challenges and clinical trial

considerations regarding antimicrobial drug development for gonorrhea.

Discussions are planned around the following topic areas:

- Animal models;
- Clinical pharmacology considerations; and
- Trial design considerations for gonorrhea, such as enrollment strategies, choice of comparators, and site of infection.

The Agency encourages healthcare providers, other U.S. Government Agencies, academic experts, industry, and other stakeholders to attend this public workshop.

III. Participating in the Public Workshop

Registration: Persons interested in attending this public workshop must register online, using the internet link noted in the *Transcripts* section below, by April 21, 2021, 11:59 p.m. Eastern Time. Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone.

Registration is free and based on space availability, with priority given to early registrants. Registrants will receive confirmation when they have been accepted.

If you need special accommodations due to a disability, please contact Antoinette Ziolkowski or Lori Benner (see **FOR FURTHER INFORMATION CONTACT**) no later than April 20, 2021.

Requests for Oral Presentations: During online registration you may indicate if you wish to present during the virtual public comment session and which topic(s) you wish to address. All requests to make oral presentations must be received by April 15, 2021. We will do our best to accommodate requests to make public comments. Individuals and organizations with common interests are urged to consolidate or coordinate their presentations and request time for a joint presentation. We will determine the amount of time allotted to each presenter and the approximate time each oral presentation is to begin and will select and notify participants by April 16, 2021. If selected for presentation, any presentation materials must be emailed to *ONDPublicMTGSupport@fda.hhs.gov* no later than April 19, 2021. No commercial or promotional material will be permitted to be presented or distributed at the public workshop.

Streaming Webcast of the Public Workshop: This public workshop will also be webcast at the following site: *https://collaboration.fda.gov/cderond042321/.*

If you have never attended a Connect Pro event before, test your connection at *https://collaboration.fda.gov/common/help/en/support/meeting_test.htm.* To get a quick overview of the Connect Pro program, visit *https://www.adobe.com/go/connectpro_overview.* FDA has verified the website addresses in this document, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

Transcripts: Please be advised that as soon as a transcript of the public workshop is available, it will be accessible at *https://www.regulations.gov.* It may be viewed at the Dockets Management Staff (see **ADDRESSES**). A link to the transcript will also be available on the internet at *https://www.fda.gov/drugs/news-events-human-drugs/development-considerations-antimicrobial-drugs-treatment-gonorrhea-04232021-04232021.*

Dated: April 7, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–07548 Filed 4–12–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1302]

Pediatric Oncology Subcommittee of the Oncologic Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Pediatric Oncology Subcommittee of the Oncologic Drugs Advisory Committee. The general function of the subcommittee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held virtually on May 11, 2021, from 10 a.m. to 3 p.m. Eastern Time and May 12, 2021, from noon to 5 p.m. Eastern Time.

ADDRESSES: Please note that due to the impact of this COVID–19 pandemic, all meeting participants will be joining this advisory committee meeting via an online teleconferencing platform. Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2020–N–1302. The docket will close on May 10, 2021. Submit either electronic or written comments on this public meeting by May 10, 2021. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before May 10, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of May 10, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Comments received on or before April 28, 2021, will be provided to the subcommittee. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA–2020–N–1302 for ''Pediatric Oncology Subcommittee of the Oncologic Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' FDA will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify the information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: She-Chia Chen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9034, email: *ODAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing platform. On May 11, 2021, the subcommittee will discuss the development and successful implementation of the Pediatric Patient-Reported Outcomes Version of the Common Terminology Criteria for Adverse Events (PRO–CTCAE) as a tool for eliciting the patient's voice in oncology clinical trials to more accurately determine tolerability and toxicity of drugs under investigation. The subcommittee will also address the challenges of capturing this type of data across the age spectrum of the pediatric population and possible generalizability of the data. It will consider approaches to address concerns about excluding the patient voice of young children deemed incapable of self-reporting. The subcommittee will also focus on approaches to investigators and commercial sponsors to use the Pediatric PRO–CTCAE in toxicity assessment moving forward.

On May 12, 2021, the subcommittee will discuss real-world evidence (RWE) for regulatory use in pediatrics, real-world data (RWD) resources, and RWD and RWE to advance pediatric safety assessments of oncology drug products in children within the context of the FDA framework for RWE. Potential data sources and publicly available platforms, including those made possible through the development and implementation of the National Cancer Institute's Childhood Cancer Data Initiative, will be discussed. The potential for use of data sources to construct external controls to evaluate effectiveness of investigational products will be considered given the frequent dependence on single-arm studies due to extremely small study populations, now exaggerated by molecularly defined subtypes of the rare cancer types that occur in children.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference meeting room will be available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link. The meeting will include slide presentations with audio components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the subcommittee. All electronic and written submissions submitted to the Docket (see **ADDRESSES**) on or before April 28, 2021, will be provided to the subcommittee. Oral presentations from the public will be scheduled between approximately 1:35 p.m. to 2:05 p.m. Eastern Time on May 11, 2021. Oral presentations from the public will also be scheduled between approximately 3:30 p.m. to 4 p.m. Eastern Time on May 12, 2021. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before April 19, 2021. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the

speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by April 20, 2021.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact She-Chia Chen (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: April 8, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–07546 Filed 4–12–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Solicitation of Nominations for Membership To Serve on the Advisory Committee on Training in Primary Care Medicine and Dentistry

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Request for nominations.

SUMMARY: HRSA is seeking nominations of qualified candidates for consideration for appointment as members of the Advisory Committee on Training in Primary Care Medicine and Dentistry (ACTPCMD or Committee).

DATES: Nominations for membership on the ACTPCMD must be received on or before the end of the fiscal year.

ADDRESSES: Nomination packages must be electronically submitted to the Designated Federal Official, Shane Rogers, via this email: *BHWAdvisoryCouncil@hrsa.gov.*

FOR FURTHER INFORMATION CONTACT: Shane Rogers, Designated Federal Official, Division of Medicine and Dentistry, Bureau of Health Workforce, email at *SRogers@hrsa.gov* or telephone at 301–443–5260.

SUPPLEMENTARY INFORMATION: The ACTPCMD provides advice and recommendations to the Secretary of Health and Human Services (Secretary); the Senate Committee on Health, Education, Labor and Pensions; and the House of Representatives' Committee on Energy and Commerce concerning the medicine and dentistry activities authorized under section 747 of the PHS Act, as it existed upon the enactment of Section 749 of the PHS Act in 1998. The ACTPCMD is responsible for preparing and submitting an annual report to the Secretary and Congress describing the activities of the Committee, including findings and recommendations made by the Committee. In addition, the ACTPCMD develops, publishes, and implements performance measures; develops and publishes guidelines for longitudinal evaluations; and recommends appropriation levels for programs under Part C of Title VII of the PHS Act. ACTPCMD currently focuses on the following targeted program areas and/or disciplines: Family medicine, general internal medicine, general pediatrics, physician assistants, general dentistry, pediatric dentistry, public health dentistry, and dental hygiene. The Committee meets at least twice a year. A copy of the current committee membership, charter, and reports can be obtained by accessing the ACTPCMD website at *https://www.hrsa.gov/advisory-committees/primarycare-dentist/index.html.*

Nominations: HRSA is requesting nominations for voting members to serve as Special Government Employees (SGEs). The Secretary appoints ACTPCMD members with the expertise needed to fulfill the duties of the Committee. The membership requirements are set forth at section 749 of the PHS Act (42 U.S.C. 293*l*). Nominees sought include, but are not limited to, representatives from the disciplines of allopathic medicine; osteopathic medicine; family medicine; general internal medicine; general pediatrics; physician assistants; general dentistry; pediatric dentistry; public health dentistry; and dental hygiene. Interested applicants may self-nominate or be nominated by another individual or organization.

Individuals selected for appointment to the Committee will be invited to serve for 3 years. Members of the ACTPCMD, as SGEs, receive compensation for performance of their duties on the Committee and reimbursement for per diem and travel expenses incurred for attending ACTPCMD meetings and conducting other business on behalf of the ACTPCMD.

The following information must be included in the package of materials submitted for each individual nominated for consideration:

(1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.,* specific attributes that qualify the nominee for service in this capacity), and a statement that the nominee is willing to serve as a member of the Committee and appears to have no conflict of interest that would preclude membership.

(2) The nominator's name, address, daytime telephone number, and the home or work address, telephone number, and email address of the individual being nominated.

(3) A current copy of the nominee's curriculum vitae.

(4) A statement of interest from the nominee including any experience with Title VII medicine and dentistry training programs, expertise in the field, and personal desire in participating on a National Advisory Committee.

Nomination packages may be submitted directly by the individual being nominated or by the person/organization nominating the candidate.

HHS endeavors to ensure that the membership of the ACTPCMD is fairly balanced in terms of points of view represented and between the health professions, a broad representation of geographic areas, including balance between urban and rural members, gender, and ethnic and minority groups, as well as individuals with disabilities. At least 75 percent of the members of the Committee are health professionals. Appointments shall be made without discrimination on the basis of age, race, color, national origin, sex, disability, or religion.

Individuals who are selected to be considered for appointment will be required to provide detailed information regarding their financial holdings, consultancies, and research grants or contracts. Disclosure of this information is required in order for ethics officials to determine whether there is a potential conflict of interest between the SGE's public duties as a member of the ACTPCMD and their private interests, including an appearance of a loss of impartiality as defined by federal laws and regulations, and to identify any

required remedial action needed to address the potential conflict.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2021–07533 Filed 4–12–21; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Advisory Council on Alzheimer's Research, Care, and Services; Meeting

AGENCY: Assistant Secretary for Planning and Evaluation, HHS.

ACTION: Notice of meeting.

SUMMARY: This notice announces the public meeting of the Advisory Council on Alzheimer's Research, Care, and Services (Advisory Council). The Advisory Council provides advice on how to prevent or reduce the burden of Alzheimer's disease and related dementias on people with the disease and their caregivers. During the May 3, 2021 meeting the Advisory Council will hear invited presentations from a panel of experts on dementia detection and diagnosis, care models, and access to care for those with younger onset dementia. Federal workgroups will also provide updates on work completed in the last quarter.

DATES: The meeting will be held on May 3, 2021 from 1:00 p.m. to 4:30 p.m. EST.

ADDRESSES: The meeting will be virtual, streaming live at *www.hhs.gov/live.*

Comments: Time is allocated on the agenda to hear public comments from 4:00 p.m. to 4:30 p.m. The time for oral comments will be limited to two (2) minutes per individual. In order to provide a public comment, please register by emailing your name to *napa@hhs.gov* by Thursday, April 29. Registered commenters will receive both a dial-in number and a link to join the meeting virtually; individuals will have the choice to either join virtually via the link, or to call in only by using the dial-in number. *Note:* There may be a 30–45 second delay in the livestream video presentation of the conference. For this reason, if you have pre-registered to submit a public comment, it is important to connect to the meeting by 3:45 p.m. to ensure that you do not miss your name and allotted time when called. If you miss your name and allotted time to speak, you may not be able to make your public comment. All participant audio lines will be muted for the duration of the meeting and only unmuted by the Host at the time of the participant's public comment. Should you have questions during the session email *napa@hhs.gov* and someone will respond to your message as quickly as possible.

In order to ensure accuracy, please submit a written copy of oral comments for the record by emailing *napa@hhs.gov* by Tuesday, May 4. These comments will be shared on the website and reflected in the meeting minutes.

In lieu of oral comments, formal written comments may be submitted for the record by Tuesday, May 4 to Helen Lamont, Ph.D., OASPE, 200 Independence Avenue SW, Room 424E, Washington, DC 20201. Comments may also be sent to *napa@hhs.gov.* Those submitting written comments should identify themselves and any relevant organizational affiliations.

FOR FURTHER INFORMATION CONTACT: Helen Lamont, 202–260–6075, *helen.lamont@hhs.gov. Note:* The meeting will be available to the public live at *www.hhs.gov/live.*

SUPPLEMENTARY INFORMATION: Notice of these meetings is given under the Federal Advisory Committee Act (5 U.S.C. App. 2, section 10(a)(1) and (a)(2)). Topics of the Meeting: Dementia detection and diagnosis, dementia care models, access to care for people with younger onset dementia.

Procedure and Agenda: The meeting will be webcast at *www.hhs.gov/live* and video recordings will be added to the National Alzheimer's Project Act website when available, after the meeting.

Authority: 42 U.S.C. 11225; Section 2(e)(3) of the National Alzheimer's Project Act. The panel is governed by provisions of Public Law 92–463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

Dated: April 5, 2021.

Rebecca Haffajee,

Acting Assistant Secretary for Planning and Evaluation.

[FR Doc. 2021–07535 Filed 4–12–21; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Clinical Trials and Biomarker Studies in Stroke.

Date: May 3–4, 2021.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Shanta Rajaram, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Rockville, MD 20852, (301) 435–6033, *rajarams@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: April 7, 2021.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–07512 Filed 4–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Bioengineering Sciences and Technologies: AREA/REAP Review.

Date: May 20, 2021.

Time: 9:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: David Filpula, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6181, MSC 7892, Bethesda, MD 20892, 301–435–2902, *filpuladr@mail.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Nanotechnology Study Section.
Date: June 9–10, 2021.
Time: 9:00 a.m. to 7:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Joseph Thomas Peterson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–408–9694, *petersonjt@csr.nih.gov.*

Name of Committee: Infectious Diseases and Immunology A Integrated Review Group; Cellular and Molecular Immunology—A Study Section.
Date: June 10–11, 2021.
Time: 9:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Mohammad Samuiul Alam, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 809D, Bethesda, MD 20892, (301) 435–1199, *alammos@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: April 6, 2021.

David W Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–07515 Filed 4–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Phase II SBIR Topic 099.
Date: April 28, 2021.
Time: 12:00 p.m. to 2:00 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).
Contact Person: Kristin Goltry, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 209–B, Bethesda, MD 20892, (301) 435–0297, *goltrykl@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: April 6, 2021.

David W Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–07514 Filed 4–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Extension From OMB of One Current Public Collection of Information: TSA Customer Comment Card

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0030 abstracted below that we will submit to OMB for an extension in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. This collection allows customers to provide feedback to TSA about their experiences with TSA's processes and procedures, to request information or request assistance at the TSA checkpoint, and to report security threats and vulnerabilities.

DATES: Send your comments by June 14, 2021.

ADDRESSES: Comments may be emailed to *TSAPRA@dhs.gov* or delivered to the TSA PRA Officer Information Technology (IT), TSA–11, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh at the above address, or by telephone (571) 227–2062.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation will be available at *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

OMB Control Number 1652–0030; TSA Customer Comment Card. TSA provides airport passengers with paper and electronic methods of providing feedback to TSA regarding their experiences with TSA security procedures. The collection of information allows TSA to evaluate and address customer concerns about security procedures and policies.

Passengers may request paper TSA Customer Comment Cards to provide feedback, complaints, or compliments. For passengers who deposit their cards

in the designated drop-boxes, TSA staff at airports collect the cards, categorize comments, enter the results into an online system for reporting, and respond to passengers as appropriate. If the passenger voluntarily provides contact information, TSA will use the contact information to respond to the passenger's comments.

In addition, passengers may make comments or requests, or file complaints, via online submission forms available at *www.tsa.gov/contact/contact-forms.* The electronic forms, which the TSA Contact Center handles, include the following forms:

• *Complaint and Compliment.* Like the paper comment card, the electronic Complaint and Compliment form is intended to allow passengers to provide feedback to TSA regarding their experiences with TSA security procedures. Passengers may also use this form to file Disability or Civil Rights and Civil Liberties complaints.

• *Request for Assistance.* This electronic form allows passengers to request assistance at the TSA checkpoint as part of the TSA Cares Program. The program was developed for passengers with disabilities, medical conditions, and other special circumstances who may need additional assistance during the security screening process.[1]

• *Request for Information.* This electronic form allows passengers to submit an inquiry about TSA policies and procedures, such as traveling with medical conditions, prohibited and permitted items, or security screening.

• *Security Issues.* This electronic form allows passengers to play a critical role in identifying and reporting suspicious activities and threats. The TSA Contact Center provides a receipt to any person who submits an electronic form or email to TSA as required by 49 CFR 1503.3(a).

TSA estimates we will receive 6,950 paper customer comment card submissions, 76,739 electronic comment submissions, and 4,663 disability and civil rights complaints.

The following provides TSA's estimates for time needed to complete these forms:

• Approximately 5 minutes (0.0833 hours) to complete the comment card and the electronic comment submission.

• Approximately 7 minutes (0.1166) hours) to complete the Disability and Civil Right complaint.

In total, TSA estimates the annual number of respondents to be 88,352, with 7,518 average annual burden hours. Annual respondents and burden hours have been adjusted from prior ICR submission estimates due to actual data obtained over the past few years.

Dated: April 7, 2021.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2021–07482 Filed 4–12–21; 8:45 am]

BILLING CODE 9110–05–P

[1] The program is available to all members of the public and is separate from the Military Severely Injured Joint Support Operations Center (MSIJSOC) and the Travel Protocol Office (TPO) programs which support and facilitate the movement of wounded warriors, severely injured military personnel, veterans and other travelers requiring an escort through the airport security screening process.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7034–N–20]

30-Day Notice of Proposed Information Collection: Public Housing Contracting With Resident-Owned Business/Application Requirements; OMB Control No. 2577–0161

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* May 13, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/StartPrintedPage15501PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on January 25, 2021 at 86 FR 6905.

A. Overview of Information Collection

Title of Information Collection: Public Housing Contracting with Resident-Owned Businesses/Application Requirements.

OMB Approval Number: 2577–0161.

Type of Request: Revision of a currently approved collection.

Form Numbers: N/A.

Description of the need for the information and proposed use: PHAs that enter contracts with resident-owned businesses prior to December 26, 2014 must comply with the requirements/procedures set forth in, 24 CFR 85.36(h) and 24 CFR 85.36(i). Contracts with resident-owned businesses entered after December 26, 2014 must also comply with 24 CFR part 963, 2 CFR 200.325, 2 CFR 200.326 and other such contract terms that may be applicable to procurement under the Department's regulations. These requirements include:

• Certified copies of any State, county, or municipal licenses that may be required of the business to engage in the type of business activity for which it was formed. Where applicable, the PHA must obtain a certified copy of its corporate charter or other organizational document that verifies that the business was properly formed in accordance with State law.

• Certification that shows the business is owned by residents, disclosure documents that indicate all owners of the business and each owner's percentage of the business along with sufficient evidence that demonstrates to the satisfaction of the PHA that the business has the ability to perform successfully under the terms and conditions of the proposed contract.

• Certification as to the number of contracts awarded, and the dollar amount of each contract award received under the alternative procurement process; and

• Contract award documents, proof of bonding documents, independent cost estimates and comparable price analyses.

Members of Affected Public: Public Housing Agencies and Applicable Resident Entrepreneurs.

Estimation of the Total number of hours needed to prepare the information collection including number of

respondents, frequency of response, and hours of response: Estimated number of respondents: 76. The calculation for burden hours is as follows: Calculation for number of respondents: 76 (estimated number of PHAs contracting with resident owned businesses) × 24 (number of hours for procurement process) = 1,824 total hours. The Department estimates that out of a total of 3,775 [1] PHAs only 2 percent or 76 PHAs contract with resident owned business. This number is less than the previous request due to several PHAs choosing to leave the program.

The national average PHA staff salary = $51,000 [2] per year or $24.00 [3] per hour.

The calculation for costs is as follows: 76 PHAs × 24 hours = 1,824 hours × $24 = $43,776.

Information collection	Number of respondents	* Average number of reponses per respondent	Total annual responses	Burden hours/ minutes per response	Total hours	Hourly cost	Total annual cost
2577–0161	76	1	76	24	1,824	$24.00	$43,776

Status of the Proposed Information Collection: Meeting HUD Regulation requirements.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2021–07551 Filed 4–12–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7034–N–18]

30-Day Notice of Proposed Information Collection: Indian Housing Block Grant (IHBG) Program; OMB Control No.: 2577–0218

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* May 13, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/StartPrintedPage 15501PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on January 25, 2021 at 86 FR 6910.

A. Overview of Information Collection

Title of Information Collection: Indian Housing Block Grant Program.

OMB Approval Number: 2577–0218.

Type of Request: Revision of a currently approved collection.

Form Numbers: HUD–52737; HUD–4117; HUD–4119; HUD–52736–A; HUD–52736–B; HUD–53246; HUD–53247; HUD–XXXX.

Description of the need for the information and proposed use: The purpose of this notice is to solicit public comment on forms associated with the Indian Housing Block Grant Formula program (IHBG Formula) and the Indian Housing Block Grant Competitive program (IHBG Competitive). The Department of Housing and Urban Development's Office of Native American Programs is responsible for managing and evaluating the programs and for annual Congressional reporting.

Respondents: Native American Tribes, Alaska Native Villages and Corporations, and Tribally Designated Housing Entities.

[1] Inventory Management/Public Housing Information Center (IMS/PIC) system, 10/26/2020.

[2] ziprecruiter.com, *https://www.ziprecruiter.com/Salaries/Public-Housing-Authority-Salary.*

[3] Computed Hourly Rates of Pay Using the 2,087-Hour Divisor, *https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/computing-hourly-rates-of-pay-using-the-2087-hour-divisor/.*

ESTIMATION OF THE TOTAL NUMBERS OF HOURS NEEDED TO PREPARE THE INFORMATION COLLECTION INCLUDING NUMBER OF RESPONDENTS, FREQUENCY OF RESPONSES, AND HOURS OF RESPONSE

Information collection	Form name	Number of respondents	Number of responses per respondent	Total annual responses	Burden hour/minutes per response	Total annual burden
HUD–52737	IHBG Formula IHP/APR	792	2	1584.00	62.00	98,208.00
HUD–4117	Formula Response Form	792	1	792.00	2.00	1,584.00
HUD–4119	Formula Challenge Form	15	1	15.00	150.00	2,250.00
HUD–52736–A	Depository Agreement (Banker)	394	1	394.00	0.25	98.50
HUD–52736–B	Depository Agreement (Broker)	394	1	394.00	0.25	98.50
HUD–53246	IHBG Cost Summary	54	1	54.00	2.00	108.00
HUD–53247	IHBG Implementation Schedule	54	1	54.00	2.00	108.00
HUD–XXXX	IHBG Competitive APR	54	1	54.00	32.00	1,728.00

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2021–07553 Filed 4–12–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7035–N–19]

30-Day Notice of Proposed Information Collection: Requirements for Designating Housing Projects; OMB Control No. 2577–0192

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* May 13, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/Start Printed Page 15501PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on January 25, 2021 at 86 FR 6912.

A. Overview of Information Collection

Title of Information Collection: Requirements for Designating Housing Projects.

OMB Approval Number: 2577–0192.

Type of Request: Revision of a currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: The information collection burden associated with designated housing is required by statute. Section 10 of the Housing Opportunity and Extension Act of 1996 modified Section 7 of the U.S. Housing Act of 1937 to require Public Housing Agencies (PHAs) to submit a plan for HUD approval before a project(s) can be designated as either elderly only, disabled only, or elderly and disabled. In this plan, PHAs must document why the designation is needed and provide the following information:

1. Description of the designated housing plan;
2. Justification for the designation;
3. Availability of alternative housing resources for the non-designated population(s);
4. Impact on the availability of accessible housing;
5. A statement that existing tenants in good standing will not be evicted;
6. A statement of the resources that will be made available if the PHA offers voluntary relocation benefits; and
7. Information describing how the DHP is consistent with any outstanding court orders, lawsuits, investigations, Voluntary Compliance Agreements (VCAs), Conciliation Agreements, or Letters of Findings or Determinations, etc., including for example, actions under Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act, the Age Discrimination Act, the Fair Housing Act, or the Americans with Disabilities Act.

Respondents (*i.e.* affected public): State, or Local Government.

Estimated Number of Respondents: 18.

Estimated Number of Responses: 1.

Frequency of Response: On occasion.

Average Hours per Response: 15 hours.

Total Estimated Burdens: 270 hours.

The previous estimation of 585 annual burden hours has been reduced to 270. This change is based on the average number of Plans submitted between Calendar Years 2017, 2018 and 2019. HUD expects that the number of respondents will continue to decline because of the trend in Public Housing Agencies (PHAs) repositioning their developments and moving out of the public housing program.

The national average PHA staff salary = $51,000 [1] per year or $24.00 per hour. The calculation for costs is as follows: 18 PHAs × 15 hours = 270 hours × $24 [2] = $6,480.

Information collection	Number of respondents	* Average number of reponses per respondent	Total annual responses	Burden hours/ minutes per response	Total hours	Hourly cost	Total annual cost
2577–0192	18	1	18	15	270	$24.00	$6,480

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2021–07552 Filed 4–12–21; 8:45 am]

BILLING CODE 4210–67–P

[1] ziprecruiter.com, *https://www.ziprecruiter.com/Salaries/Public-Housing-Authority-Salary.*

[2] Computed Hourly Rates of Pay Using the 2,087–Hour Divisor, *https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/computing-hourly-rates-of-pay-using-the-2087-hour-divisor/.*

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[GX20EG33DW20300; OMB Control Number 1028–0111]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; The National Map Corps (TNMCorps)—Volunteered Geographic Information Project

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Geological Survey (USGS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before May 13, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–0111 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Erin Korris by email at *ekorris@usgs.gov,* or by telephone at 303–202–4503. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on October 23, 2020 (85 FR 67561). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of

public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The mission of the USGS National Geospatial Program (NGP) is to organize, maintain, publish, and disseminate the geospatial baseline of the Nation's topography, natural landscape, and built environment through The National Map, a set of basic geospatial information provided as a variety of products and services.

Through Office of Management and Budget Circular A–16, the Federal Government assigns leadership responsibilities for themes of geospatial data among Federal agencies. Based in part on this assignment, and because of the unique niche of the Program to provide national coverage of topographic data, the primary focus of the program is to provide national leadership in The National Map themes of hydrography and elevation. The role of the other six layers of The National Map is generally to provide contextual or reference information to its cartographic products and services. The objective of the Program for these layers is to maintain current coverage by obtaining the data from other organizations and suppliers with a minimum investment of Program resources.

The National Map Corps (TNMCorps) is the name of the NGP project that encourages citizen participation in volunteer map data collection activities. TNMCorps uses crowdsourcing—new technologies and internet services to georeference structure points and share this information with others on map-based internet platforms—to produce volunteered geographic information (VGI). People participating in the crowd sourcing are considered part of TNMCorps.

In general, the National Structures Dataset (NSD) has been populated with the best available national data. This data has been exposed for initial improvement by TNMCorps volunteers via the online Map Editor (the instrument). In addition, the data goes through a tiered-editing process, which includes Peer Review and Advanced Editors. At each stage the data is passed through an automatic ''magic filter'' to look for data issues before being submitted into the NSD. In addition, data goes through sampling for quality assurance procedures.

Data within the NSD is available at no cost via The National Map and US Topo to the USGS and the public.

Data quality studies in 2012, 2014, and 2018 showed that the volunteers' actions were accurate and exceeded USGS quality standards. Volunteer-collected data showed an improvement in both location and attribute accuracy for existing data points. Completeness, or the extent to which all appropriate features were identified and recorded, was also improved.

Title of Collection: The National Map Corps—Volunteered Geographic Information Project.

OMB Control Number: 1028–0111.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: general public.

Total Estimated Number of Annual Respondents: 1,000.

Total Estimated Number of Annual Responses: 101,000.

Estimated Completion Time per Response: 12 minutes on average.

Total Estimated Number of Annual Burden Hours: 21,000.

Respondent's Obligation: Voluntary.

Frequency of Collection: Varies by volunteer; volunteers are not obligated to collect any specific amount of data.

Total Estimated Annual Nonhour Burden Cost: There are no ''no-hour cost'' burdens associated with this IC.

An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

David Brostuen,

Director, National Geospatial Technical Operations Center, USGS.

[FR Doc. 2021–07513 Filed 4–12–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A501010.999900253G]

Student Progress and Promotion and Certificate of Completion

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Tribal consultation session and public meeting.

SUMMARY: The Bureau of Indian Education (BIE) is seeking Tribal and public input on draft policies regarding progress and promotion and certificate of completion. The purpose of these two policies is to make certain that student promotion is based on the meeting of minimum standards, with high school graduation marking the culmination of a student's K–12 education, in recognition of all the learning that occurred during that journey.

DATES: A Tribal consultation session will be held from 1 p.m. to 2 p.m. Eastern Time (ET) on May 11, 2021, the public meeting will be held from 2 p.m. to 3 p.m. ET on May 11, 2021. Written comments must be received by 11:59 p.m. ET, May 21, 2021.

ADDRESSES: To join the teleconference, call (800) 857–5055, passcode 6951606. Written comments may be emailed to *consultation@bia.gov.*

FOR FURTHER INFORMATION CONTACT: Travis Clark, Chief Performance Officer, Bureau of Indian Education; (571) 926–6998 or email *travis.clark@bie.edu.*

SUPPLEMENTARY INFORMATION: The BIE is seeking Tribal and public stakeholder input on draft policies regarding progress and promotion and certificate of completion, available at: *https://www.bie.edu/topic-page/special-education* under ''Part 33 Draft Policy Certificate of Completion'' and ''Part 33 Draft Policy Student Progress/Promotion.''

The purpose of these two policies is to make certain that student promotion is based on the meeting of minimum standards, with high school graduation marking the culmination of a student's K–12 education, in recognition of all the learning that occurred during that journey. The conference of a diploma serves as a foundation for the next phase of a young person's life, further education and career. Nevertheless, the BIE understands that in some instances students with the most significant cognitive disabilities may not be able to meet the requirements of a standard high school diploma. In such instances, the BIE desires to give students access to a certificate of completion. The BIE encourages schools/districts to support students with disabilities in seeking and obtaining a standard high school diploma whenever possible. However, the BIE recognizes that for some students with the most significant cognitive disabilities a certificate of completion may be appropriate.

BIE welcomes input from Tribes, families of students at BIE schools and other stakeholders. Please see the information in the **DATES** and **ADDRESSES** section of this notice for information on

the public sessions and directions on joining.

Bryan Newland,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2021–07501 Filed 4–12–21; 8:45 am]

BILLING CODE 4337–15–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1261]

Notice of Institution of Investigation; Certain LED Landscape Lighting Devices and Components Thereof

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on March 9, 2021, under section 337 of the Tariff Act of 1930, as amended, on behalf of Wangs Alliance Corporation d/b/a WAC Lighting. A supplement to the complaint was filed on March 25, 2021. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain LED landscape lighting devices and components thereof by reason of infringement of certain claims of U.S. Patent No. 10,571,101 (''the '101 patent'') and U.S. Patent No. 10,920,971 (''the '971 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Katherine Hiner, Office of the Secretary, Docket Services Division, U.S. International Trade Commission, telephone (202) 205–1802.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2020).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on April 7, 2021, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1–6, 8–13, and 18 of the '101 patent and claims 1 and 7–9 of the '971 patent; and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''LED landscape devices, lights, fixtures, and components, specifically LED circuits, LED drivers, LED modules, housings, mechanical housings, driver housings, optics, lenses, dimming knobs, and stakes'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

Wangs Alliance Corporation, d/b/a WAC Lighting, 44 Harbor Park Drive, Port Washington, NY 11050

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

CAST Lighting LLC, 120–A Goffle Rd., Hawthorne, NJ 07506

Shenzhen Wanjia Lighting Co., Ltd. d/b/a WONKA, 7/F Zhongxinbao Industry Park, No.101, Fucheng'ao Industry Road, Pinghu Town, Longgang District, Shenzhen 518111, China

cBright Lighting, Inc., 15010 Wicks Blvd., San Leandro, CA 94577

Dauer Manufacturing Corp., 10100 NW 116th Way, Suite #14, Medley, FL 33178

FUSA Corp., 10100 NW 116th Way, Suite #14, Medley, FL 33178

Lumien Enterprise, Inc. d/b/a Lumien Lighting, 322 Northpoint Parkway SE, Suite J, Acworth, GA 30102

Jiangsu Sur Lighting Co., Ltd., South-eastern industrial zone, Yancheng, Jiangsu Province, 224050 China

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations will not be named as a party to this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: April 8, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–07561 Filed 4–12–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–227]

Caribbean Basin Economic Recovery Act: Impact on U.S. Industries and Consumers and on Beneficiary Countries

AGENCY: United States International Trade Commission.

ACTION: Notice of preparation of 2021 biennial report and scheduling of a public hearing.

SUMMARY: The Commission has scheduled a public hearing for June 8, 2021, and is inviting the public to submit information in connection with the preparation of its 25th report under section 215 of the Caribbean Basin Economic Recovery Act, which requires the Commission to report biennially to the Congress and the President by September 30 of each reporting year on the economic impact of the Act on U.S. industries and U.S. consumers and on the economy of the beneficiary countries. The report is being prepared under Commission Investigation No. 332–227, *Caribbean Basin Economic Recovery Act: Impact on U.S. Industries and Consumers and on Beneficiary Countries.* The report will cover trade during calendar years 2019 and 2020, and the report will be transmitted to the Congress and the President by September 30, 2021.

DATES:

May 18, 2021: Deadline for filing requests to appear at the public hearing.

May 25, 2021: Deadline for filing prehearing briefs and statements.

June 1, 2021: Deadline for filing electronic copies of oral hearing statements.

June 8, 2021: Public hearing.

June 22, 2021: Deadline for filing posthearing briefs and statements.

June 22, 2021: Deadline for filing all other written submissions.

September 30, 2021: Transmittal of Commission report to the Congress and the President.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the U.S. International Trade Commission Building, 500 E Street SW, Washington, DC. All written submissions must be submitted electronically and addressed to the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. The Commission cannot accept paper copies at this time. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Project Leader Justino De La Cruz, Ph.D. (202–205–3252 or *Justino.Delacruz@usitc.gov*) or Deputy Project Leader Serge Shikher (202–205–2393 or *Serge.Shikher@usitc.gov*) for information specific to this investigation. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its website at *https://www.usitc.gov.* Due to the COVID 19 pandemic, the Commission's building is currently closed to the public. Once the building reopens, persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Background: Section 215(a)(1) of the Caribbean Basin Economic Recovery Act (CBERA) (19 U.S.C. 2704(a)(1)) requires that the Commission submit biennial reports to the Congress and the President regarding the economic impact of the Act on U.S. industries and consumers, and on the economy of the beneficiary countries. Section 215(b)(1) requires that the reports include, but not be limited to, an assessment regarding:

(A) The actual effect, during the period covered by the report, of [CBERA] on the United States economy generally, as well as on those specific domestic industries which produce articles that are like, or directly competitive with, articles being imported into the United States from beneficiary countries; and

(B) the probable future effect which this Act will have on the United States economy generally, as well as on such domestic industries, before the provisions of this Act terminate.

The report will cover trade with the 17 beneficiary countries: Antigua and Barbuda, Aruba, The Bahamas, Barbados, Belize, British Virgin Islands, Curaçao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.

Notice of institution of the investigation was published in the **Federal Register** of May 14, 1986 (51 FR 17678). The Commission plans to transmit the 25th report, covering calendar years 2019 and 2020, by September 30, 2021.

Public Hearing: A public hearing in connection with this investigation will be held beginning at 9:30 a.m. on June 8, 2021, using a videoconference platform. More detailed information about the hearing, including how to participate, will be posted on the Commission's website at (*https://usitc.gov/research_and_analysis/what_we_are_working_on.htm*). Once on that web page, scroll down to the entry for Investigation No. 332–227, *Caribbean Basin Economic Recovery Act: Impact on U.S. Industries and Consumers and on Beneficiary Countries,* and click on the link to ''Hearing Information.'' Interested parties should check the Commission's website periodically for updates.

Requests to appear at the public hearing should be filed with the Secretary no later than 5:15 p.m., May 18, 2021, in accordance with the requirements in the ''Written Submissions'' section below. All prehearing briefs and statements should be filed not later than 5:15 p.m., May 25, 2021. To facilitate the hearing, including the preparation of an accurate written transcript of the hearing, oral testimony to be presented at the hearing must be submitted to the Commission electronically no later than noon, June 1, 2021. All posthearing briefs and statements should be filed not later than 5:15 p.m., June 22, 2021. Posthearing briefs and statements should address matters raised at the hearing. For a description of the different types of written briefs and statements, see the ''Definitions'' section below.

In the event that, as of the close of business on May 18, 2021, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant should contact the Office of the Secretary at 202–205–2000 after May 18, 2021, for information concerning whether the hearing will be held.

Written Submissions: In lieu of or in addition to participating in the hearing, interested parties are invited to file written submissions concerning this investigation. All written submissions should be addressed to the Secretary, and should be received not later than 5:15 p.m., June 22, 2021. All written submissions must conform to the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8), as temporarily amended by 85 FR 15798 (March 19, 2020). Under that rule waiver, the Office of the Secretary will accept only electronic filings at this

time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding electronic filing should contact the Office of the Secretary, Docket Services Division (202–205–1802), or consult the Commission's Handbook on Filing Procedures.

Definitions of Types of Documents That May Be Filed; Requirements: In addition to requests to appear at the hearing, this notice provides for the possible filing of four types of documents: Prehearing briefs, oral hearing statements, posthearing briefs, and other written submissions.

(1) *Prehearing briefs* refers to written materials relevant to the investigation and submitted in advance of the hearing, and includes written views on matters that are the subject of the investigation, supporting materials, and any other written materials that you consider will help the Commission in understanding your views. You should file a prehearing brief particularly if you plan to testify at the hearing on behalf of an industry group, company, or other organization, and wish to provide detailed views or information that will support or supplement your testimony.

(2) *Oral hearing statements (testimony)* refers to the actual oral statement that you intend to present at the public hearing. *Do not* include any confidential business information in that statement. If you plan to testify, you must file a copy of your oral statement by the date specified in this notice. This statement will allow Commissioners to understand your position in advance of the hearing and will also assist the court reporter in preparing an accurate transcript of the hearing (*e.g.,* names spelled correctly).

(3) *Posthearing briefs* refers to submissions filed after the hearing by persons who appeared at the hearing. Such briefs: (a) Should be limited to matters that arose during the hearing, (b) should respond to any Commissioner and staff questions addressed to you at the hearing, (c) should clarify, amplify, or correct any statements you made at the hearing, and (d) may, at your option, address or rebut statements made by other participants in the hearing.

(4) *Other written submissions* refer to any other written submissions that interested persons wish to make, regardless of whether they appeared at the hearing, and may include new information or updates of information previously provided.

There is no standard format that briefs or other written submissions must follow. However, each such document must identify on its cover (1) the name and number of the investigation and the type of document filed (*i.e.,* prehearing brief, oral statement of (name), posthearing brief, or written submission), (2) the name of the person or organization filing it, and (3) whether it contains confidential business information (CBI). If it contains CBI, it must comply with the marking and other requirements set out below in this notice relating to CBI. Submitters of written documents (other than oral hearing statements) are encouraged to include a short summary of their position or interest at the beginning of the document, and a table of contents when the document addresses multiple issues.

Confidential Business Information: Any submissions that contain confidential business information must also conform to the requirements of section 201.6 of the *Commission's Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the confidential business information is clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

The Commission intends to prepare a report that it can release to the public in its entirety, and the Commission will not include any confidential business information in the report it sends to the Congress and the President or makes available to the public. However, all information, including confidential business information, submitted in this investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel for cybersecurity purposes. The Commission will not otherwise disclose any confidential business information in a manner that would reveal the operations of the firm supplying the information.

Summaries Of Written Submissions: Persons wishing to have a summary of their position included in the report should include a summary with their written submission on or before June 22, 2021 and should mark the summary as having been provided for that purpose. The summary should be clearly marked as ''summary for inclusion in the report'' at the top of the page. The summary may not exceed 500 words, should be in MS Word format or a format that can be easily converted to MS Word, and should not include any confidential business information. The summary will be published as provided if it meets these requirements and is germane to the subject matter of the investigation. The Commission will list the name of the organization furnishing the summary and will include a link to the Commission's Electronic Document Information System (EDIS) where the written submission can be found.

By order of the Commission.

Issued: April 7, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–07499 Filed 4–12–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1259]

Notice of Institution of Investigation; Certain Toner Supply Containers and Components Thereof (I)

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on March 8, 2021, under section 337 of the Tariff Act of 1930, as amended, on behalf of Canon Inc. of Japan; Canon U.S.A., Inc. of Melville, New York; and Canon Virginia, Inc. of Newport News, Virginia. A supplement was filed on March 26, 2021. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain toner supply containers and components thereof by reason of infringement of certain claims of U.S. Patent No. 10,209,667 (''the '667 patent''); U.S. Patent No. 10,289,060 (''the '060 patent''); U.S. Patent No. 10,289,061 (''the '061 patent''); U.S. Patent No. 10,295,957 (''the '957 patent''); U.S. Patent No. 10,488,814 (''the '814 patent''); U.S. Patent No. 10,496,032 (''the '032 patent''); U.S.

Patent No. 10,496,033 (''the '033 patent''); U.S. Patent No. 10,514,654 (''the '654 patent''): U.S. Patent No. 10,520,881 (''the '881 patent''); U.S. Patent No. 10,520,882 (''the '882 patent''); U.S. Patent No. 8,565,649 (''the '649 patent''); U.S. Patent No. 9,354,551 (''the '551 patent''); and U.S. Patent No. 9,753,402 (''the '402 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainants request that the Commission institute an investigation and, after the investigation, issue a general exclusion order, or in the alternative a limited exclusion order, and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2020).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on April 7, 2021, *ordered that*—

(1) Pursuant to section 210.10(a)(6) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(a)(6), two separate investigations be instituted based on the complaint to further efficient adjudication, one of which is instituted by this notice of investigation.

(2) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (3) by reason of infringement of one or more of claims 1, 3, 6–8, and 11 of the '667 patent; claims 1, 2, and 6–8 of the '060 patent; claims 1–3, 6–8, and 11 of the '061 patent; claims 1, 2, 4, 7–9 and 12 of the '957 patent; claims 1, 4, 7–9, and 12 of the '814 patent; claims 1, 4, 7–9, 12, 50, 53, 56–58, and 61 of the '032 patent; claims 1, 5, 8–10, 13, 14, 18, 21–23, and 26 of the '033 patent; claims 1, 3–5, 46, and 48–50 of the '654 patent; claims 1, 5, 8–10, and 13 of the '881 patent; and claims 1 and 6–8 of the '882 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(3) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''certain toner supply containers and components thereof that are sold as replacements for Canon toner supply containers used in Canon copy machines'';

(4) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

Canon Inc., 30–2, Shimomaruko 3-chome, Ohta-ku, Tokyo 146–8501, Japan

Canon U.S.A., Inc., One Canon Park, Melville, New York 11747

Canon Virginia, Inc., 12000 Canon Boulevard, Newport News, Virginia 23606

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Ninestar Corporation, No. 3883, Zhuhai Avenue, Xiangzhou District, Zhuhai Guangdong, China 519060

Ninestar Image Tech Limited, No. 3883, Zhuhai Avenue, Xiangzhou District, Zhuhai Guangdong, China 519060

Ninestar Technology Company, Ltd., 13875 Ramona Avenue, Chino, California 91710

Static Control Components, Inc., 3010 Lee Avenue, Sanford, North Carolina 27332–6210

General Plastic Industrial Co. Ltd., No. 50, Tzu-Chiang Road, Wu-Chi Dist., Taichung, Taiwan 43547

Katun Corporation, 10951 Bush Lake Road, Minneapolis, Minnesota 55438–2391

Sichuan XingDian Technology Co., Ltd., 23B/24A, East Building, New Century Computer Mall, Wuhou District, Chengdu, Sichuan, China 610041

Sichuan Wiztoner Technology Co., Ltd., No. 2666, 4th Section of Konggang Road, Southwest Airlines Economic Development Zone, Chengdu, Sichuan, China 610200

Anhuiyatengshangmaoyouxiangongsi, Xiaokoucun, Haitouzhen, Ganyuqu, China 222002

ChengDuXiangChangNanShi YouSheBeiYouXianGongSi, ShaWanLu63Hao1Dong2DanYuan5 Lou1HaoFu7Hao, JinNiuQu, ChengDuShi, SiChuanSheng, China 610000

Copier Repair Specialists, Inc., P.O. Box 127, Lewisville, Texas 75067–0127

Digital Marketing Corporation d/b/a Digital Buyer Marketing Company, 155 W. Washington Blvd., Suite 306, Los Angeles, California 90015

Do It Wiser LLC d/b/a Image Toner, 3422 Old Capitol Trail, #747, Wilmington, Delaware 19808

Easy Group, LLC, 4981 Irwindale Ave., Suite 200, Irwindale, California 91706

Hefeierlandianzishangwuyou xiangongsi, Xuefushequhuan chengdongluyiduan193 195ha, Piduqutuanjiezhen, Chengdushi, China 610000

Ink Technologies Printer Supplies, LLC, 7600 McEwen Road, Dayton, Ohio 45459

Kuhlmann Enterprises, Inc. d/b/a Precision Roller, 2102 W. Quail Avenue, Suite 1, Phoenix, Arizona 85027

LD Products, Inc., 3700 Cover Street, Long Beach, California 90808

NAR Cartridges, 1011 Capuchino Ave., Burlingame, California 94010–3649

Shenzhenshi Keluodeng Kejiyouxiangognsi, Yangguanghuayuan 6dong601, Bujijiedao, Longgangqu, Shenzhen, Guangdong, China 518112

Sun Data Supply, Inc., 3250 Wilshire Blvd., Suite 1620, Los Angeles, California 90010

The Supplies Guys, Inc., 590 Centerville Road #388, Lancaster, Pennsylvania 17601

MITOCOLOR INC., 18351 Colima Road, Suite A #2810, Rowland Heights, California 91748

Xianshi yanliangqu -canqiubai-huodianshanghang, Yanliangqu XinhualujiedaobanbeizhushichangX–572, Xianshi, Shanxisheng, China 710089

Zhuhai Henyun Image Co., Ltd., No. 76, Nanping Technology Industrial Park, Xiangzhou District, Zhuhai, China 519000

Zinyaw LLC d/b/a *TonerPirate.com* and Supply District, 1321 Upland Drive #1359, Houston, Texas 77043

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: April 7, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–07542 Filed 4–12–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–465 and 731–TA–1161 (Second Review)]

Scheduling of Expedited Five-Year Reviews; Certain Steel Grating From China

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of expedited reviews pursuant to the Tariff Act of 1930 (''the Act'') to determine whether revocation of the countervailing and antidumping duty orders on certain steel grating from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: January 4, 2021.

FOR FURTHER INFORMATION CONTACT: Calvin Chang (202–205–3062), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background—On January 4, 2021, the Commission determined that the domestic interested party group response to its notice of institution (85 FR 61981, October 1, 2020) of the subject five-year reviews was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting full reviews.[1] Accordingly, the Commission determined that it would conduct expedited reviews pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Staff report—A staff report containing information concerning the subject matter of the reviews will be placed in the nonpublic record on April 15, 2021, and made available to persons on the Administrative Protective Order service list for these reviews. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

Written submissions—As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the reviews and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the reviews may file written comments with the Secretary on what determination the Commission should reach in the reviews. Comments are due on or before April 22, 2021 and may not contain new factual information. Any person that is neither a party to the five-year reviews nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the reviews by April 22, 2021. However, should the Department of Commerce (''Commerce'') extend the time limit for its completion of the final results of its reviews, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determination—The Commission has determined these reviews are extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: These reviews are being conducted under authority of title VII of the

[1] A record of the Commissioners' votes is available from the Office of the Secretary and at the Commission's website.

[2] The Commission has found the joint response to its notice of institution filed on behalf of Nucor Grating; IKG USA, LLC; Ohio Gratings, Inc.; Interstate Gratings, LLC; and Lichtgitter USA Inc., domestic producers of steel grating, to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: April 8, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–07563 Filed 4–12–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1260]

Notice of Institution of Investigation; Certain Toner Supply Containers and Components Thereof (II)

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on March 8, 2021, under section 337 of the Tariff Act of 1930, as amended, on behalf of Canon Inc. of Japan; Canon U.S.A., Inc. of Melville, New York; and Canon Virginia, Inc. of Newport News, Virginia. A supplement was filed on March 26, 2021. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain toner supply containers and components thereof by reason of infringement of certain claims of U.S. Patent No. 10,209,667 (''the '667 patent''); U.S. Patent No. 10,289,060 (''the '060 patent''); U.S. Patent No. 10,289,061 (''the '061 patent''); U.S. Patent No. 10,295,957 (''the '957 patent''); U.S. Patent No. 10,488,814 (''the '814 patent''); U.S. Patent No. 10,496,032 (''the '032 patent''); U.S. Patent No. 10,496,033 (''the '033 patent''); U.S. Patent No. 10,514,654 (''the '654 patent''): U.S. Patent No. 10,520,881 (''the '881 patent''); U.S. Patent No. 10,520,882 (''the '882 patent''); U.S. Patent No. 8,565,649 (''the '649 patent''); U.S. Patent No. 9,354,551 (''the '551 patent''); and U.S. Patent No. 9,753,402 (''the '402 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainants request that the Commission institute an investigation and, after the investigation, issue a general exclusion order, or in the alternative a limited exclusion order, and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2020).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on April 7, 2021, *ordered that*—

(1) Pursuant to section 210.10(a)(6) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(a)(6), two separate investigations be instituted based on the complaint to further efficient adjudication, one of which is instituted by this notice of investigation.

(2) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (3) by reason of infringement of one or more of claims 1, 2, 6, 7, 12, 25, and 26 of the '649 patent; claims 1–7 of the '551 patent; and claims 1, 15–18, 22, 23, 25–27, 32, 36, 37, 39–41, and 46 of the '402 patent; and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(3) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''certain toner supply containers and components thereof that are sold as replacements for Canon toner supply containers used in Canon copy machines'';

(4) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

Canon Inc., 30–2, Shimomaruko 3-chome, Ohta-ku, Tokyo 146–8501, Japan

Canon U.S.A., Inc., One Canon Park, Melville, New York 11747

Canon Virginia, Inc., 12000 Canon Boulevard, Newport News, Virginia 23606

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Sichuan XingDian Technology Co., Ltd., 23B/24A, East Building, New Century Computer Mall, Wuhou District, Chengdu, Sichuan, China 610041

Sichuan Wiztoner Technology Co., Ltd., No.2666, 4th Section of Konggang Road, Southwest Airlines Economic Development, Zone Chengdu, Sichuan, China 610200

Anhuiyatengshangmaoyouxiangongsi, Xiaokoucun, Haitouzhen, Ganyuqu, China 222002

ChengDuXiangChangNanShiYouSheBeiYouXianGongSi, ShaWanLu63Ha0;Hao1Dong2DanYuan5Lou1HaoFu7Hao, JinNiuQu, ChengDuShi, SiChuanSheng, China 610000

Digital Marketing Corporation d/b/a Digital Buyer Marketing Company, 155 W. Washington Blvd., Suite 306, Los Angeles, California 90015

Do It Wiser LLC d/b/a Image Toner, 3422 Old Capitol Trail, #747, Wilmington, Delaware 19808

Hefeierlandianzishangwuyouxi angongsi, Xuefushequhuanchengdong luyiduan193 195ha, Piduqutuanjie zhen, Chengdushi, China 610000

Shenzhenshi Keluodeng Kejiyouxiangognsi, Yangguang huayuan 6dong601, Bujijiedao, Longgangqu, Shenzhen, Guangdong, China 518112

MITOCOLOR INC., 18351 Colima Road, Suite A #2810, Rowland Heights, California 91748

Xianshi yanliangqu canqiubaihuodian shanghang, Yanliangqu Xinhualuji edaobanbeizhushichangX–572, Xianshi, Shanxisheng, China 710089

Zhuhai Henyun Image Co., Ltd., No. 76, Nanping Technology Industrial Park, Xiangzhou District, Zhuhai, China 519000

(c) The Office of Unfair Import Investigations, U.S. International Trade

Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: April 7, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–07543 Filed 4–12–21; 8:45 am]

BILLING CODE 7020–02–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NASA Document Number (21–023)]

Name of Information Collection: NASA New Technology Reporting System

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection—Renewal of existing approved collection.

SUMMARY: The National Aeronautics and Space Administration has submitted for OMB review a request regarding this information collection under the provisions of the Paperwork Reduction Act.

DATES: Comments are due by May 13, 2021.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Claire Little, NASA Clearance Officer, *claire.a.little@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Contractors performing research and development are required by statutes, NASA implementing regulations, and OMB policy to submit reports of inventions, patents, data, and copyrights, including the utilization and disposition of same. The NASA New Technology Summary Report reporting form is being used for this purpose.

II. Methods of Collection

NASA FAR Supplement clauses for patent rights and new technology encourage the contractor to use an electronic form and provide a hyperlink to the electronic New Technology Reporting System (e-NTR) site *http://invention.nasa.gov.* This website has been set up to help NASA employees and parties under NASA funding agreements (*i.e.,* contracts, grants, cooperative agreements, and subcontracts) to report new technology information directly to NASA via a secure internet connection.

III. Data

Title: NASA New Technology Reporting System.

OMB Number: 2700–0052.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses, colleges and university and/or other for-profit institutions.

Estimated Annual Number of Activities: 3,372.

Estimated Number of Respondents per Activity: 1.

Annual Responses: 3,372.

Estimated Time per Response: 3 hours.

Estimated Total Annual Burden Hours: 10,116.

Estimated Total Annual Cost: $518,191.45.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2021–07503 Filed 4–12–21; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (21–022)]

Name of Information Collection: Generic Clearance for the NASA Office of STEM Engagement Performance Measurement and Evaluation (Testing)

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

DATES: Comments are due by June 14, 2021.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Find this particular information collection by selecting ''Currently under 60-day Review-Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or

copies of the information collection instrument(s) and instructions should be directed to Claire Little, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546 or email *claire.a.little@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

NASA's founding legislation, the Space Act of 1958, as amended, directs the agency to expand human knowledge of Earth and space phenomena and to preserve the role of the United States as a leader in aeronautics, space science, and technology. The NASA Office of STEM Engagement administers the agency's national education activities in support of the Space Act, including the performance measurement and evaluation of educational projects and programs. This generic clearance will allow the NASA Office of STEM Engagement to continue to test and pilot with subject matter experts, secondary students, higher education students, educators, and interested parties new and existing information collection forms and assessment instruments for the purposes of improvement and establishing validity and reliability characteristics of the forms and instruments. Existing information collections include the NASA Intern Survey (Retrospective Survey), NASA Internship Applicants and Awardees Survey (Retrospective Survey), STEM Challenges Impact Surveys (Educator Feedback Retrospective Survey), STEM Challenges Impact Surveys (Parent Survey), and STEM Challenges Impact Surveys (Student Retrospective Survey). Forms and instruments to be tested include program application forms, customer satisfaction questionnaires, focus group protocols, and project activity survey instruments. Methodological testing will include focus group discussions, pilot surveys to test new individual question items as well as the complete form and instrument. In addition, test-retest and similar protocols will be used to determine reliability characteristics of the forms and instruments. Methodological testing will assure that forms and instruments accurately and consistently collect and measure what they are intended to measure and that data collection items are interpreted precisely and consistently, all towards the goal of accurate Agency reporting while improving the execution of NASA STEM Engagement activities.

II. Methods of Collection

Electronic, paper, and focus group interviews.

III. Data

Title: Generic Clearance for the NASA Office of Education Performance Measurement and Evaluation (Testing).

OMB Number: 2700–0159.

Type of Review: Renewal of an existing collection.

Affected Public: Individuals and Households.

Estimated Annual Number of Activities: 8.

Estimated Number of Respondents per Activity: 2,800.

Annual Responses: 1.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 5,600.

Estimated Total Annual Cost: $54,082.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2021–07502 Filed 4–12–21; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 86 FR 17644, April 5, 2021.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: The National Science Board's Committee on Strategy closed teleconference meeting scheduled for April 8, 2021, from 11 a.m.–12:00 p.m. EDT.

CHANGES IN THE MEETING: The meeting was postponed. The new date and time will be published as soon as it is rescheduled.

CONTACT PERSON FOR MORE INFORMATION: Chris Blair, 703/292–7000, *cblair@nsf.gov.*

Chris Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2021–07589 Filed 4–9–21; 11:15 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2021–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of April 12, 19, 26, May 3, 10, 17, 2021.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public.

MATTERS TO BE CONSIDERED:

Week of April 12, 2021

Tuesday, April 13, 2021

9:00 a.m. Briefing on Advanced Reactor Preparedness through Regulatory Engagement and Research Cooperation (Public Meeting) (Contact: Nick Difrancesco: 301–415–1115)

Additional Information: Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the web address—*https://video.nrc.gov/.*

Week of April 19, 2021—Tentative

There are no meetings scheduled for the week of April 19, 2021.

Week of April 26, 2021—Tentative

There are no meetings scheduled for the week of April 26, 2021.

Week of May 3, 2021—Tentative

There are no meetings scheduled for the week of May 3, 2021.

Week of May 10, 2021—Tentative

There are no meetings scheduled for the week of May 10, 2021.

Week of May 17, 2021—Tentative

There are no meetings scheduled for the week of May 17, 2021.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Wesley Held at 301–287–3591 or via email at

Wesley.Held@nrc.gov. The schedule for Commission meetings is subject to change on short notice.

The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, at 301–415–1969, or by email at *Tyesha.Bush@nrc.gov.*

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: April 8, 2021.

For the Nuclear Regulatory Commission.

Wesley W. Held,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2021–07583 Filed 4–9–21; 11:15 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91497; File No. SR–PEARL–2021–15]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Pearl Equities Fee Schedule

April 7, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 31, 2021, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the fee schedule applicable for MIAX Pearl Equities, an equities trading facility of the Exchange (the ''Fee Schedule'').[3] The proposed changes will become effective on April 1, 2021.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently charges different rates for orders in Tapes A, B, and C securities priced at or above $1.00 that remove liquidity from the MIAX Pearl Equities Book.[4] For securities priced at or above $1.00, the Exchange currently charges a fee of $0.0028 per share for orders that remove liquidity in Tapes A and C securities and $0.0027 per share for orders that remove liquidity in Tape B securities. The Exchange now proposes to decrease the fee to remove liquidity in securities priced at or above $1.00 to $0.0025 per share for Tapes A, B, and C securities.[5] With the proposed change, the Exchange will charge the same $0.0025 per share fee for orders in Tape A, B, and C securities priced at or above $1.00 that remove liquidity from the MIAX Pearl Equities Book.

The Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or rebates/incentives to be insufficient. More specifically, the Exchange is only one of several equities venues (including both registered exchanges and various alternative trading systems) to which market participants may direct their order flow and execute their trades. Indeed, equity trading is currently dispersed across 16 exchanges,[6] 31 alternative trading systems,[7] and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 20% of total market share.[8] Thus, in such a low-concentrated and highly competitive market, no single equities trading venue possesses significant pricing power in the execution of trades, and, the Exchange currently represents a very small percentage of the overall market.

The purpose of this proposed change is for business and competitive reasons. As a new entrant into the equities market, the Exchange initially adopted a fee of $0.0028 per share for orders that remove liquidity in securities priced at or above $1.00.[9] The Exchange later delineated the fee for orders that remove liquidity in Tapes A and C from the fee for orders that remove liquidity in Tape B for securities priced at or above $1.00 from the MIAX Pearl Equities Book. With that proposal, the Exchange decreased the fee for orders that remove liquidity in Tape B securities priced at or above $1.00 from $0.0028 to $0.0027 per share. The purpose of this change was to target liquidity in Tape B securities as a means to encourage market participants to enter liquidity removing orders on the Exchange, thereby increasing the execution opportunities for the liquidity adding orders resting on the MIAX Pearl Equities Book.[10] Since those changes

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 1901.

[4] *See* Securities Exchange Act Release No. 90894 (January 11, 2021), 86 FR 4139 (January 15, 2021) (SR–PEARL–2020–37).

[5] The Exchange does not propose to amend the rate for orders that remove liquidity in securities priced below $1.00.

[6] *See* Cboe Global Markets, U.S Equities Market Volume Summary, available at *https://markets.cboe.com/us/equities/market_share/.*

[7] *See* FINRA ATS Transparency Data, available at *https://otctransparency.finra.org/otctransparency/AtsIssueData.* A list of alternative trading systems registered with the Commission is available at *https://www.sec.gov/foia/docs/atslist.htm.*

[8] *See supra* note 6.

[9] *See* Securities Exchange Act Release No. 90102 (October 6, 2020), 85 FR 64559 (October 13, 2020) (SR–PEARL–2020–17).

[10] *See* Securities Exchange Act Release No. 90894 (January 11, 2021), 86 FR 4139 (January 15, 2021) (SR–PEARL–2020–37).

took effect, the Exchange notes that it has experienced an increase in liquidity in Tape B securities overall since it decreased the fee for liquidity removing orders.

The Exchange now proposes to decrease the fee to remove liquidity to $0.0025 per share for orders in Tapes A, B, and C securities priced at or above $1.00. The Exchange believes it is appropriate to further decrease the fee to $0.0025 per share for all orders that remove liquidity across all Tapes to further encourage market participants to enter liquidity removing orders on the Exchange, thereby increasing the execution opportunities for the liquidity adding orders resting on the MIAX Pearl Equities Book.

The proposed changes will become effective on April 1, 2021. The Exchange does not propose any other changes to the MIAX Pearl Equities Fee Schedule.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [11] in general, and furthers the objectives of Section 6(b)(4) of the Act [12] in particular, in that it is an equitable allocation of reasonable fees and other charges among its members and issuers and other persons using its facilities. As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or rebates/incentives to be insufficient. The Exchange believes that the amended Fee Schedule reflects a simple and competitive pricing structure, which is designed to incentivize market participants to add aggressively priced displayed liquidity and direct their order flow to the Exchange. The proposed changes are not unfairly discriminatory because they will apply equally to all Equity Members.[13]

The Exchange believes its proposal to decrease the fee for orders that remove liquidity in all securities priced at or above $1.00 is reasonable, equitable and not unfairly discriminatory because it will apply to all orders in all Tapes for securities priced at or above $1.00. The Exchange believes the proposed decreased fee will encourage market participants to additional [sic] liquidity removing orders on the Exchange, thereby increasing the execution opportunities for liquidity adding orders resting on the MIAX Pearl Equities Book. Therefore, the decreased fee should improve liquidity and price discovery in all securities priced at or above $1.00 across all Tapes. Lastly, the Exchange notes that the proposed decreased fee is also comparable to or lower than the standard fee to remove liquidity charged by other exchanges.[14]

Further, the Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [15]

As the Commission itself recognized, the market for trading services in NMS stocks has become ''more fragmented and competitive.'' [16] Indeed, equity trading is currently dispersed across 16 exchanges,[17] 31 alternative trading systems,[18] and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 20% market share (whether including or excluding auction volume).[19] Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange only recently launched trading operations on September 25, 2020, and thus has a market share of approximately less than 1% of executed volume of equities trading.

The Exchange has designed its proposed changes to continue to balance the need to attract order flow as a new exchange entrant with the desire to continue to provide a simple fee structure to market participants. The Exchange believes its proposed changes will enable it to continue to compete for order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or decrease use of certain categories of products, in response to fee changes. With respect to non-marketable orders which provide liquidity on an exchange, Equity Members can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces reasonably constrain exchange transaction fees that relate to orders that would provide displayed liquidity on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow. Given this competitive environment, the Exchange's proposed changes represent a reasonable attempt to attract order flow to a new exchange entrant.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed fee change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Equity Members and non-Equity Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [20]

The Exchange does not believe that the proposed fee change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposed fee change will

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4) and (5).

[13] The term ''Equity Member'' means a Member authorized by the Exchange to transact business on MIAX Pearl Equities. *See* Exchange Rule 1901.

[14] *See* MEMX LLC fee schedule, available at *https://info.memxtrading.com/fee-schedule/* (providing a standard fee of $0.0026 per share for orders that remove liquidity); Cboe EDGX Exchange, Inc. (''EDGX'') fee schedule, *available at https://www.cboe.com/us/equities/membership/fee_schedule/edgx/* (providing a standard fee of $0.0027 per share to orders that remove liquidity). *See also* the New York Stock Exchange LLC (''NYSE'') fee schedule, *available at https://www.nyse.com/markets/nyse/trading-info/fees* (providing fees to ''take'' liquidity ranging from $0.0024–$0.00275 depending on the type of market participant, order, and execution).

[15] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (File No. S7–10–04) (''Regulation NMS'').

[16] *See* Securities Exchange Act Release No. 82873 (March 14, 2018), 83 FR 13008 (March 26, 2018) (File No. S7–05–18) (Transaction Fee Pilot for NMS Stocks).

[17] *See supra* note 6.

[18] *See supra* note 7.

[19] *See supra* note 6.

[20] *See supra* note 15.

increase competition and is intended to draw volume to the Exchange. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to decrease use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. As a new exchange, the Exchange faces intense competition from existing exchanges and other non-exchange venues that provide markets for equities trading. The proposed decreased fees for securities in all Tapes are intended to attract liquidity to the Exchange, much like the way other exchanges offer multiple incentives to their participants, including tiered pricing that provides higher rebates or discounted executions. These other exchanges will be able to modify such incentives to compete with the Exchange.

Further, while pricing incentives do cause shifts of liquidity between trading centers, market participants make determinations on where to provide liquidity or route orders to take liquidity based on factors other than pricing, including technology, functionality, and other considerations. Consequently, the Exchange believes that the degree to which its proposed changes could impose any burden on competition is extremely limited, and does not believe that such decreased fee for securities in all Tapes would burden competition between Equity Members or competing venues in a manner that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed decreased fee for securities in all Tapes will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes will apply equally to all Equity Members. The proposed decreased fee is intended to encourage market participants to send liquidity removing orders to attempt to execute against the orders that add liquidity to the MIAX Pearl Equities Book. The proposed rates are equally applicable to all market participants and, therefore, the Exchange does not believe they will impose any inappropriate burden on intramarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[21] and Rule 19b–4(f)(2) [22] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2021–15 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2021–15. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2021–15, and should be submitted on or before May 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07496 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

[21] 15 U.S.C. 78s(b)(3)(A)(ii).

[22] 17 CFR 240.19b–4(f)(2).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 91501/April 7, 2021]

In the Matter of the Cboe BZX Exchange, Inc. For an Order of Approval of Proposed Rule Change To List and Trade Shares of the 2x Long VIX Futures ETF (File No. SR–CboeBZX–2020–053); Order Scheduling Filing of Statements on Review

On June 23, 2020, Cboe BZX Exchange, Inc. (''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the 2x Long VIX Futures ETF under BZX Rule 14.11(f)(4). On June 26, 2020, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on July 10, 2020.[3] On August 13, 2020, the Division of Trading and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89234 (July 6, 2020), 85 FR 41644.

Markets (''Division''), pursuant to delegated authority, extended the time period for Commission action on the proposed rule change.[4] On October 7, 2020, the Division, pursuant to delegated authority, instituted proceedings pursuant to Section 19(b)(2)(B) of the Act[5] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[6] On December 15, 2020, the Division, pursuant to delegated authority, designated a longer period for Commission action on the proposed rule change.[7] On February 1, 2021, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change as modified by Amendment No. 1. On February 16, 2021, the Exchange submitted Amendment No. 3 to the proposed rule change and, on February 19, 2021, the Exchange withdrew Amendment No. 3. On February 19, 2021, the Exchange filed partial Amendment No. 4 to the proposed rule change. The Commission received one comment letter on the proposed rule change.[8]

On March 5, 2021, the Division, pursuant to delegated authority,[9] noticed the filing of Amendments No. 2 and No. 4 and approved the proposed rule change, as modified by Amendments No. 2 and No. 4, on an accelerated basis.[10] On March 5, 2021, the Assistant Secretary of the Commission notified BZX that, pursuant to Commission Rule of Practice 431,[11] the Commission would review the Division's action pursuant to delegated authority and that the Division's action pursuant to delegated authority was stayed until the Commission orders otherwise.[12]

Accordingly, *it is ordered*, pursuant to Commission Rule of Practice 431, that by May 7, 2021, any party or other person may file a statement in support of, or in opposition to, the action made pursuant to delegated authority.

It is further *ordered* that the order approving proposed rule change SR–CboeBZX–2020–053 shall remain stayed pending further order of the Commission.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021–07526 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

[4] *See* Securities Exchange Act Release No. 89545, 85 FR 51124 (August 19, 2020).

[5] 15 U.S.C. 78s(b)(2)(B).

[6] *See* Securities Exchange Act Release No. 90118, 85 FR 64563 (October 13, 2020).

[7] *See* Securities Exchange Act Release No. 90671, 85 FR 83136 (December 21, 2020).

[8] The comment letter, as well as all of the amendments to the proposed rule change (except for the one that was withdrawn) are available at: *https://www.sec.gov/comments/sr-cboebzx-2020-053/srcboebzx2020053.htm.*

[9] 17 CFR 200.30–3(a)(12).

[10] *See* Securities Exchange Act Release No. 91265 (March 5, 2021), 86 FR 13922 (March 11, 2021).

[11] 17 CFR 201.431.

[12] *See* letter from J. Matthew DeLesDernier, Assistant Secretary, Commission, to Kyle Murray, Vice President and Associate General Counsel, Cboe Global Markets, dated March 5, 2021, available at *https://www.sec.gov/rules/sro/cboebzx/2018/34-91265-letter-from-assistant-secretary.pdf.*

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91498; File No. SR–MIAX–2021–06]

Self-Regulatory Organizations: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by Miami International Securities Exchange LLC To Amend Its Fee Schedule

April 7, 2021.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 26, 2021, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the ''Fee Schedule'') to extend the waiver period for certain non-transaction fees applicable to Market Makers[3] that trade solely in Proprietary Products[4] until December 31, 2021.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings*, at MIAX's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Market Makers'' refers to ''Lead Market Makers'', ''Primary Lead Market Makers'' and ''Registered Market Makers'' collectively. *See* Exchange Rule 100.

[4] The term ''Proprietary Product'' means a class of options that is listed exclusively on the Exchange. *See* Exchange Rule 100.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to extend the waiver period for certain non-transaction fees applicable to Market Makers that trade solely in Proprietary Products until December 31, 2021.

On October 12, 2018, the Exchange received approval from the Commission to list and trade on the Exchange, options on the SPIKES® Index, a new index that measures expected 30-day volatility of the SPDR S&P 500 ETF Trust (commonly known and referred to by its ticker symbol, ''SPY'').[5] The Exchange adopted its initial SPIKES transaction fees on February 15, 2019 and adopted a new section of the Fee Schedule—Section 1)a)xi), SPIKES—for those fees.[6] Options on the SPIKES Index began trading on the Exchange on February 19, 2019.

On May 31, 2019, the Exchange filed a proposal with the Commission to amend the Fee Schedule to waive certain non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options

[5] *See* Securities Exchange Act Release No. 84417 (October 12, 2018), 83 FR 52865 (October 18, 2018) (SR–MIAX–2018–14) (Order Granting Approval of a Proposed Rule Change by Miami International Securities Exchange, LLC to List and Trade on the Exchange Options on the SPIKES® Index).

[6] *See* Securities Exchange Release No. 85283 (March 11, 2019), 84 FR 9567 (March 15, 2019) (SR–MIAX–2019–11). The Exchange initially filed the proposal on February 15, 2019 (SR–MIAX–2019–04). That filing was withdrawn and replaced with SR–MIAX–2019–11. On September 30, 2020, the Exchange filed its proposal to, among other things, reorganize the Fee Schedule to adopt new Section 1)b), Proprietary Products Exchange Fees, and moved the fees and rebates for SPIKES options into new Section 1)b)i). *See* Securities Exchange Act Release No. 90146 (October 9, 2020), 85 FR 65443 (October 15, 2020) (SR–MIAX–2020–32); Securities Exchange Act Release No. 90814 (December 29, 2020), 86 FR 327 (January 5, 2021) (SR–MIAX–2020–39).

on the SPIKES Index) until September 30, 2019.[7] In particular, the Exchange adopted waivers for Membership Application fees, monthly Market Maker Trading Permit fees, Application Programming Interface (''API'') Testing and Certification fees for Members, and monthly MIAX Express Interface (''MEI'') Port fees assessed to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until September 30, 2019.

On October 1, 2019, the Exchange filed a proposal with the Commission to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until December 31, 2019.[8] On December 30, 2019, the Exchange filed a proposal with the Commission to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until June 30, 2020.[9] On June 30, 2020, the Exchange filed a proposal with the Commission to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until September 30, 2020.[10] On September 30, 2020, the Exchange filed a proposal with the Commission to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until December 31, 2020.[11] On December 29, 2020, the Exchange filed a proposal with the Commission to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until March 31, 2021.[12]

The Exchange now proposes to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until December 31, 2021. In particular, the Exchange proposes to waive Membership Application fees, monthly Market Maker Trading Permit fees, Member API Testing and Certification fees, and monthly MEI Port fees assessed to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until December 31, 2021.

Membership Application Fees

The Exchange currently assesses Membership fees for applications of potential Members. The Exchange assesses a one-time Membership Application fee on the earlier of (i) the date the applicant is certified in the membership system, or (ii) once an application for MIAX membership is finally denied. The one-time application fee is based upon the applicant's status as either a Market Maker or an Electronic Exchange Member (''EEM'').[13] A Market Maker is assessed a one-time Membership Application fee of $3,000.

The Exchange proposes that the waiver for the one-time Membership Application fee of $3,000 for Market Makers that trade solely in Proprietary Products (including options on SPIKES) will be extended from April 1, 2021 until December 31, 2021, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposed change is to continue to provide an incentive for potential Market Makers to submit membership applications, which should result in increasing potential liquidity in Proprietary Products, including options on SPIKES. Even though the Exchange is proposing to extend the waiver of this particular fee for Market Makers who will trade solely in Proprietary Products from April 1, 2021 until December 31, 2021, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness that the Exchange intends to assess such a fee after December 31, 2021.

Trading Permit Fees

The Exchange issues Trading Permits that confer the ability to transact on the Exchange. MIAX Trading Permits are issued to Market Makers and EEMs. Members receiving Trading Permits during a particular calendar month are assessed monthly Trading Permit fees as set forth in the Fee Schedule. As it relates to Market Makers, MIAX currently assesses a monthly Trading Permit fee in any month the Market Maker is certified in the membership system, is credentialed to use one or more MIAX MEI Ports[14] in the production environment and is assigned to quote in one or more classes. MIAX assesses the monthly Market Maker Trading Permit fee for its Market Makers based on the greatest number of classes listed on MIAX that the MIAX Market Maker was assigned to quote in on any given day within a calendar month and the applicable fee rate is the lesser of either the per class basis or percentage of total national average daily volume measurements. A MIAX Market Maker is assessed a monthly Trading Permit Fee according to the following table:

Type of trading permit	Monthly MIAX trading permit fee	Market maker assignments (the lesser of the applicable measurements below) Ω	
		Per class	% of National average daily volume
Market Maker (includes RMM, LMM, PLMM).	$7,000.00	Up to 10 Classes	Up to 20% of Classes by volume.
	$12,000.00	Up to 40 Classes	Up to 35% of Classes by volume.
	* $17,000.00	Up to 100 Classes	Up to 50% of Classes by volume.
	* $22,000.00	Over 100 Classes	Over 50% of Classes by volume up to all Classes listed on MIAX.

Ω Excludes Proprietary Products.

[7] *See* Securities Exchange Act Release No. 86109 (June 14, 2019), 84 FR 28860 (June 20, 2019) (SR–MIAX–2019–28).

[8] *See* Securities Exchange Act Release No. 87282 (October 10, 2019), 84 FR 55658 (October 17, 2019) (SR–MIAX–2019–43).

[9] *See* Securities Exchange Act Release No. 87897 (January 6, 2020), 85 FR 1346 (January 10, 2020) (SR–MIAX–2019–53).

[10] *See* Securities Exchange Act Release No. 89289 (July 10, 2020), 85 FR 43279 (July 16, 2020) (SR–MIAX–2020–22).

[11] *See* Securities Exchange Act Release No. 90146 (October 9, 2020), 85 FR 65443 (October 15, 2020) (SR–MIAX–2020–32).

[12] *See* Securities Exchange Act Release No. 90814 (December 29, 2020), 86 FR 327 (January 5, 2021) (SR–MIAX–2020–39).

[13] The term ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[14] Full Service MEI Ports provide Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per matching engine. *See* Fee Schedule, note 27.

* For these Monthly MIAX Trading Permit Fee levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.060% of the total monthly executed volume reported by OCC in the market maker account type for MIAX-listed option classes for that month, then the fee will be $15,500 instead of the fee otherwise applicable to such level.

MIAX proposes that the waiver for the monthly Trading Permit fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) will be extended from April 1, 2021 to December 31, 2021, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposed change is to continue to provide an incentive for Market Makers to provide liquidity in Proprietary Products on the Exchange, which should result in increasing potential order flow and volume in Proprietary Products, including options on SPIKES. Even though the Exchange is proposing to extend the waiver of this particular fee for Market Makers trading solely in Proprietary Products from April 1, 2021 until December 31, 2021, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness by potential Members seeking a Trading Permit on the Exchange that the Exchange intends to assess such a fee after December 31, 2021.

The Exchange also proposes that Market Makers who trade Proprietary Products (including options on SPIKES) along with multi-listed classes will continue to not have Proprietary Products (including SPIKES) counted toward those Market Makers' class assignment count or percentage of total national average daily volume. This exclusion is noted with the symbol ''Ω'' following the table that shows the monthly Trading Permit Fees currently assessed for Market Makers in Section (3)(b) of the Fee Schedule.

API Testing and Certification Fee

The Exchange assesses an API Testing and Certification fee to all Members depending upon the type of Member. An API makes it possible for Members' software to communicate with MIAX software applications, and is subject to Members testing with, and certification by, MIAX. The Exchange offers four types of interfaces: (i) The Financial Information Exchange Port (''FIX Port''),[15] which enables the FIX Port user (typically an EEM or a Market Maker) to submit simple and complex orders electronically to MIAX; (ii) the MEI Port, which enables Market Makers to submit simple and complex electronic quotes to MIAX; (iii) the Clearing Trade Drop Port (''CTD Port''),[16] which provides real-time trade clearing information to the participants to a trade on MIAX and to the participants' respective clearing firms; and (iv) the FIX Drop Copy Port (''FXD Port''),[17] which provides a copy of real-time trade execution, correction and cancellation information through a FIX Port to any number of FIX Ports designated by an EEM to receive such messages.

API Testing and Certification fees for Market Makers are assessed (i) initially per API for CTD and MEI in the month the Market Maker has been credentialed to use one or more ports in the production environment for the tested API and the Market Maker has been assigned to quote in one or more classes, and (ii) each time a Market Maker initiates a change to its system that requires testing and certification. API Testing and Certification fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. The Exchange currently assesses a Market Maker an API Testing and Certification fee of $2,500. The API Testing and Certification fees represent costs incurred by the Exchange as it works with each Member for testing and certifying that the Member's software systems communicate properly with MIAX's interfaces.

MIAX proposes to extend the waiver of the API Testing and Certification fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) from April 1, 2021 until December 31, 2021, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposed change is to continue to provide an incentive for potential Market Makers to develop software applications to trade in Proprietary Products, including options on SPIKES. Even though the Exchange is proposing to extend the waiver of this particular fee for Market Makers who trade solely in Proprietary Products from April 1, 2021 until December 31, 2021, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness that the Exchange intends to assess such a fee after December 31, 2021.

MEI Port Fees

MIAX provides four (4) Port types, including (i) the FIX Port, which enables the FIX Port user (typically an EEM or a Market Maker) to submit simple and complex orders electronically to MIAX; (ii) the MEI Port, which enables Market Makers to submit simple and complex electronic quotes to MIAX; (iii) the CTD Port, which provides real-time trade clearing information to the participants to a trade on MIAX and to the participants' respective clearing firms; and (iv) the FXD Port, which provides a copy of real-time trade execution, correction and cancellation information through a FIX Port to any number of FIX Ports designated by an EEM to receive such messages.

MIAX assesses monthly MEI Port Fees to Market Makers in each month the Member has been credentialed to use the MEI Port in the production environment and has been assigned to quote in at least one class. The amount of the monthly MEI Port Fee is based upon the number of classes in which the Market Maker was assigned to quote on any given day within the calendar month, and upon the class volume percentages set forth in the table below. The class volume percentage is based on the total national average daily volume in classes listed on MIAX in the prior calendar quarter. Newly listed option classes are excluded from the calculation of the monthly MEI Port Fee until the calendar quarter following their listing, at which time the newly listed option classes will be included in both the per class count and the percentage of total national average

[15] A FIX Port is an interface with MIAX systems that enables the Port user (typically an Electronic Exchange Member or a Market Maker) to submit simple and complex orders electronically to MIAX. *See* Fee Schedule, note 24.

[16] Clearing Trade Drop (''CTD'') provides Exchange members with real-time clearing trade updates. The updates include the Member's clearing trade messages on a low latency, real-time basis. The trade messages are routed to a Member's connection containing certain information. The information includes, among other things, the following: (i) Trade date and time; (ii) symbol information; (iii) trade price/size information; (iv) Member type (for example, and without limitation, Market Maker, Electronic Exchange Member, Broker-Dealer); (v) Exchange Member Participant Identifier (''MPID'') for each side of the transaction, including Clearing Member MPID; and (vi) strategy specific information for complex transactions. CTD Port Fees will be assessed in any month the Member is credentialed to use the CTD Port in the production environment. *See* Fee Schedule, Section 5)d)iii.

[17] The FIX Drop Copy Port (''FXD'') is a messaging interface that will provide a copy of real-time trade execution, trade correction and trade cancellation information for simple and complex orders to FIX Drop Copy Port users who subscribe to the service. FIX Drop Copy Port users are those users who are designated by an EEM to receive the information and the information is restricted for use by the EEM only. FXD Port Fees will be assessed in any month the Member is credentialed to use the FXD Port in the production environment. *See* Fee Schedule, Section 5(d)iv.

daily volume. The Exchange assesses MIAX Market Makers the monthly MEI Port Fee based on the greatest number of classes listed on MIAX that the MIAX Market Maker was assigned to quote in on any given day within a calendar month and the applicable fee rate that is the lesser of either the per class basis or percentage of total national average daily volume measurement. MIAX assesses MEI Port Fees on Market Makers according to the following table:

Monthly MIAX MEI fees	Market maker assignments (the lesser of the applicable measurements below) Ω	
	Per class	% of National average daily volume
$5,000.00	Up to 5 Classes	Up to 10% of Classes by volume.
$10,000.00	Up to 10 Classes	Up to 20% of Classes by volume.
$14,000.00	Up to 40 Classes	Up to 35% of Classes by volume.
$17,500.00 *	Up to 100 Classes	Up to 50% of Classes by volume.
$20,500.00 *	Over 100 Classes	Over 50% of Classes by volume up to all Classes listed on MIAX.

Ω Excludes Proprietary Products.

* For these Monthly MIAX MEI Fees levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.060% of the total monthly executed volume reported by OCC in the market maker account type for MIAX-listed option classes for that month, then the fee will be $14,500 instead of the fee otherwise applicable to such level.

MIAX proposes to extend the waiver of the monthly MEI Port Fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) from April 1, 2021 until December 31, 2021, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposal is to continue to provide an incentive to Market Makers to connect to MIAX through the MEI Port such that they will be able to trade in MIAX Proprietary Products. Even though the Exchange is proposing to extend the waiver of this particular fee for Market Makers trading solely in Proprietary Products until December 31, 2021, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness that the Exchange intends to assess such a fee after December 31, 2021.

The Exchange notes that for the purposes of this proposed change, other Market Makers who trade MIAX Proprietary Products (including options on SPIKES) along with multi-listed classes will continue to not have Proprietary Products (including SPIKES) counted toward those Market Makers' class assignment count or percentage of total national average daily volume. This exclusion is noted by the symbol ''Ω'' following the table that shows the monthly MEI Port Fees currently assessed for Market Makers in Section 5)d)ii) of the Fee Schedule.

The proposed extension of the fee waivers are targeted at market participants, particularly market makers, who are not currently members of MIAX, who may be interested in being a Market Maker in Proprietary Products on the Exchange. The Exchange estimates that there are fewer than ten (10) such market participants that could benefit from the extension of these fee waivers. The proposed extension of the fee waivers does not apply differently to different sizes of market participants, however the fee waivers do only apply to Market Makers (and not EEMs).

Market Makers, unlike other market participants, take on a number of obligations, including quoting obligations that other market participants do not have. Further, Market Makers have added market making and regulatory requirements, which normally do not apply to other market participants. For example, Market Makers have obligations to maintain continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and to not make bids or offers or enter into transactions that are inconsistent with a course of dealing. Accordingly, the Exchange believes it is reasonable and not unfairly discriminatory to continue to offer the fee waivers to Market Makers because the Exchange is seeking additional liquidity providers for Proprietary Products, in order to enhance liquidity and spreads in Proprietary Products, which is traditionally provided by Market Makers, as opposed to EEMs.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [18] in general, and furthers the objectives of Section 6(b)(4) of the Act [19] in particular, in that it is an equitable allocation of reasonable fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the proposal to extend the fee waiver period for certain non-transaction fees for Market Makers in Proprietary Products is an equitable allocation of reasonable fees because the proposal continues to waive non-transaction fees for a limited period of time in order to enable the Exchange to improve its overall competitiveness and strengthen its market quality for all market participants in MIAX's Proprietary Products, including options on SPIKES. The Exchange believe the proposed extension of the fee waivers is fair and equitable and not unreasonably discriminatory because it applies to all market participants not currently registered as Market Makers at the Exchange. Any market participant may choose to satisfy the additional requirements and obligations of being a Market Maker and trade solely in Proprietary Products in order to qualify for the fee waivers.

The Exchange believes that the proposed extension of the fee waivers is equitable and not unfairly discriminatory for Market Makers as compared to EEMs because Market Makers, unlike other market participants, take on a number of obligations, including quoting obligations that other market participants do not have. Further, Market Makers have added market making and regulatory requirements, which normally do not apply to other market participants. For example, Market Makers have obligations to maintain continuous markets, engage in a course of dealings reasonably

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(4) and (5).

calculated to contribute to the maintenance of a fair and orderly market, and to not make bids or offers or enter into transactions that are inconsistent with a course of dealing.

The Exchange believes it is reasonable and equitable to continue to waive the one-time Membership Application Fee, monthly Trading Permit Fee, API Testing and Certification Fee, and monthly MEI Port Fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) until December 31, 2021, since the waiver of such fees provides incentives to interested market participants to trade in Proprietary Products. This should result in increasing potential order flow and liquidity in MIAX Proprietary Products, including options on SPIKES.

The Exchange believes it is reasonable and equitable to continue to waive the API Testing and Certification fee assessable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until December 31, 2021, since the waiver of such fees provides incentives to interested Members to develop and test their APIs sooner. Determining system operability with the Exchange's system will in turn provide MIAX with potential order flow and liquidity providers in Proprietary Products.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory that Market Makers who trade in Proprietary Products along with multi-listed classes will continue to not have Proprietary Products counted toward those Market Makers' class assignment count or percentage of total national average daily volume for monthly Trading Permit Fees and monthly MEI Port Fees in order to incentivize existing Market Makers who currently trade in multi-listed classes to also trade in Proprietary Products, without incurring certain additional fees.

The Exchange believes that the proposed extension of the fee waivers constitutes an equitable allocation of reasonable fees and other charges among its members and issuers and other persons using its facilities. The proposed extension of the fee waivers means that all prospective market makers that wish to become Market Maker Members of the Exchange and quote solely in Proprietary Products may do so and have the above-mentioned fees waived until December 31, 2021. The proposed extension of the fee waivers will continue to not apply to potential EEMs because the Exchange is seeking to enhance the quality of its markets in Proprietary Products through introducing more competition among Market Makers in Proprietary Products. In order to increase the competition, the Exchange believes that it must continue to waive entry type fees for such Market Makers. EEMs do not provide the benefit of enhanced liquidity which is provided by Market Makers, therefore the Exchange believes it is reasonable and not unfairly discriminatory to continue to only offer the proposed fee waivers to Market Makers (and not EEMs). Further, the Exchange believes it is reasonable and not unfairly discriminatory to continue to exclude Proprietary Products from an existing Market Maker's permit fees and port fees, in order to incentive such Market Makers to quote in Proprietary Products. The amount of a Market Maker's permit and port fee is determined by the number of classes quoted and volume of the Market Maker. By excluding Proprietary Products from such fees, the Exchange is able to incentivize Market Makers to quote in Proprietary Products. EEMs do not pay permit and port fees based on the classes traded or volume, so the Exchange believes it is reasonable, equitable, and not unfairly discriminatory to only offer the exclusion to Market Makers (and not EEMs).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes that the proposal to reorganize certain sections of the Fee Schedule does not impose any burden on intra-market competition that is not necessary or appropriate because this proposal is not competitive in nature, but rather is designed to remedy minor non-substantive issues and provide added clarity to the Fee Schedule in order to avoid potential confusion on the part of market participants.

The Exchange believes that the proposal to extend certain of the non-transaction fee waivers until December 31, 2021 for Market Makers that trade solely in Proprietary Products would increase intra-market competition by incentivizing new potential Market Makers to quote in Proprietary Products, which will enhance the quality of quoting and increase the volume of contracts in Proprietary Products traded on MIAX, including options on SPIKES. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity for the Exchange's Proprietary Products. Enhanced market quality and increased transaction volume in Proprietary Products that results from the anticipated increase in Market Maker activity on the Exchange will benefit all market participants and improve competition on the Exchange.

The Exchange does not believe that the proposed rule change will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes for each separate type of market participant (new Market Makers and existing Market Makers) will be assessed equally to all such market participants. While different fees are assessed to different market participants in some circumstances, these different market participants have different obligations and different circumstances as discussed above. For example, Market Makers have quoting obligations that other market participants (such as EEMs) do not have.

Inter-Market Competition

The Exchange does not believe the proposal to reorganize certain sections of the Fee Schedule will impose any burden on inter-market competition as the proposal does not address any competitive issues and is intended to protect investors by providing further transparency regarding the Exchange's Fee Schedule.

The Exchange does not believe that the proposed rule change to extend the fee waiver for certain non-transaction fees will impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed extension of the fee waivers apply only to the Exchange's Proprietary Products (including options on SPIKES), which are traded exclusively on the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[20] and Rule

[20] 15 U.S.C. 78s(b)(3)(A)(ii).

19b–4(f)(2)[21] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2021–06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2021–06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2021–06, and should be submitted on or before May 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07497 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

[21] 17 CFR 240.19b–4(f)(2).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Securities Exchange Act of 1934 Release No. 91502]

Order Scheduling Filing of Statements of Review in the Matter of the CBOE BZX Exchange, Inc. for an Order of Approval of Proposed Rule Change To List and Trade Shares of the –1x Short VIX Futures ETF (File No. SR–CboeBZX–2020–070)

April 7, 2021.

On September 4, 2020, Cboe BZX Exchange, Inc. (''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the –1x Short VIX Futures ETF under BZX Rule 14.11(f)(4). The proposed rule change was published for comment in the **Federal Register** on September 23, 2020.[3] On October 30, 2020, the Division of Trading and Markets (''Division''), pursuant to delegated authority, extended the time period for Commission action on the proposed rule change.[4] On December 14, 2020, the Division, pursuant to delegated authority, instituted proceedings pursuant to Section 19(b)(2)(B) of the Act[5] to determine whether to approve or disapprove the proposed rule change.[6] On January 28, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed. On February 16, 2021, the Exchange submitted Amendment No. 2 to the proposed rule change and, on February 19, 2021, the Exchange withdrew Amendment No. 2. On February 19, 2021, the Exchange filed partial Amendment No. 3 to the proposed rule change. The Commission received eight comment letters on the proposed rule change.[7]

On March 5, 2021, the Division, pursuant to delegated authority,[8] noticed the filing of Amendments No. 1 and No. 3 and approved the proposed rule change, as modified by Amendments No. 1 and No. 3, on an accelerated basis.[9] On March 5, 2021, the Assistant Secretary of the Commission notified BZX that, pursuant to Commission Rule of Practice 431,[10] the Commission would review the Division's action pursuant to delegated authority and that the Division's action pursuant to delegated authority was stayed until the Commission orders otherwise.[11]

Accordingly, *It is ordered,* pursuant to Commission Rule of Practice 431, that by May 7, 2021, any party or other person may file a statement in support of, or in opposition to, the action made pursuant to delegated authority.

It is further *ordered* that the order approving proposed rule change SR–CboeBZX–2020–070 shall remain stayed pending further order of the Commission.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021–07528 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89901 (September 17, 2020), 85 FR 59836.

[4] *See* Securities Exchange Act Release No. 90292, 85 FR 70678 (November 5, 2020).

[5] 15 U.S.C. 78s(b)(2)(B).

[6] *See* Securities Exchange Act Release No. 90659, 85 FR 82536 (December 18, 2020).

[7] The comment letters, as well as all of the amendments to the proposed rule change are available at: *https://www.sec.gov/comments/sr-cboebzx-2020-070/srcboebzx2020070.htm.*

[8] 17 CFR 200.30–3(a)(12).

[9] *See* Securities Exchange Act Release No. 91264 (March 5, 2021), 86 FR 13939 (March 11, 2021).

[10] 17 CFR 201.431.

[11] *See* letter from J. Matthew DeLesDernier, Assistant Secretary, Commission, to Kyle Murray, Vice President and Associate General Counsel, Cboe Global Markets, dated March 5, 2021, available at *https://www.sec.gov/rules/sro/cboebzx/2018/34-91264-letter-from-assistant-secretary.pdf.*

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34242; File No. 812–15101]

The Ohio National Life Insurance Company, et al.

April 7, 2021.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order approving the substitution of certain securities pursuant to section 26(c) of the Investment Company Act of 1940, as amended (the ''Act'') and an order of exemption pursuant to section 17(b) of the Act from section 17(a) of the Act.

APPLICANTS: The Ohio National Life Insurance Company (''Ohio National'') and National Security Life and Annuity Company (''National Security'' and collectively with Ohio National, the ''Insurance Company Applicants''); their respective separate accounts, Ohio National Variable Account A, Ohio National Variable Account B, Ohio National Variable Account D and National Security Variable Account N (collectively, the ''Separate Accounts,'' and together with the Insurance Company Applicants, the ''Section 26 Applicants''); the Section 26 Applicants, Ohio National Fund, Inc. (''ON Fund'') and Ohio National Investments, Inc. (''ONII'') (collectively the ''Section 17 Applicants'' or the ''Applicants'').

SUMMARY OF APPLICATION: The Section 26 Applicants seek an order pursuant to section 26(c) of the Act, approving the substitution of shares issued by certain investment portfolios of registered investment companies (the ''Existing Portfolios'') for the shares of certain investment portfolios of registered investment companies (the ''Replacement Portfolios''), held by the Separate Accounts as investment options for certain variable annuity contracts (the ''Contracts'') issued by Ohio National and National Security (the ''Substitutions''). The Section 17 Applicants seek an order pursuant to section 17(b) of the Act exempting them from section 17(a) of the Act to the extent necessary to permit them to engage in certain in-kind transactions in connection with the Substitutions (''In-Kind Transactions'').

FILING DATES: The application was filed on February 27, 2020 and amended on June 26, 2020, November 20, 2020, January 29, 2021, April 1, 2021, and April 2, 2021.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicants with a copy of the request personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on May 3, 2021 and should be accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Kimberly A. Plante, Esq., Vice President and Counsel, The Ohio National Life Insurance Company, *OhioNationalFund@ohionational.com.*

FOR FURTHER INFORMATION CONTACT: Asaf Barouk, Attorney-Advisor at (202) 551–4029 or David Nicolardi, Branch Chief at (202) 551–6825 (Chief Counsel's Office, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm*, or by calling (202) 551–8090.

Applicants' Representations

1. Ohio National is a stock life insurance company. Ohio National offers individual annuities and previously offered variable annuities. National Security is a stock life insurance company. National Security previously offered variable annuities and variable universal life insurance. Ohio National is the depositor and sponsor of Ohio National Variable Account A, Ohio National Variable Account B and Ohio National Variable Account D. National Security is the depositor and sponsor of National Security Variable Account N.

2. Each Separate Account meets the definition of ''separate account,'' as defined in section 2(a)(37) of the Act. The Separate Accounts are registered with the Commission under the Act as unit investment trusts. The Separate Accounts are segmented into subaccounts, and each subaccount invests in an underlying registered open-end management investment company or series thereof, such as each of the Existing Portfolios.

3. The Contracts are single and flexible premium deferred individual variable annuity contracts (the ''Individual Contracts'') and flexible premium deferred group variable annuity contracts (the ''Group Contracts''). Each Contract is registered under the Securities Act of 1933, as amended (the ''1933 Act''). The application sets forth the registration statement file numbers for the Contracts and the Separate Accounts.

4. By the terms of the Contracts and subject to certain restrictions (and as set forth in the prospectuses for the Contracts), Contract owners (each, a ''Contract owner,'' and collectively, ''Contract owners'') may allocate some or all of their Contract values to the subaccounts that are available as investment options under their respective Contracts, as well as any available fixed rate options. A Contract owner may transfer Contract value among any available subaccounts during the accumulation period, as well as during the annuitization period if the Contract owner elected a variable annuity payout option.

5. As disclosed in the Contracts' prospectuses, Ohio National and National Security impose or reserve the right to impose certain limitations on transfers among subaccounts. Currently, Ohio National and National Security do not impose fees on transfers or expressly limit the number or frequency of transfers among subaccounts. Also, Ohio National and National Security impose or may impose limits on the total number of subaccounts to which a Contract owner may allocate Contract value.

6. Certain Individual Contracts made available guaranteed death benefit riders (each, a ''Death Benefit Rider,'' and collectively the ''Death Benefit Riders'') and guaranteed living benefit riders (each, a ''Living Benefit Rider,'' and collectively, the ''Living Benefit Riders''). The terms of certain Death Benefit Riders and certain Living Benefit Riders include investment restrictions that limit the available investment options to identified categories consisting of a specified selection of investment options. A Contract owner with a Death Benefit Rider or Living Benefit Rider that has investment restrictions may transfer Contract value by reallocating all of his or her Contract value within the parameters of the investment restrictions.

7. Applicants state that, as set forth in the prospectuses for the Contracts, each

Contract provides that Ohio National or National Security, as applicable, reserves the right to substitute shares of the funds in which the Separate Accounts invest for shares of any funds already held or to be held in the future by the Separate Accounts.

8. Ohio National and National Security, each on its own behalf and on behalf of its Separate Accounts, proposes to exercise its contractual right to substitute shares of certain underlying funds currently available under the Contracts for shares of different underlying funds. The Section 26 Applicants propose to substitute shares of the Existing Portfolios that are held in subaccounts of their respective Separate Accounts for shares of the corresponding Replacement Portfolios below. All shares of the Existing Portfolios utilized as investment allocation options under the Contracts will be replaced through the proposed Substitutions. Additional information for each Existing Portfolio and the corresponding Replacement Portfolio, including investment objectives, principal investment strategies, principal risks, and performance, as well as the fees and expenses of each Existing Portfolio and its corresponding Replacement Portfolio, can be found in the application.

Sub No.	Existing portfolio	Replacement portfolio
1	AB VPS Dynamic Asset Allocation Portfolio (Class B)	AB VPS Global Risk Allocation-Moderate Portfolio (Class B).[1]
2	PIMCO Global Diversified Allocation Portfolio (Administrative Share Class).	AB VPS Global Risk Allocation-Moderate Portfolio (Class B).
3	Federated Hermes Managed Volatility Fund II (Primary Shares and Service Shares).	ON iShares Managed Risk Balanced Portfolio.[2]
4	Janus Henderson VIT U.S. Low Volatility Portfolio (Service Shares).	ON Janus Henderson U.S. Low Volatility Portfolio.
5	Morgan Stanley VIF Core Plus Fixed Income Portfolio (Class II).	ON Federated Core Plus Bond Portfolio.
6	PIMCO Total Return Portfolio (Administrative Share Class)	ON Federated Core Plus Bond Portfolio.

9. ON Fund and ONII have received an exemptive order from the Commission (File No. 812–12288) (the ''Manager of Managers Order'') that provides an exemption from section 15(a) of the Act with respect to ON Fund's sub-advisory agreements. The Manager of Managers Order permits ONII, subject to certain conditions, including the approval of ON Fund's Board of Directors, but without the approval of shareholders, to hire unaffiliated sub-advisers, and to modify any existing or future sub-advisory agreement with, unaffiliated sub-advisers. The Manager of Managers Order applies to each of the ON Replacement Portfolios, and ON Fund's registration statement discloses and explains the substance and effect of the Manager of Managers Order.

10. The Insurance Company Applicants state the proposed Substitutions are part of an ongoing effort to make the Contracts more attractive to existing Contract owners and to make the Contracts more efficient to administer. The Insurance Company Applicants represent that the proposed Substitutions involve replacing an Existing Portfolio with a Replacement Portfolio with substantially similar investment objective(s), principal investment strategies and principal risks. The Insurance Company Applicants further state that the proposed Substitutions are designed to provide Contract owners with an opportunity to continue their investment in a similar investment option without interruption and without any cost to them.

11. For the Substitution 3–6 Replacement Portfolios, after the Substitution Date, ONII will not change a Replacement Portfolio's sub-adviser, add a new sub-adviser, or otherwise rely on the Manager of Managers Order or any replacement order from the Commission with respect to any such Replacement Portfolio without first obtaining shareholder approval of the change in sub-adviser, the new sub-adviser, or the Replacement Portfolio's ability to rely on the Manager of Managers Order, or any replacement order from the Commission, at a shareholder meeting, the record date for which shall be after the proposed Substitution has been effected.

12. The Section 26 Applicants represent that at least 30 days prior to the Substitution Date, they will deliver to all affected Contract owners prospectus supplements filed with the Commission or other supplemental disclosure documents that describe the proposed Substitutions (collectively, the ''Supplements''). The Section 26 Applicants represent that each Supplement will:

- Provide Contract owners notice of the respective Insurance Company Applicant's intent to take the necessary actions, including seeking the order requested by this Application, to substitute shares of the Existing Portfolios as described herein on the Substitution Date;
- Advise Contract owners that for at least thirty (30) days before the Substitution Date, they are permitted to make at least one transfer of Contract value from each subaccount investing in an Existing Portfolio (''Existing Portfolio Subaccount'') to any other available investment option offered under their Contract, without any transfer charge (and without the transfer being counted as a transfer for purposes of transfer charges that would otherwise be applicable under the terms of the Contracts);
- Instruct Contract owners how to submit transfer requests in light of the proposed Substitutions;
- Advise Contract owners that any Contract value remaining in an Existing Portfolio Subaccount on the Substitution Date will be transferred to a subaccount investing in the

[1] The Replacement Portfolio for Substitutions 1–2 is a series of AB Variable Products Series Fund, Inc. (''AB VPS Fund''), a Maryland corporation. AB VPS Fund is registered with the Commission as an open-end management investment company under the Act, and its shares are registered under the 1933 Act. The AB VPS Global Risk Allocation-Moderate Portfolio (Class B) is one of the Replacement Portfolios. AllianceBernstein L.P. (''AllianceBernstein'') is a master limited partnership organized under the State of Delaware and is a registered investment adviser. AllianceBernstein serves as the investment adviser for the AB VPS Global Risk Allocation-Moderate Portfolio.

[2] The Replacement Portfolios listed in the table above for Substitutions 3–6 are all a series of ON Fund (''ON Replacement Portfolios''). ON Fund is a Maryland corporation that is registered with the Commission as an open-end management investment company under the Act. Shares of ON Fund are registered under the 1933 Act. Except for the ON Federated Core Plus Bond Portfolio, which began operations on May 1, 2020, the other ON Replacement Portfolios will not begin operations until the proposed Substitutions are performed. ONII is an Ohio corporation and registered investment adviser. ONII serves as the investment adviser for ON Fund, including each of the ON Replacement Portfolios.

corresponding Replacement Portfolio (''Replacement Portfolio Subaccount''), and that the Substitutions will take place at relative net asset value;

• Inform Contract owners that for at least 30 days following the Substitution Date, they will be permitted to make at least one transfer of Contract value from each Replacement Portfolio Subaccount to any other available investment option offered under their Contract, without any transfer charge (and without the transfer being counted as a transfer for purposes of transfer charges that would otherwise be applicable under the terms of the Contracts); and

• Inform Contract owners that, except as described in the market timing/short-term trading provisions of the relevant prospectus or limitations imposed by Death Benefit Riders or Living Benefit Riders with investment restrictions, the Insurance Company Applicants will not exercise any right they may have under the Contracts to impose restrictions on transfers between the subaccounts under the Contracts, including limitations on the future number of transfers, for a period beginning at least 30 days before the Substitution Date through at least 30 days following the Substitution Date.

13. At least 30 days prior to the Substitution Date, the Section 26 Applicants will also deliver to affected Contract owners a prospectus for each applicable Replacement Portfolio.

14. Within five business days after the Substitution Date, the Insurance Company Applicants will send Contract owners a written confirmation of the completed proposed Substitutions in accordance with rule 10b–10 under the Securities Exchange Act of 1934. The confirmation statement will include or be accompanied by a statement that reiterates the free transfer rights disclosed in the Supplements. The confirmation will also reflect the Contract owners' Contract values before and after the Substitution(s).

15. Each Substitution will take place at the applicable Existing and Replacement Portfolios' relative per share net asset values determined on the Substitution Date in accordance with section 22 of the Act and rule 22c–1 thereunder. Accordingly, the Insurance Company Applicants assert that the proposed Substitutions will have no negative financial impact on any Contract owner. Each proposed Substitution will be effected by having each Existing Portfolio Subaccount redeem its Existing Portfolio shares in cash and/or in-kind on the Substitution Date at net asset value per share and purchase shares of the appropriate Replacement Portfolio at net asset value per share calculated on the same date.[3]

16. The Insurance Company Applicants or an affiliate will pay all expenses and transaction costs reasonably related to the proposed Substitutions, including all legal, accounting, and brokerage expenses relating to the proposed Substitutions, the below described disclosure documents, and this Application. No costs of the proposed Substitutions will be borne directly or indirectly by Contract owners. Contract owners will not incur any fees or charges as a result of the proposed Substitutions, nor will their rights or the obligations of the Insurance Company Applicants under the Contracts be altered in any way.

17. The proposed Substitutions will not cause the fees and charges under the Contracts currently being paid by Contract owners to be greater after the proposed Substitutions than before the proposed Substitutions. The charges for optional death benefit and living benefit riders may change from time to time in accordance the applicable rider and as disclosed in the applicable prospectus and any such changes would be unrelated to the proposed Substitutions.

18. With respect to Substitutions 1 and 2, for a period of two (2) years following the Substitution Date and for those Contracts with assets allocated to the applicable Existing Portfolio on the Substitution Date, the Insurance Company Applicants will make a corresponding reduction in Separate Account (or subaccount) expenses, no later than the last business day of each fiscal quarter, to Contract owners whose subaccount invests in the applicable Replacement Portfolio to the extent that the applicable Replacement Portfolio's annual net operating expenses for such period exceeds, on an annualized basis, the annual net operating expenses of the corresponding Existing Portfolio for fiscal year 2019.

19. With respect to Substitutions 3–6, ONII will enter into a written contract with the applicable Replacement Portfolio whereby during the two years following the Substitution Date the annual net operating expenses of the applicable Replacement Portfolio will not exceed the annual net operating expenses of the Existing Portfolio for the fiscal year ended December 31, 2019.

[3] The process for accomplishing the transfer of assets from each Existing Portfolio to its corresponding Replacement Portfolio will be determined on a case-by-case basis. In some cases, it is expected that the Substitutions will be effected by redeeming shares of an Existing Portfolio for cash and using the cash to purchase shares of the Replacement Portfolio. In other cases, it is expected that the Substitutions will be effected by redeeming the shares of an Existing Portfolio in-kind; those assets will then be contributed in-kind to the corresponding Replacement Portfolio to purchase shares of that Portfolio.

Legal Analysis—Section 26(c) of the Act

1. The Section 26 Applicants request that the Commission issue an order pursuant to section 26(c) of the Act approving the proposed Substitutions. Section 26(c) of the Act makes it unlawful for any depositor or trustee of a registered unit investment trust holding the security of a single issuer to substitute another security for such security unless the Commission approves the substitution. Section 26(c) requires the Commission to issue an order approving a substitution if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. The Section 26 Applicants assert that the Substitutions are in furtherance of the exercise, by the Insurance Company Applicants, of rights reserved under the Contracts and disclosed in prospectuses relating thereto. Furthermore, they state the terms and conditions of the Substitutions are consistent with the principles and purposes of section 26(c) and do not entail any of the abuses that section 26(c) is designed to prevent. The Section 26 Applicants assert that proposed Substitutions will not result in the type of costly forced redemption that section 26(c) was intended to guard against and are consistent with the protection of investors and the purposes fairly intended by the Act.

Legal Analysis—Section 17 of the Act

3. The Section 17 Applicants request that the Commission issue an order pursuant to section 17(b) of the Act exempting them from the provisions of section 17(a) of the Act to the extent necessary to permit them to carry out the In-Kind Transactions.

4. Section 17(a)(1) of the Act, in relevant part, prohibits any affiliated person of a registered investment company, or any affiliated person of such a person, acting as principal, from knowingly selling any security or other property to that company. Section 17(a)(2) of the Act generally prohibits the same persons, acting as principals, from knowingly purchasing any security or other property from the registered investment company.

5. Section 17(b) of the Act provides that the Commission may, upon application, issue an order exempting any proposed transaction from the provisions of section 17(a) if evidence establishes that: (1) The terms of the proposed transaction, including the

consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned; (2) the proposed transaction is consistent with the policy of each registered investment company concerned, as recited in its registration statement and reports filed under the Act; and (3) the proposed transaction is consistent with the general purposes of the Act.

6. Currently, the Insurance Company Applicants, through their Separate Accounts, own more than 25% of the shares of each Existing Portfolio and each corresponding Replacement Portfolio involved in Substitutions 3–5, and therefore may be deemed to be a control person of such Existing Portfolio and each corresponding Replacement Portfolio. In addition, ONII, as the investment manager of each Replacement Portfolio in Substitutions 3–6, may be deemed to be a control person thereof. Because the Insurance Company Applicants and ONII are under common control, entities that they control likewise may be deemed to be under common control, and thus affiliated persons of each other, notwithstanding the fact that the Contract owners may be considered the beneficial owners of those shares held in the Separate Accounts.

7. Each Existing Portfolio and the corresponding Replacement Portfolio also may be deemed to be affiliated persons of affiliated persons. Regardless of whether the Insurance Company Applicants can be considered to control an applicable Existing Portfolio and the corresponding Replacement Portfolio, the Insurance Company Applicants may be deemed to be affiliated persons thereof because they, through their Separate Accounts, own of record 5% or more of the outstanding shares of such Portfolios. In addition, the Insurance Company Applicants may be deemed affiliated persons of each applicable Replacement Portfolio because their affiliate, ONII, may be deemed to control each applicable Replacement Portfolio by virtue of serving as its investment adviser. As a result of these relationships, an applicable Existing Portfolio may be deemed to be an affiliated person of an affiliated person (the Insurance Company Applicants or the Separate Accounts) of each corresponding Replacement Portfolio, and vice versa.

8. The proposed In-Kind Transactions with respect to Substitutions 3–6, therefore, could be seen as the indirect purchase of shares of the applicable Replacement Portfolios with portfolio securities of the corresponding Existing Portfolios and conversely the indirect sale of portfolio securities of the applicable Existing Portfolios for shares of the corresponding Replacement Portfolios. The proposed In-Kind Transactions with respect to Substitutions 3–6 also could be categorized as a purchase of shares of the applicable Replacement Portfolios by the corresponding Existing Portfolios, acting as principal, and a sale of portfolio securities by the applicable Existing Portfolios, acting as principal, to the corresponding Replacement Portfolios. In addition, the proposed In-Kind Transactions with respect to Substitutions 3–6 could be viewed as a purchase of securities from the applicable Existing Portfolios and a sale of securities to the corresponding Replacement Portfolios by the Insurance Company Applicants (or the Separate Accounts), acting as principal. If characterized in this manner, the proposed In-Kind Transactions with respect to Substitutions 3–6 may be deemed to contravene section 17(a) due to the affiliated status of these entities.

9. The Section 17 Applicants maintain that the terms of the proposed In-Kind Transactions are reasonable and fair and do not involve overreaching on the part of any person concerned because: (1) The proposed In-Kind Transactions will not adversely affect or dilute the interests of Contract owners; and (2) the proposed In-Kind Transactions will comply with the conditions set forth in rule 17a–7 under the Act, other than the requirement relating to cash consideration, as described in the Application. Even though the proposed In-Kind Transactions will not comply with the cash consideration requirement of paragraph (a) of rule 17a–7, the terms of the proposed In-Kind Transactions will offer to the applicable Existing Portfolios and corresponding Replacement Portfolios the same degree of protection from overreaching that rule 17a–7 generally provides in connection with the purchase and sale of securities under that rule in the ordinary course of business. In particular, the Section 17 Applicants cannot effect the proposed In-Kind Transactions at a price that is disadvantageous to either the applicable Existing Portfolio or corresponding Replacement Portfolio, and the proposed In-Kind Transactions will not occur absent an exemptive order from the Commission.

10. The Section 17 Applicants further maintain that the proposed redemption of shares of the applicable Existing Portfolios are, or will be, consistent with all relevant policies of the applicable Existing Portfolios and corresponding Replacement Portfolios, as recited in their respective registration statements and reports filed under the Act.

11. Finally, the Section 17 Applicants assert that the proposed In-Kind Transactions, as described herein, are consistent with the general purposes of the Act.

Applicants' Conditions

The Section 26 Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. The Substitutions will not be effected unless the Insurance Company Applicants determine that: (a) The Contracts allow the substitution of shares of registered open-end investment companies in the manner contemplated by the Application; (b) the Substitutions can be consummated as described in the Application under applicable insurance laws; and (c) any regulatory requirements in each jurisdiction where the Contracts are qualified for sale have been complied with to the extent necessary to complete the Substitutions.

2. The Insurance Company Applicants or their affiliates will pay all expenses and transaction costs of the Substitutions, including legal and accounting expenses, any applicable brokerage expenses and other fees and expenses. No fees or charges will be assessed to the Contract owners to effect the Substitutions.

3. The Substitutions will be effected at the relative net asset values of the respective shares in conformity with section 22(c) of the Act and rule 22c–1 thereunder without the imposition of any transfer or similar charges by the Section 26 Applicants. The Substitutions will be effected without change in the amount or value of any Contracts held by affected Contract owners.

4. The Substitutions will in no way alter the tax treatment of affected Contract owners in connection with their Contracts, and no tax liability will arise for affected Contract owners as a result of the Substitutions.

5. The rights or obligations of the Section 26 Applicants under the Contracts of affected Contract owners will not be altered in any way. The Substitutions will not adversely affect any riders under the Contracts since each Replacement Portfolio will be an allowable investment option for use with such riders as of the Substitution Date.

6. Affected Contract owners will be permitted to make at least one transfer of Contract value from each Existing Portfolio Subaccount (before the

Substitution Date) or each Replacement Portfolio Subaccount (after the Substitution Date) to any other available investment option under the Contract, without charge, for a period beginning at least 30 days before the Substitution Date through at least 30 days following the Substitution Date. Except as described in any market timing/short-term trading provisions of the relevant prospectus or limitations imposed by Death Benefit Riders or Living Benefit Riders with investment restrictions, the Insurance Company Applicants will not exercise any right they may have under the Contracts to impose restrictions on transfers between the subaccounts under the Contracts, including limitations on the future number of transfers, for a period beginning at least 30 days before the Substitution Date through at least 30 days following the Substitution Date.

7. All affected Contract owners will be notified, at least 30 days before the Substitution Date about: (a) The intended substitution of the Existing Portfolios with the Replacement Portfolios; (b) the intended Substitution Date; and (c) information with respect to transfers as set forth in Condition 6 above. In addition, the Insurance Company Applicants will deliver to all affected Contract owners, at least 30 days before the Substitution Date, a prospectus for each applicable Replacement Portfolio.

8. The Insurance Company Applicants will deliver to each affected Contract owner within five (5) business days of the Substitution Date a written confirmation which will include: (a) A confirmation that the Substitutions were carried out as previously notified; (b) a restatement of the information set forth in the Supplements; and (c) before and after account values.

9. With respect to Substitutions 1 and 2, for a period of two (2) years following the Substitution Date and for those Contracts with assets allocated to the applicable Existing Portfolio on the Substitution Date, the Insurance Company Applicants will make a corresponding reduction in Separate Account (or subaccount) expenses, no later than the last business day of each fiscal quarter, to Contract owners whose subaccount invests in the applicable Replacement Portfolio to the extent that the applicable Replacement Portfolio's annual net operating expenses for such period exceeds, on an annualized basis, the annual net operating expenses of the corresponding Existing Portfolio for fiscal year 2019.

The Section 26 Applicants further agree that separate account charges or expenses (*e.g.,* mortality and expense risk and account expense charges) of any subaccounts investing in the Substitution 1 and 2 Replacement Portfolios for any applicable Contract owner on the Substitution Date will not be increased at any time during the two year period following the Substitution Date.

10. In addition, with respect to Substitutions 3–6, ONII will enter into a written contract with the applicable Replacement Portfolio whereby during the two years following the Substitution Date the annual net operating expenses of the applicable Replacement Portfolio will not exceed the annual net operating expenses of the Existing Portfolio for the fiscal year ended December 31, 2019.

The Section 26 Applicants further agree that separate account charges or expenses (*e.g.,* mortality and expense risk account expenses charges) of any subaccounts investing in the Substitution 3–6 Replacement Portfolios for any applicable Contract owner on the Substitution Date will not be increased at any time during the two year period following the Substitution Date.

11. The Substitution 3–6 Replacement Portfolios will not rely on the Manager of Managers Order unless such action is approved by a majority of the applicable Replacement Portfolio's outstanding voting securities, as defined in the Act, at a meeting whose record date is after the applicable Substitution has been effected.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07488 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91496; File No. SR–PEARL–2021–10]

Self-Regulatory Organizations: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by MIAX PEARL, LLC To Amend the MIAX Pearl Fee Schedule

April 7, 2021.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 25 2021, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to add liquidity indicator codes to the fee schedule applicable for MIAX Pearl Equities, an equities trading facility of the Exchange (the ''Fee Schedule''). The Exchange also proposes to add new Section 4 to the Fee Schedule concerning the Exchange's obligations under Section 31 of the Act.[3]

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to add liquidity indicator codes to the MIAX Pearl Equities Fee Schedule. The Exchange also proposes to add new Section 4 to the Fee Schedule concerning the Exchange's obligations under Section 31 of the Exchange Act.

Liquidity Indicator Codes

Liquidity indicator codes would be applied to a transaction so that the Equity Member [4] that entered the order

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78ee.

[4] The term ''Equity Member'' is defined as ''a Member authorized by the Exchange to transact business on MIAX Pearl Equities. *See* Exchange Rule 1901.

may better understand the fee or rebate that will be applied to the execution. Each side of a trade would be assigned a liquidity indicator code in order to identify the scenario under which the trade occurred. This liquidity indicator code will be returned on the real-time trade reports sent to the Equity Member that submitted the order. The Exchange proposes to add a liquidity indicator code table to the Fee Schedule that would identify the liquidity indicator code, describe the transaction type, and set forth the applicable fee or rebate.[5] The Exchange also proposes to add the standard liquidity indicator codes to the Fee Schedules Standard Rates table. The proposed liquidity indicator codes are simply meant to be illustrative and provide Equity Members increased clarity as to which fee or rebate may ultimately be applied to their execution. The Exchange does not propose to amend any fees or rebates.

The Exchange proposes to describe the below liquidity indicator codes in the Fee Schedule.

- Liquidity indicator code AA would be applied to a Displayed[6] order that adds liquidity in Tape A securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code AA would receive the existing rebate of $0.0032 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code AB would be applied to a Displayed order that adds liquidity in Tape B securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code AB would receive the existing rebate of $0.0035 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code AC would be applied to a Displayed order that adds liquidity in Tape C securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code AC would receive the existing rebate of $0.0032 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code Aa would be applied to a Non-Displayed[7] order that adds liquidity in Tape A securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code Aa would receive the existing rebate of $0.0022 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code Ab would be applied to a Non-Displayed order that adds liquidity in Tape B securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code Ab would receive the existing rebate of $0.0022 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code Ac would be applied to a Non-Displayed order that adds liquidity in Tape C securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code Ab would receive the existing rebate of $0.0022 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code O would be applied to an order that is executed during MIAX Pearl Equities' Opening or Re-Opening process.[8] The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code O would be subject to the existing rate and provided free of charge in securities priced at or above $1.00 and securities priced below $1.00.
- Liquidity indicator code RA would be applied to a Displayed order[9] that removes liquidity in Tape A securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code Ra would be subject to the existing fee of $0.0028 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code RB would be applied to a Displayed order that removes liquidity in Tape B securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code RB would be subject to the existing fee of $0.0027 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code RC would be applied to a Displayed order that removes liquidity in Tape C securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code RC would be subject to the existing fee of $0.0028 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code Ra would be applied to a Non-Displayed order that removes liquidity in Tape A securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code Ra would be subject to the existing fee of $0.0028 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code Rb would be applied to a Non-Displayed order that removes liquidity in Tape B securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code Rb would be subject to the existing fee of $0.0027 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code Rc would be applied to a Non-Displayed order that removes liquidity in Tape C securities. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code Rc would be subject to the existing fee of $0.0028 per share in securities priced at or above $1.00 and 0.05% of the transaction's dollar value in securities priced below $1.00.
- Liquidity indicator code X would be applied to an order that is routed to and executed on an away market. The Liquidity Indicator Code and Associated Fees table would specify that orders that yield liquidity indicator code X would be subject to the existing fee of $0.0030 per share in securities priced at or above $1.00 and 0.30% of the dollar value of

[5] The use of liquidity indicator codes (aka fee codes) is not novel and are currently utilized by other equity exchanges. For example, see the fee schedules of the Cboe EDGX Exchange, Inc. (''EDGX'') *available at http://markets.cboe.com/us/equities/membership/fee_schedule/edgx/,* Investors Exchange LLC (''IEX'') *available at https://iextrading.com/trading/fees/, and* MEMX LLC. (''MEMX'') *available at https://info.memxtrading.com/fee-schedule/.*

[6] The term ''Displayed'' is defined as ''[a]n instruction the User may attach to an order stating that the order is to be displayed by the System on the MIAX Pearl Equities Book. *See* Exchange Rule 2614(c)(3).

[7] The term ''Non-Displayed'' is defined as ''[a]n instruction the User may attach to an order stating that any part of the order is not to be displayed by the System on the MIAX Pearl Equities Book. *See* Exchange Rule 2614(c)(4).

[8] *See* Exchange Rule 2615 for a description of the MIAX Pearl Equities Opening and Re-Opening process.

[9] The Exchange notes that, unlike orders that add liquidity, whether an order that removes liquidity is either Displayed or Non-Displayed does not impact the applicable rate. The Exchange proposes to provide separate liquidity indicator codes based on whether the order that removes liquidity was Displayed or Non-Displayed as a convenience to Equity Members.

a transaction in securities priced below $1.00.

The Exchange also proposes to add the above liquidity indicator codes to the Standard Rates table. Specifically, liquidity indicator codes AA, AB, and AC would be added to the ''Added Liquidity Displayed Order'' column, liquidity indicator codes Aa, Ab, and Ac would be added to the ''Added Liquidity Non-Displayed Order'' column, liquidity indicator codes RA, RB, RC, Ra, Rb, and Rc would be added to the ''Removing Liquidity'' column, liquidity indicator code X would be added to the ''Routing and Removing Liquidity'' column, and liquidity indicator code O would be added to the ''Opening and Re-Opening Process'' column.

Due to the technological changes associated with the proposed liquidity indicator codes, the Exchange will issue a trading alert publicly announcing the implementation date of when the liquidity indicator codes would be available. The Exchange anticipates that the implementation date will be in either the second or third quarter of 2021.

Section 31

The Exchange also proposes to add new Section 4 to the Fee Schedule concerning the Exchange's obligations under Section 31 of the Act. Exchange Rule 3000(b) describes the Exchange's obligations under Section 31 of the Act and provides that ''[e]ach Equity Member engaged in executing transactions on MIAX Pearl Equities shall pay, in such manner and at such times as the Exchange shall direct, a Regulatory Transaction Fee equal to (i) the rate determined by the Commission to be applicable to covered sales occurring on the Exchange in accordance with Section 31 of the Exchange Act multiplied by (ii) the Equity Member's aggregate dollar amount of covered sales occurring on MIAX Pearl Equities during any computational period. Exchange Rule 3000(c) provides that ''[t]o the extent the Exchange is charged a fee by a third party that results directly from an Equity Member cross-connecting its trading hardware to the Exchange's System from another Trading Center's system that is located in the same data center as the Exchange, the Exchange will pass that fee on, in full, to the Equity Member.''

The Exchange proposed to add Section 4 to the Fee Schedule to reference the fees described under Exchange Rule 3000. Proposed Section 4 would provide that ''[a]dditional fees are set forth in Rule 3000 of the MIAX Pearl Rule book.'' Proposed Section 4 would further provide that ''[s]uch fees include Regulatory Transaction Fees collected to fund the Exchange's Section 31 obligations.'' The Exchange notes that this proposed addition is to provide additional specificity to the Fee Schedule. The Exchange currently includes a similar provision in its fee schedule for its options trading facility.[10] The Exchange's affiliates, the Miami International Securities Exchange, LLC (''MIAX'') and MIAX Emerald, LLC (''Emerald''), also include similar provisions in their respective fee schedules.[11]

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [12] in general, and furthers the objectives of Section 6(b)(4) of the Act [13] in particular, in that it is an equitable allocation of reasonable fees and other charges among its members and issuers and other persons using its facilities. The Exchange repeats that is does not propose to amend any fees or rebates. The proposal simply seek to provide additional specificity within the Fee Schedule to provide Equity Members greater certainty about what fee or rebate would apply to their transaction and to reference the applicable Exchange Rules regarding the Exchange's obligations under Section 31 of the Act.

The proposed liquidity indicator codes are equitable and reasonable because they are simply meant to be illustrative and provide Equity Members increased clarity as to which fee or rebate may ultimately be applied to their execution. As discussed above, each side of a trade would be assigned a liquidity indicator code in order to identify the scenario under which the trade occurred. This liquidity indicator code would be returned on the real-time trade reports sent to the Equity Member that submitted the order. The use of liquidity indicator codes is not unique to the Exchange and are currently utilized and described in the fee schedules of other equity exchanges.[14]

The Exchange's proposal to add new Section 4 referencing Exchange Rule 3000 regarding fee charged pursuant to Section 31 of the Act is also equitable and reasonable because it is simple intended to provide additional information regarding the Exchange's obligations under Section 31 of the Act and how fees may be passed through to the Equity Member. The Exchange currently includes a similar provision in its fee schedule for its options trading facility and similar language is in the fee schedules of other exchanges.[15]

Lastly, both of the proposed changes are not unfairly discriminatory because they will apply equally to all Equity Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed fee change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed change is not designed to have a competitive impact and does not seek to amend any of the Exchange's current fees or rebates. The proposal is simply intended to provide additional specificity in the Fee Schedule so that Equity Members may connect an execution to the applicable fee or rebate. The proposal also seeks to reference the Exchange's obligations under Section 31 of the Act by reference the applicable Exchange Rule 3000 so that the Exchange's Section 31 obligations are referenced in the Fee Schedule making the Fee Schedule more comprehensive.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[16] and Rule 19b–4(f)(2) [17] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public

[10] *See* Section 2(a) of the Exchange's options fee schedule *available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_PEARL_Options_Fee_Schedule_03012021.pdf.*

[11] *See, e.g.,* Section 2(a) of the MIAX fee schedule *available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_01_13_21.pdf, and* Section 2(a) of Emerald's fee schedule *available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_03_24_2021.pdf.*

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4) and (5).

[14] *See supra* note 5.

[15] *See supra* notes 10 and 11.

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

[17] 17 CFR 240.19b–4(f)(2).

interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2021–10 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2021–10. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2021–10, and should be submitted on or before May 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07495 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91495; File No. SR–FINRA–2021–006]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Expiration Date of the Temporary Amendments Set Forth in SR–FINRA–2020–015 and SR–FINRA–2020–027

April 7, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 1, 2021, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared substantially by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to extend the expiration date of the temporary amendments set forth in SR–FINRA–2020–015 and SR–FINRA–2020–027 from April 30, 2021, to August 31, 2021.[4] The proposed rule change would not make any changes to the text of FINRA rules.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In response to the COVID–19 global health crisis and the corresponding need to restrict in-person activities, FINRA filed proposed rule changes, SR–FINRA–2020–015 and SR–FINRA–2020–027, which respectively provide temporary relief from some timing, method of service and other procedural requirements in FINRA rules and allow FINRA's Office of Hearing Officers (''OHO'') and the National Adjudicatory Council (''NAC'') to conduct hearings, on a temporary basis, by video conference, if warranted by the current COVID–19-related public health risks posed by an in-person hearing. In December 2020, FINRA filed a proposed rule change, SR–FINRA–2020–042, to extend the expiration date of the temporary amendments in both SR–FINRA–2020–015 and SR–FINRA–2020–027 from December 31, 2020, to April 30, 2021.[5] While there are signs of improvement, the COVID–19 conditions necessitating these temporary amendments persist and, based on its assessment of current COVID–19 conditions and the lack of certainty as to when COVID–19-related health concerns and corresponding restrictions will meaningfully subside, FINRA has determined that there is a continued need for this temporary relief for several months beyond April 30, 2021. Accordingly, FINRA proposes to extend

---

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] If FINRA seeks to provide additional temporary relief from the rule requirements identified in this proposed rule change beyond August 31, 2021, FINRA will submit a separate rule filing to further extend the temporary extension of time. The amended FINRA rules will revert to their original form at the conclusion of the temporary relief period and any extension thereof.

[5] *See* Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–042).

the expiration date of the temporary rule amendments in SR–FINRA–2020–015 and SR–FINRA–2020–027 from April 30, 2021, to August 31, 2021.

i. SR–FINRA–2020–015

As stated in its previous filings, FINRA proposed, and subsequently extended, the changes set forth in SR–FINRA–2020–015 to temporarily amend some timing, method of service and other procedural requirements in FINRA rules during the period in which FINRA's operations are impacted by the outbreak of COVID–19.[6] Among other things, the need for FINRA staff, with limited exceptions, to work remotely and restrict in-person activities—consistent with the recommendations of public health officials—have made it challenging to meet some procedural requirements and perform some functions required under FINRA rules. For example, working remotely makes it difficult to send and receive hard copy documents and conduct in-person oral arguments.

The temporary amendments have addressed these concerns by easing logistical and other issues and providing FINRA with needed flexibility for its operations during the COVID–19 outbreak, allowing FINRA to continue critical adjudicatory and review processes in a reasonable and fair manner and meet its critical investor protection goals, while also following best practices with respect to the health and safety of its staff.

FINRA staff, with limited exceptions, continue to work remotely to protect their health and safety. As indicated in its previous filings, FINRA has established a COVID–19 task force to develop a data-driven, staged plan for FINRA staff to safely return to working in FINRA office locations and resume other in-person activities. Based on its assessment of current COVID–19 conditions, FINRA does not believe the COVID–19-related health concerns necessitating this relief will meaningfully subside by April 30, 2021, and therefore proposes to extend the expiration date of the temporary rule amendments originally set forth in SR–FINRA–2020–015 from April 30, 2021, to August 31, 2021.[7]

ii. SR–FINRA–2020–027

The same public health concerns and restrictions, along with a corresponding backlog of disciplinary cases,[8] led FINRA to file, and subsequently extend to April 30, 2021, SR–FINRA–2020–027 to temporarily amend FINRA Rules 1015, 9261, 9524, and 9830 to grant OHO and the NAC authority[9] to conduct hearings in connection with appeals of Membership Application Program decisions, disciplinary actions, eligibility proceedings and temporary and permanent cease and desist orders by video conference, if warranted by the COVID–19-related public health risks posed by an in-person hearing.[10]

As set forth in the previous filings, FINRA also relies on the guidance of its health and safety consultant, in conjunction with COVID–19 data and guidance issued by public health authorities, to determine whether the current public health risks presented by an in-person hearing may warrant a hearing by video conference.[11] Based on that guidance and data, FINRA does not believe the COVID–19-related health concerns necessitating this relief will meaningfully subside by April 30, 2021, and has determined that there will be a continued need for this temporary relief for several months beyond that date. Accordingly, FINRA proposes to extend the expiration date of the temporary rule amendments originally set forth in SR–FINRA–2020–027 from April 30, 2021, to August 31, 2021.[12] The extension of these temporary amendments allowing for specified OHO and NAC hearings to proceed by video conference will allow FINRA's critical adjudicatory functions to continue to operate effectively in these extraordinary circumstances—enabling FINRA to fulfill its statutory obligations to protect investors and maintain fair and orderly markets—while also protecting the health and safety of hearing participants.[13]

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[14] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change is also consistent with Section 15A(b)(8) of the Act,[15] which requires, among other things, that FINRA rules provide a fair procedure for the disciplining of members and persons associated with members.

The proposed rule change, which extends the expiration date of the temporary amendments to FINRA rules set forth in SR–FINRA–2020–015, will continue to provide FINRA, and in some cases another party to a proceeding, temporary modifications to its procedural requirements in order to allow FINRA to maintain fair processes and protect investors while operating in a remote work environment and with corresponding restrictions on its activities. It is in the public interest, and consistent with the Act's purpose, for FINRA to operate pursuant to this temporary relief. The temporary

[6] *See* Securities Exchange Act Release No. 88917 (May 20, 2020), 85 FR 31832 (May 27, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–015); Securities Exchange Act Release No. 89055 (June 12, 2020), 85 FR 36928 (June 18, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–017); Securities Exchange Act Release No. 89423 (July 29, 2020), 85 FR 47278 (August 4, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–022); *supra* note 5.

[7] *See supra* note 6 (outlining the filing history of SR–FINRA–2020–015 and its prior extensions).

[8] For example, FINRA began temporarily postponing in-person hearings as a result of the COVID–19 impacts on March 16, 2020.

[9] For OHO hearings under FINRA Rules 9261 and 9830, the proposed rule change temporarily grants authority to the Chief or Deputy Chief Hearing Officer to order that a hearing be conducted by video conference. For NAC hearings under FINRA Rules 1015 and 9524, this temporary authority is granted to the NAC or the relevant Subcommittee.

[10] *See* Securities Exchange Act Release No. 89739 (September 2, 2020), 85 FR 55712 (September 9, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–027); *supra* note 5.

[11] As noted in SR–FINRA–2020–027, the temporary proposed rule change grants discretion to OHO and the NAC to order a video conference hearing. In deciding whether to schedule a hearing by video conference, OHO and the NAC may consider a variety of other factors in addition to COVID–19 trends. In SR–FINRA–2020–027, FINRA provided a non-exhaustive list of other factors OHO and the NAC may take into consideration, including a hearing participant's individual health concerns and access to the connectivity and technology necessary to participate in a video conference hearing.

[12] *See supra* note 5.

[13] Since the temporary amendments were implemented, OHO and the NAC have conducted several hearings by video conference. As of March 16, 2021, OHO has conducted seven disciplinary hearings by video conference (decisions have been issued in two of these cases) and scheduled hearings in 11 other disciplinary matters, three of which already have been ordered to proceed by video conference. Also, as of March 16, 2021, the NAC, through the relevant Subcommittee, has conducted 10 oral arguments by video conference in connection with appeals of FINRA disciplinary proceedings pursuant to FINRA Rule 9341(d), as temporarily amended. Furthermore, the NAC has conducted via video conference a one-day evidentiary hearing in a membership application proceeding pursuant to FINRA Rule 1015, as temporarily amended.

[14] 15 U.S.C. 78*o*–3(b)(6).

[15] 15 U.S.C. 78*o*–3(b)(8).

amendments allow FINRA to specify filing and service methods, extend certain time periods, and modify the format of oral argument for FINRA disciplinary and eligibility proceedings and other review processes to cope with the current pandemic conditions. In addition, extending this temporary relief will further support FINRA's disciplinary and eligibility proceedings and other review processes that serve a critical role in providing investor protection and maintaining fair and orderly markets.

The proposed rule change, which also extends the expiration date of the temporary amendments to FINRA rules set forth in SR–FINRA–2020–027, will continue to aid FINRA's efforts to timely conduct hearings in connection with its core adjudicatory functions. Given current COVID–19 conditions and the uncertainty around when those conditions will meaningfully improve, without this relief allowing OHO and NAC hearings to proceed by video conference, FINRA might be required to postpone some or all hearings indefinitely. FINRA must be able to perform its critical adjudicatory functions to fulfill its statutory obligations to protect investors and maintain fair and orderly markets. As such, this relief is essential to FINRA's ability to fulfill its statutory obligations and allows hearing participants to avoid the serious COVID–19-related health and safety risks associated with in-person hearings.

Among other things, this relief will allow OHO to conduct temporary cease and desist proceedings by video conference so that FINRA can take immediate action to stop ongoing customer harm and will allow the NAC to timely provide members, disqualified individuals and other applicants an approval or denial of their applications. As set forth in detail in the original filing, this temporary relief allowing OHO and NAC hearings to proceed by video conference accounts for fair process considerations and will continue to provide fair process while avoiding the COVID–19-related public health risks for hearing participants. Accordingly, the proposed rule change extending this temporary relief is in the public interest and consistent with the Act's purpose.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the temporary proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As set forth in SR–FINRA–2020–015 and SR–FINRA–2020–027, the proposed rule change is intended solely to extend temporary relief necessitated by the continued impacts of the COVID–19 outbreak and the related health and safety risks of conducting in-person activities. FINRA believes that the proposed rule change will prevent unnecessary impediments to FINRA's operations, including its critical adjudicatory processes, and its ability to fulfill its statutory obligations to protect investors and maintain fair and orderly markets that would otherwise result if the temporary amendments were to expire on April 30, 2021.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) thereunder.[17]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. As FINRA requested in connection with SR–FINRA–2020–015 and related extensions,[18] FINRA has also asked the Commission to waive the 30-day operative delay so that this proposed rule change may become operative immediately upon filing.

FINRA has indicated that extending the relief provided originally in SR–FINRA–2020–015 and SR–FINRA–2020–027 will continue to ease logistical and other issues by providing FINRA with needed flexibility for its operations during the COVID–19 outbreak. Importantly, extending the relief provided in these prior rule changes immediately upon filing and without a 30-day operative delay will allow FINRA to continue critical adjudicatory and review processes in a reasonable and fair manner and meet its critical investor protection goals, while also following best practices with respect to the health and safety of its employees.[19] The Commission also notes that this proposal, like SR–FINRA–2020–015 and SR–FINRA–2020–027, provides only temporary relief during the period in which FINRA's operations are impacted by COVID–19. As proposed, the changes would be in place through August 31, 2021.[20] FINRA also noted in both SR–FINRA–2020–015 and SR–FINRA–2020–027 that the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof.[21] For these reasons, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[22]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

[18] *See* SR–FINRA–2020–015, 85 FR at 31836. Although FINRA did not request that the Commission waive the 30-day operative delay for SR–FINRA–2020–027, FINRA did request that the Commission waive the 30-day operative delay for SR–FINRA–2020–042, which extended the expiration date of the temporary amendments originally set forth in SR–FINRA–20202–027.

[19] *See supra* p. 4; *see also* SR–FINRA–2020–015, 85 FR at 31833.

[20] As noted above, *see supra* note 4, FINRA states that if it requires temporary relief from the rule requirements identified in this proposal beyond August 31, 2021, it may submit a separate rule filing to extend the effectiveness of the temporary relief under these rules.

[21] *See* SR–FINRA–2020–015, 85 FR at 31833; *see also* SR–FINRA–2020–027, 85 FR at 55712.

[22] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2021–006 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2021–006. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2021–006 and should be submitted on or before May 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07494 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91492; File No. SR–NASDAQ–2021–013]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Insert Language Concerning an Initial Listing Requirement Applicable to American Depository Receipts or Shares

April 7, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 24, 2021, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise Listing Rule 5315(e) and Rule 5405(a), which outline the initial listing requirements for primary equity securities for Nasdaq Global Select and Global Market, respectively, to insert language concerning the requirement for there to be at least 400,000 ADRs issued for initial listing of such securities.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to revise Listing Rule 5315(e) and Rule 5405(a), which outline the initial listing requirements for primary equity securities for Nasdaq Global Select and Global Market, respectively, to insert language concerning the requirement for there to be at least 400,000 ADRs issued for initial listing of such securities.

In 2009, Nasdaq moved the listing rules from the Rule 4000 Series of the Nasdaq Listing Rules and restated them in Rule 5000 Series in order to reduce redundancies and improve the organization of the rules by presenting them in a simpler, more transparent and reader-friendly format.[3] Prior to the reorganization, Nasdaq Listing Rule 4320 provided the requirements for listing on Nasdaq applicable to the security of a non-Canadian foreign issuer, ADR or similar security issued in respect of a security of a foreign issuer. The rule further provided that issuers that met the requirements in Rule 4320, but that were not listed on the Nasdaq Global Market (including the Nasdaq Global Select Market), were listed on the Nasdaq Capital Market. Prior Rule 4320(e)(6) stated that ''in the case of . . . ADRs for initial listing only, at least 400,000 shall be issued.'' As part of Rule 4320, this requirement applied to ADRs listed on the Nasdaq Global Market (including the Nasdaq Global Select Market) as well as companies listed on the Nasdaq Capital Market.

However, in the 2009 restatement of the listing rules, the 400,000 ADR requirement from Rule 4320(e)(6) was restated under Rule 5505(a), which only applies to the Nasdaq Capital Market. Nasdaq inadvertently omitted this requirement from Rule 5315(e) and Rule 5405(a), which outline the initial listing requirements for primary equity securities on the Nasdaq Global Select Market and Nasdaq Global Market,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR–Nasdaq–2009–018). The listing rules contained in the Rule 4000 Series as of April 13, 2009, are available at *https://listingcenter.nasdaq.com/assets/rulebook/nasdaq/rules/old_listing_rules.pdf.*

respectively. As a result, there is currently no stated minimum ADRs requirement for the Nasdaq Global Select Market and Nasdaq Global Market. This change was inadvertent and in connection with the 2009 restatement Nasdaq specifically indicated that it was ''not making any substantive changes to the Listing Rules.'' [4]

Accordingly Nasdaq now proposes to insert language concerning the initial listing requirement for there to be a minimum of 400,000 ADRs issued for all Nasdaq market tiers, which was inadvertently deleted from the Nasdaq Global Select and Global Markets.[5]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(5) of the Act,[7] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The proposed rule change is consistent with the investor protection provisions of the Act because it will insert language concerning the initial listing requirement for there to be a minimum of 400,000 ADRs issued, which Nasdaq inadvertently omitted from the Nasdaq Global Select and Global Markets, to ensure consistency across the market tiers. This requirement is designed to help ensure that there is sufficient liquidity in the issue to promote orderly trading.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change will have no material impact on competition as it merely inserts language concerning a requirement, which Nasdaq inadvertently omitted, to provide consistency across the Nasdaq market tiers and help ensure orderly trading in ADRs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) [10] normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the Exchange may immediately insert language in the Listing Rules concerning the initial listing requirement for the minimum number of ADRs that must be issued for a company to list on the Nasdaq Global Select and Global Market. The Exchange stated that the proposed rule change would provide transparency to the requirement's application to all market tiers in the same manner as before it was inadvertently omitted. The Commission notes that previous Nasdaq Listing Rule 4320(e)(6) had applied this same minimum ADRs issued requirement to companies listing on the Nasdaq Global Select and Global Market and that the Exchange states that it had inadvertently omitted the requirement in the Global Select and Global Market rules in its 2009 restatement of its Listing Rules.[12] For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [14] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2021–013 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2021–013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be

[4] *Id.*

[5] Since the 2009 restatement Nasdaq has not listed any ADRs on the Nasdaq Global Select or Global Markets with fewer than 400,000 ADRs outstanding at the time of listing. The requirements for a minimum number of round lot holders and publicly held shares in Rule 4320(e)(6) have been carried over to the Nasdaq Global Select and Global Market rules pursuant to the 2009 restatement.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] *See supra* note 4 and accompanying text.

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78s(b)(2)(B).

available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2021–013 and should be submitted on or before May 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07491 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91489; File No. SR–ICC–2021–007]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to ICC's Treasury Operations Policies and Procedures

April 7, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 29, 2021, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by ICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed rule change is to revise the ICC Treasury Operations Policies and Procedures (''Treasury Policy''). These revisions do not require any changes to the ICC Clearing Rules (the ''Rules'').

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission, or advance notice and discussed any comments it received on the proposed rule change, security-based swap submission, or advance notice. The text of these statements may be examined at the places specified in Item IV below. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICC proposes to revise its Treasury Policy. The proposed amendments consist of clarifications and updates with respect to governance arrangements and collateral asset haircuts and include other minor clean-up changes. ICC believes that such revisions will facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible. ICC proposes to make such changes effective following Commission approval of the proposed rule change. The proposed revisions are described in detail as follows.

ICC proposes to amend the ''Revision History'' section of the Treasury Policy. The proposed changes correct a statement indicating that the document's revision history is limited to the last three years. The proposed changes memorialize the review and approval process of the document, which consists of review by the Risk Committee and review and approval by the Board at least annually. Additionally, ICC would update the revision history table to include the most recent changes to the document.

ICC proposes updates and clarification changes to the ''Collateral Assets Risk Management Framework'' appendix (''Appendix 6''). Under the Treasury Policy, ICC accounts for the risk associated with fluctuations in the value of collateral assets by applying haircuts. Haircuts are calculated by the ICC Risk Department (the ''Risk Department'') on an on-going basis and described in more detail in Appendix 6. ICC proposes changes in Appendix 6 that update the measure of daily changes for collateral assets such as sovereign debt. The proposed changes would amend and remove certain language that differentiates between yield rates greater than and less than or equal to one basis point in respect of sovereign debt collateral haircuts. Such amendments do not represent a change to the methodology and would provide a more generalized and consistent collateral risk management framework for sovereign debt. ICC proposes additional clarifications, including with respect to time series used for sovereign debt collateral haircuts and a formula regarding a risk factor specific haircut. ICC also proposes a grammatical update to change a reference to ''haircuts'' from plural to singular.

ICC further proposes additional detail on the process of reviewing and updating collateral asset haircuts. Appendix 6 currently states that such haircuts are reviewed monthly. ICC proposes to clarify that haircuts are established by the Risk Department within their respective intervals and are reviewed at least monthly to determine the need for updates. ICC also proposes to specify any discretion provided to the Risk Department during periods of extreme market stress with respect to updating collateral asset haircuts.

(b) Statutory Basis

Section 17A(b)(3)(F) of the Act[3] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, and to the extent applicable, derivative agreements, contracts and transactions; to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible; and to comply with the provisions of the Act and the rules and regulations thereunder. ICC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to ICC, in particular, to Section 17(A)(b)(3)(F),[4] because ICC believes that the proposed rule change will promote the prompt and accurate clearance and settlement of securities transactions, derivatives agreements, contracts, and transactions, and contribute to the safeguarding of securities and funds associated with security-based swap transactions in ICC's custody or control, or for which ICC is responsible. As described above, the proposed rule change would allow ICC to make certain clarifications and updates to the Treasury Policy, including with respect to collateral asset

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78q–1(b)(3)(F).

[4] *Id.*

haircuts in the appendix. The proposed amendments to Appendix 6 update the measure of daily changes for collateral assets such as sovereign debt. Such amendments do not represent a change to the methodology and would provide a more generalized and consistent collateral risk management framework for sovereign debt. The additional clarifications and updates strengthen the governance arrangements set out in the Treasury Policy and promote clarity, including by memorializing the review and approval process for the document, providing additional detail on the Risk Department's process for reviewing and updating haircuts, and making clean-up changes to improve readability. The proposed updates thus ensure that the documentation of ICC's Treasury Policy remains up-to-date, transparent, and focused on clearly articulating the policies and procedures used to support ICC's treasury functions, which promotes the prompt and accurate clearance and settlement of securities transactions, derivatives agreements, contracts, and transactions and contributes to the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible. As such, the proposed rule change is designed to promote the prompt and accurate clearance and settlement of securities transactions, derivatives agreements, contracts, and transactions and to contribute to the safeguarding of securities and funds associated with security-based swap transactions in ICC's custody or control, or for which ICC is responsible within the meaning of Section 17A(b)(3)(F) of the Act.[5]

The amendments would also satisfy relevant requirements of Rule 17Ad–22.[6] Rule 17Ad–22(e)(2)(i) and (v)[7] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility. The proposed changes strengthen the governance procedures and arrangements detailed in the Treasury Policy. The amended ''Revision History'' section memorializes the review and approval of the document by relevant groups at least annually. Amended Appendix 6 more clearly defines the roles and responsibilities of the Risk Department regarding reviewing and updating collateral asset haircuts, including any discretion provided to the Risk Department during periods of extreme market stress with respect to updating collateral asset haircuts. As such, in ICC's view, the proposed rule change continues to ensure that ICC maintains policies and procedures that are reasonably designed to provide for clear and transparent governance arrangements and specify clear and direct lines of responsibility, consistent with Rule 17Ad–22(e)(2)(i) and (v).[8]

Rule 17Ad–22(e)(3)(i)[9] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which includes risk management policies, procedures, and systems designed to identify, measure, monitor, and manage the range of risks that arise in or are borne by the covered clearing agency, that are subject to review on a specified periodic basis and approved by the Board annually. ICC maintains a sound risk management framework that identifies, measures, monitors, and manages the range of risks that it faces. As described above, ICC accounts for the risk associated with fluctuations in the value of collateral assets by applying haircuts under the Treasury Policy. The proposed changes update the measure of daily changes for collateral assets such as sovereign debt, which would provide a more generalized and consistent collateral risk management framework for sovereign debt, and make other clarifications to ensure that the Treasury Policy remains effective and clear. Moreover, the Treasury Policy is a key aspect of ICC's risk management approach, and the proposed amendments would memorialize that the document is reviewed by the Risk Committee and reviewed and approved by the Board at least annually. As such, the amendments would satisfy the requirements of Rule 17Ad–22(e)(3)(i).[10]

Rule 17Ad–22(e)(5)[11] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to limit the assets it accepts as collateral to those with low credit, liquidity, and market risks, and set and enforce appropriately conservative haircuts and concentration limits if the covered clearing agency requires collateral to manage its or its participants' credit exposure; and require a review of the sufficiency of its collateral haircuts and concentration limits to be performed not less than annually. The Treasury Policy limits the assets ICC accepts as collateral to those with low credit, liquidity, and market risks. The proposed amendments provide additional detail on the process of reviewing and updating collateral asset haircuts, including clarifying that haircuts are established by the Risk Department within their respective intervals and are reviewed at least monthly to determine the need for updates. As such, the amendments would satisfy the requirements of Rule 17Ad–22(e)(5).[12]

(B) Clearing Agency's Statement on Burden on Competition

ICC does not believe the proposed rule change would have any impact, or impose any burden, on competition. The proposed changes to ICC's Treasury Policy will apply uniformly across all market participants. Therefore, ICC does not believe the proposed rule change imposes any burden on competition that is inappropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change, Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule

[5] *Id.*

[6] 17 CFR 240.17Ad–22.

[7] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

[8] *Id.*

[9] 17 CFR 240.17Ad–22(e)(3)(i).

[10] *Id.*

[11] 17 CFR 240.17Ad–22(e)(5).

[12] *Id.*

change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICC–2021–007 on the subject line.

Paper Comments

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–ICC–2021–007. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at *https://www.theice.com/clear-credit/regulation.*

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICC–2021–007 and should be submitted on or before May 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07489 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91490; File Nos. SR–NYSE–2021–14, SR–NYSEAMER–2021–10, SR–NYSEArca–2021–13, SR–NYSECHX–2021–03, SR–NYSENAT–2021–04]

Self-Regulatory Organizations; New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Changes To Amend the Schedule of Wireless Connectivity Fees and Charges To Add Circuits for Connectivity Into and Out of the Data Center in Mahwah, New Jersey

April 7, 2021.

On February 12, 2021, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. each filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to (1) add circuits for connectivity into and out of the data center in Mahwah, New Jersey (''Mahwah Data Center''); (2) add services available to customers of the Mahwah Data Center that are not colocation Users; and (3) change the name of the Fee Schedule to ''Mahwah Wireless, Circuits, and Non-Colocation Connectivity Fee Schedule.'' The proposed rule changes were published for comment in the **Federal Register** on February 26, 2021.[3] The Commission has received one comment letter on the proposed rule changes.[4]

Section 19(b)(2) of the Act[5] provides that within 45 days of the publication of notice of the filing of a propose rule change, or within such longer period up to 90 days as the Commission may designate if it find such longer period to be appropriate and published its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the Notices for these proposed rule changes is April 18, 2021. The Commission is extending this 45-day period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule changes so that it has sufficient time to consider the proposed rule changes and the comment letter. Accordingly, pursuant to Section 19(b)(2) of the Act,[6] the Commission designates June 2, 2021, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule changes (File Nos. SR–NYSE–2021–14, SR–NYSEAMER–2021–10, SR–NYSEArca–2021–13, SR–NYSECHX–2021–03, SR–NYSENAT–2021–04).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07490 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 91217 (February 26, 2021), 86 FR 12715 (March 4, 2021) (SR–NYSE–2021–14); 91218 (February 26, 2021), 86 FR 12744 (March 4, 2021) (SR–NYSEAMER–2021–10); 91216 (February 26, 2021), 86 FR 12735 (March 4, 2021) (SR–NYSEArca–2021–13); 91219 (February 26, 2021), 86 FR 12724 (March 4, 2021) (SR–NYSECHX–2021–03); and 91215 (February 26, 2021), 86 FR 12752 (March 4, 2021) (SR–NYSENAT–2021–04) (collectively, the ''Notices'').

[4] Comments received on the Notices are available on the Commission's website at: *https://www.sec.gov/comments/sr-nyse-2021-14/srnyse202114.htm.*

[5] 15 U.S.C. 78s(b)(2).

[6] 15 U.S.C. 78s(b)(2).

[7] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91494; File No. SR–CboeEDGX–2021–018]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule

April 7, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 1, 2021, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the fee schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule applicable to its equities trading platform (''EDGX Equities'') to include an additional Remove Volume Tier. The Exchange proposes to implement the proposed change to its fee schedule on April 1, 2021.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Exchange Act, to which market participants may direct their order flow. Based on publicly available information,[3] no single registered equities exchange has more than 16% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a ''Maker-Taker'' model whereby it pays credits to members that add liquidity and assesses fees to those that remove liquidity. The Exchange's fee schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

Pursuant to footnote 1 of the Fee Schedule, the Exchange offers a Remove Volume Tier that provides a reduced fee to Members meeting certain volume thresholds. Now, the Exchange is proposing to rename the existing Remove Volume Tier to Remove Volume Tier 1, and add an additional Remove Volume Tier 2. The proposed Remove Volume Tier 2 offers a reduced fee of $0.0026 for orders in securities at or above $1.00 and 0.28% of total dollar value for orders in securities below $1.00 yielding fee code ''N'',[4] ''W'',[5] and ''BB''[6] where a Member has (1) a Step-Up Add TCV[7] from January 2021 equal to or greater than 0.15%; (2) an ADAV[8] greater than or equal to 0.08% of the TCV[9] for Non-Displayed orders that yield fee codes DM,[10] HA,[11] HI,[12] MM,[13] or RP;[14] and (3) removes an ADV[15] greater than or equal to 0.75% of the TCV. The proposed Remove Volume Tier 2 is designed to incentivize Members to increase their orders that add liquidity on the Exchange for displayed and non-displayed orders, as well as remove displayed volume on the Exchange in order to receive a reduced fee on their qualifying, liquidity removing orders.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[16] in general, and furthers the objectives of Section 6(b)(4),[17] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members, issuers and other persons using its facilities. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule changes reflect a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members. The Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are reasonable, equitable and non-discriminatory because they are open to all members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Competing equity exchanges offer similar tiered pricing structures,

[3] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (March 29, 2021), available at *https://markets.cboe.com/us/equities/market_statistics/.*

[4] Orders yielding Fee Code ''N'' are orders removing liquidity from EDGX (Tape C).

[5] Orders yielding Fee Code ''W'' are orders removing liquidity from EDGX (Tape A).

[6] Orders yielding Fee Code ''BB'' are orders removing liquidity from EDGX (Tape B).

[7] Step-Up Add TCV means ADAV as a percentage of TCV in the relevant baseline month subtracted from current ADAV as a percentage of TCV.

[8] ADAV means average daily added volume calculated as the number of shares added per day.

[9] TCV means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

[10] Orders yielding Fee Code ''DM'' are orders adding liquidity using MidPoint Discretionary order within discretionary range.

[11] Orders yielding Fee Code ''HA'' are Non-Displayed orders adding liquidity.

[12] Orders yielding Fee Code ''HI'' are Non-Displayed orders that receive price improvement and add liquidity.

[13] Orders yielding Fee Code ''MM'' are Non-Displayed orders adding liquidity using MidPoint Peg.

[14] Orders yielding Fee Code ''RP'' are Non-Displayed orders adding liquidity using Supplemental Peg.

[15] ADV means average daily volume calculated as the number of shares added to, removed from, or routed by, the Exchange, or any combination or subset thereof, per day.

[16] 15 U.S.C. 78f.

[17] 15 U.S.C. 78f(b)(4).

including schedules of rebates and fees that apply based upon members achieving certain volume and/or growth thresholds, as well as assess similar fees or rebates for similar types of orders, to that of the Exchange.

The Exchange believes the proposed addition to the Remove Volume Tiers is reasonable because it provides an additional opportunity for Members to receive a discounted rate for liquidity removing orders. The Exchange notes the proposed tier is available to all Members and is competitively achievable for all Members that submit the requisite order flow, in that, all firms are eligible for the proposed tier and those that submit the requisite order flow could compete to meet the proposed tier. Each Member will uniformly receive the respective proposed reduced fee if the corresponding tier criteria is met.

The Exchange believes the Remove Volume Tier is a reasonable means to incentivize Members to continue to provide liquidity adding, displayed volume to the Exchange by offering them a different, additional opportunity than that of the Add Volume Tiers—to receive a reduced fee on their liquidity removing orders by meeting the proposed criteria in submitting additional add volume order flow.

Overall, the Exchange believes that adding new tier criteria each based on a Member's liquidity adding and removing orders, will benefit all market participants by incentivizing continuous liquidity and thus, deeper more liquid markets as well as increased execution opportunities. Particularly, the proposed tier is designed to incentivize Members to increase their orders that add displayed and non-displayed volume on the Exchange in order to receive a reduced fee on their qualifying, liquidity removing orders. This overall increase in activity deepens the Exchange's liquidity pool, offers additional cost savings, supports the quality of price discovery, promotes market transparency and improves market quality, for all investors.

Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would definitely result in any Members qualifying for the proposed tiers. While the Exchange has no way of predicting with certainty how the proposed tiers will impact Member activity, the Exchange anticipates that for the proposed Remove Volume Tier 2 at least one Member will be able to compete for and achieve the proposed criteria. The Exchange notes, however, that the proposed tier is open to any Member that satisfies the tier's criteria. The Exchange also notes that the proposed tier will not adversely impact any Member's pricing or their ability to qualify for other tiers. Rather, should a Member not meet the proposed criteria for the proposed tier, the Member will merely not receive the corresponding reduced fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.''

The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed change applies to all Members equally in that all Members are eligible for the proposed Remove Volume Tier 2 and have a reasonable opportunity to meet the tier's criteria and will all receive the proposed reduced fee if such criteria is met. Additionally, the proposed tier is designed to attract additional order flow to the Exchange. The Exchange believes that the additional tier criteria would incentivize market participants to direct liquidity adding and removing order flow to the Exchange, bringing with it improved price transparency. Greater overall order flow and pricing transparency benefits all market participants on the Exchange by providing more trading opportunities, enhancing market quality, and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem, which benefits all market participants.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including other equities exchanges, off-exchange venues, and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 16% of the market share.[18] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [19] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission*, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[20] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[18] *Supra* note 3.

[19] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[20] *NetCoalition* v. *SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [21] and paragraph (f) of Rule 19b–4 [22] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGX–2021–018 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2021–018. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGX–2021–018 and should be submitted on or before May 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07493 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91493; File No. SR–ICC–2021–008]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to the ICC Risk Management Model Description

April 7, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 31, 2021, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by ICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed rule change is to make changes to ICC's Risk Management Model Description. These revisions do not require any changes to the ICC Clearing Rules (the ''Rules'').

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission, or advance notice and discussed any comments it received on the proposed rule change, security-based swap submission, or advance notice. The text of these statements may be examined at the places specified in Item IV below. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICC proposes revising its Risk Management Model Description to include an enhancement related to the index liquidity charge (''LC'') methodology and other clarifications. ICC believes that such revisions will facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible. ICC proposes to make such changes effective following Commission approval of the proposed rule change. The proposed revisions are described in detail as follows.

ICC proposes to amend the ''Initial Margin Methodology'' section of the Risk Management Model Description. The proposed changes memorialize the review and approval process of the document, which consists of review by the Risk Committee and review and approval by the Board at least annually.

ICC proposes to revise the ''Liquidity Charge for Index Risk Factors'' subsection (Subsection II.2) to include an enhancement related to the index LC methodology. The proposed changes amend a formula for the index series LC. Currently, to arrive at the index series LC, ICC takes into account the estimated LCs for the instruments that belong to the same index series and the sign of the notional amount of the instrument. Under the proposed changes, the index series LC is established as the more

conservative liquidity requirement associated with the sum of the bought and sold protection position LCs for the instruments that belong to the same index series. Such enhancement represents a unification of the index LC with the single name and credit default index swaption (''Index Option'') [3] LC methodologies. ICC does not propose any further changes to the methodology.

ICC proposes additional clarifications in the Risk Management Model Description. In the ''Liquidity Charge for Index Options'' subsection (Subsection II.2.1), ICC proposes a clarification with respect to long Index Option instruments to specify that the LC combined with the integrated spread response requirement will not exceed the end-of-day option instrument price. Such amendment reflects the maximum loss condition. In the ''Anti-Procyclicality Measures'' subsection (Subsection VII.5.3), ICC proposes clarifications regarding the scenarios associated with extreme price decreases and extreme price increases (the ''Extreme Price Change Scenarios''). Specifically, the proposed changes clarify that the extreme price decrease and increase scenarios for Index Options incorporate hypothetical forward price decreases and increases, respectively. Further, in respect of the maximum loss condition, ICC proposes to update formulas related to the final portfolio initial margin in the ''Portfolio Loss Boundary Condition'' section (Section IX) to incorporate reference to the portfolio level integrated spread response.

(b) Statutory Basis

ICC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act [4] and the regulations thereunder applicable to it, including the applicable standards under Rule 17Ad–22.[5] In particular, Section 17A(b)(3)(F) of the Act [6] requires that the rule change be consistent with the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and transactions cleared by ICC, the safeguarding of securities and funds in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest. The proposed amendments include an enhancement related to the index LC methodology. Such enhancement represents a unification of the index LC with the single name and Index Option LC methodologies, which would simplify the LC methodology and promote ease of understanding. The proposed rule change would also strengthen the governance arrangements set out in the Risk Management Model Description by memorializing the review and approval process for the document. The proposed clarifications would further ensure readability and clarity with respect to ICC's risk methodology in the Risk Management Model Description to ensure that it remains up-to-date, clear, and transparent to support the effectiveness of ICC's risk management system. The proposed rule change is therefore consistent with the prompt and accurate clearing and settlement of the contracts cleared by ICC, the safeguarding of securities and funds in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest, within the meaning of Section 17A(b)(3)(F) of the Act.[7]

Rule 17Ad–22(e)(2)(i) and (v) [8] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility. ICC's Risk Management Model Description clearly assigns and documents responsibility and accountability for risk decisions and requires consultation or approval from relevant parties. The proposed changes strengthen the governance procedures and arrangements detailed in the Risk Management Model Description by memorializing the review and approval of the document by relevant groups at least annually. As such, in ICC's view, the proposed rule change continues to ensure that ICC maintains policies and procedures that are reasonably designed to provide for clear and transparent governance arrangements and specify clear and direct lines of responsibility, consistent with Rule 17Ad–22(e)(2)(i) and (v).[9]

Rule 17Ad–22(e)(3)(i) [10] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which includes risk management policies, procedures, and systems designed to identify, measure, monitor, and manage the range of risks that arise in or are borne by the covered clearing agency, that are subject to review on a specified periodic basis and approved by the Board annually. ICC maintains a sound risk management framework that identifies, measures, monitors, and manages the range of risks that it faces. The Risk Management Model Description is a key aspect of ICC's risk management approach, and the proposed amendments would memorialize that the document is reviewed by the Risk Committee and reviewed and approved by the Board at least annually. As such, the amendments would satisfy the requirements of Rule 17Ad–22(e)(3)(i).[11]

Rule 17Ad–22(e)(4)(ii) [12] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining additional financial resources at the minimum to enable it to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the two participant families that would potentially cause the largest aggregate credit exposure for the covered clearing agency in extreme but plausible market conditions. The proposed changes promote the soundness of the model including by enhancing the index LC methodology, such that the index series LC is established as the more conservative liquidity requirement associated with the sum of the bought and sold protection position LCs for the instruments that belong to the same index series. Such enhancement represents a unification of the index LC with the single name and Index Option LC methodologies, which would simplify the LC methodology and promote ease of understanding. ICC proposes additional clarifications discussed above related to the maximum loss condition and the Extreme Price Change Scenarios. In ICC's view, the proposed changes enhance and provide further clarity and transparency on ICC's risk methodology and, as such, the proposed amendments would strengthen ICC's ability to maintain its financial resources and withstand the pressures of defaults,

[3] Index Swaptions are also referred to herein and in the Risk Management Model Description as ''index options'' or ''index CDS options'', or in similar terms.

[4] 15 U.S.C. 78q–1.

[5] 17 CFR 240.17Ad–22.

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] *Id.*

[8] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

[9] *Id.*

[10] 17 CFR 240.17Ad–22(e)(3)(i).

[11] *Id.*

[12] 17 CFR 240.17Ad–22(e)(4)(ii).

consistent with the requirements of Rule 17Ad–22(e)(4)(ii).[13]

Rule 17Ad–22(e)(6)(i)[14] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market. As described above, the proposed changes amend a formula with respect to the index series LC, which would unify the index LC with the single name and Index Option LC methodologies. ICC does not propose to otherwise change the methodology. The additional clarifications in respect of the maximum loss condition and the Extreme Price Change Scenarios further promote clarity and transparency in the Risk Management Model Description. ICC believes that the proposed changes enhance the margin methodology, which will continue to consider and produce margin levels commensurate with the risks and particular attributes of each relevant product, portfolio, and market, consistent with the requirements of Rule 17Ad–22(e)(6)(i).[15]

(B) Clearing Agency's Statement on Burden on Competition

ICC does not believe the proposed rule change would have any impact, or impose any burden, on competition. The proposed changes to ICC's Risk Management Model Description will apply uniformly across all market participants. Therefore, ICC does not believe the proposed rule change imposes any burden on competition that is inappropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICC–2021–008 on the subject line.

Paper Comments

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–ICC–2021–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at *https://www.theice.com/clear-credit/regulation.*

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICC–2021–008 and should be submitted on or before May 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–07492 Filed 4–12–21; 8:45 am]

BILLING CODE 8011–01–P

[13] *Id.*

[14] 17 CFR 240.17Ad–22(e)(6)(i).

[15] *Id.*

[16] 17 CFR 200.30–3(a)(12).

SUSQUEHANNA RIVER BASIN COMMISSION

Public Hearing

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: The Susquehanna River Basin Commission will hold a public hearing on May 6, 2021. Due to the COVID–19 situation and the relevant orders in place in the Commission's member jurisdictions, the Commission will hold this hearing telephonically. At this public hearing, the Commission will hear testimony on the projects listed in the **SUPPLEMENTARY INFORMATION** section of this notice. The Commission will also hear testimony on a proposed rulemaking and three proposed policies at this hearing. Such projects and proposals are intended to be scheduled for Commission action at its next business meeting, tentatively scheduled for June 17, 2021, which will be noticed separately. The public should take note that this public hearing will be the only opportunity to offer oral comment to the Commission for the listed projects and proposals. The deadline for the submission of written comments is May 17, 2021.

DATES: The public hearing will convene on May 6, 2021, at 6:30 p.m. The public hearing will end at 9:00 p.m. or at the conclusion of public testimony, whichever is sooner. The deadline for the submission of written comments is May 17, 2021.

ADDRESSES: This hearing will be held by telephone rather than at a physical location. Conference Call # 1–888–387–8686, Conference Room Code # 9179686050.

FOR FURTHER INFORMATION CONTACT: Jason Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423; fax: (717) 238–2436.

Information concerning the applications for these projects is available at the Commission's Water Application and Approval Viewer at *https://www.srbc.net/waav.* Additional supporting documents are available to inspect and copy in accordance with the Commission's Access to Records Policy at *www.srbc.net/regulatory/policies-guidance/docs/access-to-records-policy-2009-02.pdf.*

SUPPLEMENTARY INFORMATION: The public hearing will cover a proposed rulemaking and three proposed groundwater-related policies, posted at *www.srbc.net,* under ''What's New'', click on the link for the ''Proposed Rulemaking.'' The public hearing will also cover the following projects:

Projects Scheduled for Action

1. *Project Sponsor and Facility:* ARD Operating, LLC (West Branch Susquehanna River), Piatt Township, Lycoming County, Pa. Modification to update flow protection rates to be in accordance with current Low Flow Protection Policy No. 2012–01 (Docket No. 20120601).

2. *Project Sponsor and Facility:* Beech Resources, LLC (Lycoming Creek), Lycoming Township, Lycoming County, Pa. Application for surface water withdrawal of up to 1.500 mgd (peak day).

3. *Project Sponsor:* CAN DO, Inc. Project Facility: Humbolt Industrial Park, Hazle Township, Luzerne County, Pa. Applications for renewal of groundwater withdrawals (30-day averages) of up to 0.187 mgd from Humbolt Well 1, up to 0.187 mgd from Humbolt Well 3, up to 0.230 mgd from Humbolt Well 7, up to 0.144 mgd from Humbolt Well 8, and up to 0.230 mgd from Humbolt Well 9 (Docket No. 19960501).

4. *Project Sponsor and Facility:* Geneva Farm Golf Course, Inc., Dublin District, Harford County, Md. Application for renewal of consumptive use of up to 0.099 mgd (30-day average) (Docket No. 19910104).

5. *Project Sponsor and Facility:* Greenfield Township Municipal Authority, Greenfield Township, Blair County, Pa. Application for groundwater withdrawal of up to 0.499 mgd (30-day average) from Well PW–4.

6. *Project Sponsor and Facility:* Pennsylvania State University, College Township, Centre County, Pa. Applications for renewal of groundwater withdrawal of up to 0.960 mgd (30-day average) from Well UN–37 and consumptive use of up to 0.960 mgd (peak day) (Docket No. 19890106–1).

7. *Project Sponsor and Facility:* PPG Operations LLC (West Branch Susquehanna River), Goshen Township, Clearfield County, Pa. Application for surface water withdrawal of up to 3.000 mgd (peak day).

8. *Project Sponsor and Facility:* Quarryville Borough Authority, Quarryville Borough, Lancaster County, Pa. Application for renewal of groundwater withdrawal of up to 0.250 mgd (30-day average) from Well 2 (Docket No. 19931102).

9. *Project Sponsor and Facility:* SUEZ Water Owego-Nichols Inc., Village of Owego and Town of Owego, Tioga County, N.Y. Applications for groundwater withdrawals (30-day averages) of up to 0.880 mgd from Well 1, up to 1.115 mgd from Well 3, and up to 0.710 mgd from Well 4.

10. *Project Sponsor:* Weaverland Valley Authority. Project Facility: Blue Ball Water System, East Earl Township, Lancaster County, Pa. Application for groundwater withdrawal of up to 0.144 mgd (30-day average) from Well 4 as well as recognizing historic withdrawals from wells 1, 2 and 3.

Project Scheduled for Action Involving a Diversion

1. *Project Sponsor and Facility:* City of Aberdeen, Harford County, Md. Modifications to extend the approval term of the consumptive use, surface water withdrawal, and out-of-basin diversion approval (Docket No. 20021210) to allow additional time for evaluation of the continued use of the source for the Aberdeen Proving Ground—Aberdeen Area.

Commission-Initiated Project Approval Modification

1. *Project Sponsor and Facility:* Municipal Authority of the Borough of Mansfield, Richmond Township, Tioga County, Pa. Conforming the grandfathered amount with the forthcoming determination for a withdrawal from Webster Reservoir up to 0.311 mgd (30-day average) (Docket No. 20130609).

2. *Project Sponsor and Facility:* Williamsport Municipal Water Authority, Williamsport City, Lycoming County, Pa. Conforming the grandfathered amounts with the forthcoming determination for withdrawals (30-day averages) from Well 3 up to 0.940 mgd, from Well 4 up to 0.940 mgd, from Well 5 up to 2.141 mgd, from Well 6 up to 0.687 mgd, from Well 7 up to 2.254 mgd, from Well 8 up to 0.987 mgd, from Well 9 up to 0.800 mgd, from Mosquito Creek up to 6.833 mgd, and from Hagermans Run up to 4.926 mgd (Docket No. 20110628).

Opportunity To Appear and Comment

Interested parties may call into the hearing to offer comments to the Commission on any business listed above required to be the subject of a public hearing. Given the telephonic nature of the meeting, the Commission strongly encourages those members of the public wishing to provide oral comments to pre-register with the Commission by emailing Jason Oyler at *joyler@srbc.net* prior to the hearing date. The presiding officer reserves the right to limit oral statements in the interest of time and to otherwise control the course of the hearing. Access to the hearing via telephone will begin at 6:15 p.m. Guidelines for the public hearing are posted on the Commission's website, *www.srbc.net,* prior to the hearing for review. The presiding officer reserves the right to modify or supplement such guidelines at the hearing. Written comments on any business listed above required to be the subject of a public hearing may also be mailed to Mr. Jason Oyler, Secretary to the Commission, Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, Pa. 17110–1788, or submitted electronically through *https://www.srbc.net/regulatory/public-comment/.* Comments mailed or electronically submitted must be received by the Commission on or before May 17, 2021, to be considered.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: April 7, 2021.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2021–07476 Filed 4–12–21; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2020–0090; Notice 1]

Nissan North America, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: Nissan North America, Inc. (Nissan) has determined that certain replacement windshield glass panes manufactured by Central Glass Co., Ltd., outsourced to Japan Tempered & Laminated Glass Co., Ltd., and sold to Nissan as replacement parts for use in certain Nissan motor vehicles do not

fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 205, *Glazing Materials.* Nissan filed a noncompliance report dated June 29, 2020. Nissan subsequently petitioned NHTSA on July 29, 2020, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces receipt of Nissan's petition.

DATES: Send comments on or before May 13, 2021.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the docket. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

SUPPLEMENTARY INFORMATION:

I. Overview

Nissan has determined that certain replacement windshield glass panes manufactured by Central Glass Co., Ltd., outsourced to Japan Tempered & Laminated Glass Co., Ltd., and sold to Nissan as replacement parts for use in certain Nissan motor vehicles do not fully comply with the requirements of paragraph S6.2 of FMVSS No. 205, *Glazing Materials* (49 CFR 571.205). Nissan filed a noncompliance report dated June 29, 2020, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Nissan subsequently petitioned NHTSA on July 29, 2020, for an exemption from the notification and remedy requirements of 49 U.S.C. chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of Nissan's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any Agency decision or other exercise of judgment concerning the merits of the petition.

II. Windshields Involved

Approximately 1,934 replacement windshield glass panes sold as replacement service parts, manufactured between April 1, 2000, and April 30, 2012, are potentially involved. These replacement windshield glass panes were manufactured by Central Glass Co., Ltd., who subsequently outsourced to a subsidiary company, Japan Tempered & Laminated Glass Co., Ltd., and sold to Nissan as replacement parts for Nissan motor vehicles.

III. Noncompliance

Nissan explains that the noncompliance is that subject replacement windshield glass panes manufactured by Central Glass Co., Ltd., who subsequently outsourced to a subsidiary company, Japan Tempered & Laminated Glass Co., Ltd., and sold to Nissan as replacement parts for use in certain Nissan motor vehicles contain the incorrect manufacturer's code mark and therefore, do not meet the requirements set forth in paragraph S6.2 of FMVSS No. 205. Specifically, the subject replacement windshield glass panes were marked with manufacturer code DOT44, which applies to Central Glass Co., Ltd., when they should have been marked, DOT166, which applies to Japan Tempered & Laminated Glass Co., Ltd. (JTLG).

IV. Rule Requirements

Paragraph S6.2 of FMVSS No. 205 includes the requirements relevant to this petition. A prime glazing manufacturer certifies its glazing by adding to the marks required by section 7 of ANSI/SAE Z26. 1–1996, in letters and numerals of the same size, the symbol ''DOT'' and a manufacturer's code mark that NHTSA assigns to the manufacturer. NHTSA will assign a code mark to a manufacturer after the manufacturer submits a written request to the Office of Vehicle Safety Compliance, National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. The request must include the company name, address, and a statement from the manufacturer certifying its status as a prime glazing manufacturer as defined in S4.

V. Summary of Nissan's Petition

The following views and arguments presented in this section, ''V. Summary of Nissan's Petition,'' are the views and arguments provided by Nissan. They have not been evaluated by the Agency and do not reflect the views of the Agency. Nissan describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, Nissan offers the following reasoning:

1. Nissan states that although the manufacturer code is incorrect, the certification mark affixed to the subject parts features the correct AS Item number and model number (*i.e.,* M number). In addition, the windshield glass panes were fabricated in full compliance with the technical requirements of 49 CFR 571.205 applicable to laminated glass for use in motor vehicles.

2. Nissan says that many of the 1,934 windshield glass components that may

contain an incorrect manufacturer's code are located in non-U.S. markets. For this reason, Nissan believes the actual number of subject parts is substantially lower than the 1,934 possible windshield glass panes because only a small number of potentially affected windshield glass panes were shipped to the U.S. market for use as service parts between April 1, 2000, and April 30, 2012.

3. Nissan also states that the part number remains accurate, despite the manufacturer's code discrepancy. The subject noncompliance, accordingly, is unlikely to result in the use of an incorrect replacement part in an OEM application because the part would be ordered using Nissan's unique part number and not the ''DOT'' number. In Nissan's ordering system, parts with the incorrect manufacturing code are indistinguishable from parts with the correct code. In fact, the parts are traceable to Central Glass Co., Ltd., since the incorrect code used by their subsidiary, JLTG is the code for the parent company, Central Glass Co., Ltd.

4. Nissan believes that there is a low likelihood of a vehicle requiring this replacement part because the average age of potentially affected vehicles (MY 1991–1999) is 25+ years old. Currently, only one replacement windshield glass service part (727120M010) is in stock and available. However, Nissan instructed the Sagamihara Part Center in Japan to suspend shipment for this part. Even so, if a vehicle previously received or were to receive a subject replacement part, the part fully complies with the technical requirements of 49 CFR 571.205. In no way is the actual safety aspect of the windshield glass compromised by the misprinted manufacturer's code.

5. Nissan contends that in similar situations, NHTSA has granted the applications of other petitioners. For example, 80 FR 3737 (January 23, 2015) Petition by Custom Glass Solutions Upper Sandusky Corporation.

• ''Custom Glass explains that the noncompliance is that the labeling on the subject laminated glass panes does not fully meet the requirements of paragraph S6 of FMVSS No. 205. The panes were labeled with the incorrect manufacturer's code mark, incorrect manufacturer's trademark, and incorrect manufacturer's model number, and were incorrectly marked as Tempered.''

• Nissan cited NHTSA, saying ''NHTSA believes that the subject labeling errors are inconsequential to motor vehicle safety because the marking of glazing as 'Tempered' or 'Laminated' is not required by FMVSS No. 205, the probability of anyone in the United States obtaining the subject incorrectly marked glazing as replacement glazing is very unlikely since the affected glazing is specifically designed for use in mining vehicles manufactured by Atlas Copco in Australia. In addition, there is no concern that the wrong model number on the subject glazing would result in an incorrect replacement part being used because replacement parts are ordered by referring to the glazing part number or by identifying the vehicle for which the replacement glazing is intended.''

Nissan concludes by again contending that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles and equipment that Nissan no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle and equipment distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles and replacement windshield glass panes under their control after Nissan notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120: Delegations of authority at 49 CFR 1.95 and 501.8)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2021–07507 Filed 4–12–21; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of persons whose property and interests in property have been unblocked pursuant to Executive Order 13850 of November 1, 2018, ''Blocking Property of Additional Persons Contributing to the Situation in Venezuela'' (''E.O. 13850''), as amended by Executive Order 13857 of January 25, 2019, ''Taking Additional Steps To Address the National Emergency With Respect to Venezuela'' (''E.O. 13857''). Additionally, OFAC is publishing an update to the identifying information of persons currently included in the Specially Designated Nationals and Blocked Persons List (SDN List).

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2480; Associate Director for Global Targeting, tel: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Actions

On March 31, 2021, OFAC removed from the SDN List the persons listed below, whose property and interests in property were blocked pursuant to E.O. 13850, as amended by E.O. 13857. On March 31, 2021, OFAC determined that circumstances no longer warrant the inclusion of the following persons on the SDN List under this authority. These persons are no longer subject to the blocking provisions of Section 1(a) of E.O. 13850, as amended by E.O. 13857.

Entities:

1. AMG S.A.S. DI ALESSANDRO BAZZONI & C. (a.k.a. AMG S.A.S. DI ALESSANDRO BAZZONI AND C.; a.k.a. AMG S.A.S. DI ALESSANDRO BAZZONI E C.), Via Sottomonte 5, Verona 37124, Italy; V.A.T. Number IT02483560237 (Italy) [VENEZUELA–EO13850].

2. SERIGRAPHICLAB DI BAZZONI ALESSANDRO, Via Amsicora 46, Porto Torres 07046, Italy; V.A.T. Number 02732450909 (Italy) [VENEZUELA–EO13850].

Dated: March 31, 2020.

Bradley T. Smith,

Acting Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2021–07534 Filed 4–12–21; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2480; Associate Director for Global Targeting, tel: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On April 8, 2021, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Entities

1. MYANMA GEMS ENTERPRISE (f.k.a. MYANMAR GEMS CORPORATION; a.k.a. MYANMAR GEMS ENTERPRISE), No. 70–072 Yarza Thingaha Road, Thapyaygone Ward, Zabuthiri Township, Naypyitaw, Burma; Rm Counter 23/24, G Flr, Mayangone, Rangoon, Burma; No. 66 Kaba Aye Pagoda Road, Mayangone Township, Rangoon, Burma [BURMA–EO14014].

Designated pursuant to section 1(a)(iv) of Executive Order 14014 of February 10, 2021, ''Blocking Property With Respect to the Situation in Burma'' (''the Order'') for being a political subdivision, agency, or instrumentality of the Government of Burma.

Dated: April 8, 2021.

Bradley T. Smith,

Acting Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2021–07531 Filed 4–12–21; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0660]

Agency Information Collection Activity Under OMB Review: Request for Contact Information

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Refer to ''OMB Control No. 2900–0660.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0660'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C. 5502 and 38 U.S.C. 5711.

Title: Request for Contact Information (Form Letter 21P–30).

OMB Control Number: 2900–0660.

Type of Review: Reinstatement of a previously approved collection.

Abstract: Form Letter 21P–30 is used to locate a fiduciary, beneficiary, claimant, or witness when a field examination is necessary in order to gather information that is needed to maintain program integrity. The form is used only when contact information cannot be obtained by other means, or when travel funds may be significantly impacted (*e.g.,* when the individual resides in a remote location and has a history of not being home during the day or when visited). This is a reinstatement only with no changes. The respondent burden has not changed.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 86 FR 36 on February 25, 2021, pages 11592 and 11593.

Affected Public: Individuals and households.

Estimated Annual Burden: 1,250 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: Once.

Estimated Number of Respondents: 5,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–07527 Filed 4–12–21; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 86 Tuesday,

No. 69 April 13, 2021

Part II

Commodity Futures Trading Commission

17 CFR Parts 1, 4, 41, and 190

Bankruptcy Regulations; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 4, 41, and 190

RIN 3038–AE67

Bankruptcy Regulations

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (the ''Commission'') is amending its regulations governing bankruptcy proceedings of commodity brokers. The amendments are meant comprehensively to update those regulations to reflect current market practices and lessons learned from past commodity broker bankruptcies.

DATES:

Effective date: The effective date for this final rule is May 13, 2021.

Compliance date: The compliance date for § 1.43 is April 13, 2022, for all letters of credit accepted, and customer agreements entered into, by a futures commission merchant prior to May 13, 2021.

FOR FURTHER INFORMATION CONTACT: Robert B. Wasserman, Chief Counsel and Senior Advisor, 202–418–5092, *rwasserman@cftc.gov,* Ward P. Griffin, Senior Special Counsel, 202–418–5425, *wgriffin@cftc.gov,* Jocelyn Partridge, 202–418–5926, *jpartridge@cftc.gov,* Abigail S. Knauff, 202–418–5123, *aknauff@cftc.gov,* Division of Clearing and Risk; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
A. Background of the Notice of Proposed Rulemaking
B. Major Themes in the Revisions to Part 190
II. Finalized Regulations
A. Subpart A—General Provisions
1. Regulation § 190.00: Statutory Authority, Organization, Core Concepts, Scope, and Construction
2. Regulation § 190.01: Definitions
3. Regulation § 190.02: General
B. Subpart B—Futures Commission Merchant (FCM) as Debtor
1. Regulation § 190.03: Notices and Proofs of Claims
2. Regulation § 190.04: Operation of the Debtor's Estate—Customer Property
3. Regulation § 190.05: Operation of the Debtor's Estate—General
4. Regulation § 190.06: Making and Taking Delivery Under Commodity Contracts
5. Regulation § 190.07: Transfers
6. Regulation § 190.08: Calculation of Funded Net Equity
7. Regulation § 190.09: Allocation of Property and Allowance of Claims
8. Regulation § 190.10: Provisions Applicable to Futures Commission Merchants During Business as Usual
C. Subpart C—Clearing Organization as Debtor
1. Regulation § 190.11: Scope and Purpose of Subpart C
2. Regulation § 190.12: Required Reports and Records
3. Regulation § 190.13: Prohibition on Avoidance of Transfers
4. Regulation § 190.14: Operation of the Estate of the Debtor Subsequent to the Filing Date
5. Regulation § 190.15: Recovery and Wind-Down Plans; Default Rules and Procedures
6. Regulation § 190.16: Delivery
7. Regulation § 190.17: Calculation of Net Equity
8. Regulation § 190.18: Treatment of Property
9. Regulation § 190.19: Support of Daily Settlement
D. Appendix A Forms
E. Appendix B Forms
F. Technical Corrections to Other Parts
1. Part 1
2. Part 4
3. Part 41
G. Additional Comments
H. Supplemental Proposal
III. Cost-Benefit Considerations
A. Introduction
1. Baseline
2. Overarching Concepts
a. Changes to Structure of Industry
b. Trustee Discretion
c. Cost Effectiveness and Promptness Versus Precision
d. Unique Nature of Bankruptcy Events
e. Administrative Costs Are Costs to the Estate, and Often to the Customers
f. Preference for Public Customers Over Non-Public Customers and for Both Over General Creditors
B. Subpart A—General Provisions
1. Regulation § 190.00: Statutory Authority, Organization, Core Concepts, Scope, and Construction: Consideration of Costs and Benefits
2. Regulation § 190.01: Definitions: Consideration of Costs and Benefits
3. Regulation § 190.02: General: Consideration of Costs and Benefits
4. Section 15(a) Factors—Subpart A
C. Subpart B—Futures Commission Merchant as Debtor
1. Regulation § 190.03: Notices and Proofs of Claims: Consideration of Costs and Benefits
2. Regulation § 190.04: Operation of the Debtor's Estate—Customer Property: Consideration of Costs and Benefits
3. Regulation § 190.05: Operation of the Debtor's Estate—General: Consideration of Costs and Benefits
4. Regulation § 190.06: Making and Taking Delivery Under Commodity Contracts: Consideration of Costs and Benefits
5. Regulation § 190.07: Transfers: Consideration of Costs and Benefits
6. Regulation § 190.08: Calculation of Funded Net Equity: Consideration of Costs and Benefits
7. Regulation § 190.09: Allocation of Property and Allowance of Claims: Consideration of Costs and Benefits
8. Regulation § 190.10: Provisions Applicable to Futures Commission Merchants During Business as Usual: Consideration of Costs and Benefits
9. Section 15(a) Factors—Subpart B
D. Subpart C—Clearing Organization as Debtor
1. Regulation § 190.11: Scope and Purpose of Subpart C: Consideration of Costs and Benefits
2. Regulation § 190.12: Required Reports and Records: Consideration of Costs and Benefits
3. Regulation § 190.13: Prohibitions on Avoidance of Transfers: Consideration of Costs and Benefits
4. Regulation § 190.14: Operation of the Estate of the Debtor Subsequent to the Filing Date: Consideration of Costs and Benefits
5. Regulation § 190.15: Recovery and Wind-Down Plans; Default Rules and Procedures: Consideration of Costs and Benefits
6. Regulation § 190.16: Delivery: Consideration of Costs and Benefits
7. Regulation § 190.17: Calculation of Net Equity: Consideration of Costs and Benefits
8. Regulation § 190.18: Treatment of Property: Consideration of Costs and Benefits
9. Regulation § 190.19: Support of Daily Settlement: Consideration of Costs and Benefits
10. Section 15(a) Factors—Subpart C
E. Changes to Appendices A and B
F. Technical Corrections to Parts 1, 4, and 41
IV. Related Matters
A. Antitrust Considerations
B. Regulatory Flexibility Act
C. Paperwork Reduction Act
1. Reporting Requirements in an FCM Bankruptcy
2. Recordkeeping Requirements in an FCM Bankruptcy
3. Third-Party Disclosure Requirements Applicable to a Single Respondent in an FCM Bankruptcy
4. Reporting Requirements in a Derivatives Clearing Organization (DCO) Bankruptcy
5. Recordkeeping Requirements in a DCO Bankruptcy
6. Third-Party Disclosure Requirements Applicable to a Single Respondent in a DCO Bankruptcy
7. Third-Party Disclosure Requirements Applicable to Multiple Respondents During Business as Usual

I. Background

A. Background of the Notice of Proposed Rulemaking

The basic structure of the Commission's bankruptcy regulations, part 190 of title 17 of the Code of Federal Regulations, was proposed in 1981 and finalized in 1983. In April of

this year, the Commission proposed a comprehensive revision of part 190 (the ''Proposal''),[1] and in September of this year, the Commission issued a supplemental proposal (the ''Supplemental Proposal'')[2] addressing a particular issue involving the interaction between bankruptcy and resolution of a clearing organization pursuant to Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act[3] (hereinafter, ''Title II'' and ''Dodd-Frank'').

The Commission is revising part 190 comprehensively in light of several major changes to the industry over the 37 years since part 190 was first finalized. These changes include exponential growth in the speed of transactions and trade processing, important lessons learned over prior bankruptcies, and the increased importance of derivatives clearing organizations (''DCOs'') to the financial system.

In promulgating these rules, the Commission is exercising its broad power under the Commodity Exchange Act (''CEA'' or ''Act'') to make regulations with respect to commodity broker debtors. Specifically, section 20(a) states that notwithstanding title 11, the Commission may provide, with respect to a commodity broker that is a debtor under chapter 7 of title 11, by rule or regulation (1) that certain cash, securities, other property, or commodity contracts are to be included in or excluded from customer property or member property; (2) that certain cash, securities, other property, or commodity contracts are to be specifically identifiable to a particular customer in a specific capacity; (3) the method by which the business of such commodity broker is to be conducted or liquidated after the date of the filing of the petition under such chapter, including the payment and allocation of margin with respect to commodity contracts not specifically identifiable to a particular customer pending their orderly liquidation; (4) any persons to which customer property and commodity contracts may be transferred under section 766 of title 11; and (5) how the net equity of a customer is to be determined.[4]

In developing this rulemaking, the Commission benefited from outside contributions. In particular, the Proposal benefited from a thoughtful and detailed model set of part 190 rules submitted by the Part 190 Subcommittee of the Business Law Section of the American Bar Association (''ABA Subcommittee'').[5] In addition, and as discussed further below, the Commission benefited from thoughtful, analytical, and detailed public comments submitted in response to the Proposal and Supplemental Proposal.

B. Major Themes in the Revisions to Part 190

The major themes in the revisions to part 190 include the following:

(1) The Commission is adding § 190.00, which sets out the statutory authority, organization, core concepts, scope, and rules of construction for part 190. More generally, this section sets out, after notice and comment rulemaking, the Commission's thinking and intent regarding part 190 in order to benefit and to enhance the understanding of DCOs, FCMs, their customers, trustees,[6] and the public at large.

(2) Some of the provisions support the implementation of the requirements, established consistent with section 4d of the CEA, that shortfalls in segregated property should be made up from the FCM's general assets, while others further the preferences, arising from both title 11 of the United States Code (*i.e.,* the ''Bankruptcy Code''), section 766(h), and Commission policy, that with respect to customer property, public customers are favored over non-public customers, and that public customers are entitled *inter se* to a *pro rata* distribution based on their respective claims.

(3) Other provisions foster the longstanding and continuing policy preference for transferring (as opposed to liquidating) positions of public customers and those customers' proportionate share of associated collateral.[7]

(4) The Commission is promulgating a new subpart C to part 190, governing the bankruptcy of a clearing organization. In doing so, the Commission is establishing *ex ante* the approach to be taken in addressing such a bankruptcy, in order to foster prompt action in the event such a bankruptcy occurs, and in order to establish a more clear counterfactual (*i.e.,* ''what would creditors receive in a liquidation in bankruptcy?'') in the event of a resolution of a clearing organization pursuant to Title II of Dodd-Frank.[8] The Commission's approach toward a DCO bankruptcy is characterized by three overarching concepts:

a. First, the trustee should follow, to the extent practicable and appropriate, the DCO's pre-existing default management rules and procedures and recovery and wind-down plans that have been submitted to the Commission. These rules, procedures, and plans will, in most cases,[9] have been developed pursuant to the Commission's regulations in part 39, and subject to staff oversight. This approach relieves the trustee of the burden of developing, in the moment, models to address an extraordinarily complex situation. It would also enhance the clarity of the counterfactual for purposes of resolution under Title II. However, as discussed further below, such plans are not rigid formulae. Moreover, the Commission's approach gives the trustee discretion in following those plans. Accordingly, the approach seeks to balance advance planning with flexibility to tailor the implementation to the specific circumstances.

b. Second, resources that are intended to flow through to members as part of daily settlement (including both daily variation payments and default resources) are devoted to that purpose, rather than to the general estate.[10]

c. Third, other provisions draw, with appropriate adaptations, from provisions applicable to FCMs.[11]

(5) The Commission is noting the applicability of part 190 in the context

[1] 85 FR 36000 (June 12, 2020).

[2] 85 FR 60110 (Sept. 24, 2020).

[3] Public Law 111–203 (July 21, 2010).

[4] *See* CEA section 20(a), 7 U.S.C. 24(a).

[5] The submission by the ABA Subcommittee cautioned that ''[t]he views expressed in this letter, and the proposed Model Part 190 Rules, are presented on behalf of the [ABA Subcommittee]. They have not been approved by the House of Delegates or Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA. In addition, they do not represent the position of the ABA Business Law Section, nor do they necessarily reflect the views of all members of the Committee.''

[6] Including bankruptcy and SIPA trustees, as well as the FDIC in its role as a receiver.

[7] This policy preference is manifest in section 764(b) of the Bankruptcy Code, 11 U.S.C. 764(b) (protecting from avoidance transfers approved by the Commission up to seven days *after* the order for relief), and in current § 190.02(e).

[8] Section 210(d)(2), 12 U.S.C. 5390(d)(2), provides that the maximum liability of the FDIC, acting as a receiver for a covered financial company in a resolution under Title II, is the amount the claimant would have received if the FDIC had not been appointed receiver and the covered financial company had instead been liquidated under chapter 7 of the Bankruptcy Code. Thus, in developing resolution strategies for a DCO while mitigating claims against the FDIC as receiver, it is important to understand what would happen if the DCO was instead liquidated pursuant to chapter 7 of the Bankruptcy Code (and this part 190), and such a liquidation is the counterfactual to resolution of that DCO under Title II.

[9] Only those DCOs that are subject to subpart C of part 39 (*i.e.,* those that have been designated as systemically important by the Financial Stability Oversight Council (FSOC) or that have elected to be subject to subpart C of part 39) are subject to § 39.35 (default rules and procedures) and § 39.39 (recovery and wind-down plans).

[10] *See generally* § 190.19.

[11] *See, e.g.,* §§ 190.16, 190.17(c).

of proceedings under the Securities Investors Protection Act (''SIPA'') in the case of FCMs subject to a SIPA proceeding,[12] and Title II of Dodd-Frank in the case of a commodity broker where the Federal Deposit Insurance Corporation (''FDIC'') is acting as a receiver.

(6) The Commission is enacting changes to the treatment of letters of credit as collateral, both during business as usual and during bankruptcy, in order to ensure that, consistent with the *pro rata* distribution principle, customers who post letters of credit as collateral suffer the same proportional loss as customers who post other types of collateral.

(7) The Commission is granting trustees enhanced discretion, based on both practical necessity and positive experience.

a. Recent commodity broker bankruptcies have involved many thousands of customers, with as many as hundreds of thousands of commodity contracts. Trustees must make decisions as to how to handle such customers and contracts in the days—in some cases, the hours—after being appointed. Moreover, each commodity broker bankruptcy has unique characteristics, and bankruptcy trustees need to adapt correspondingly quickly to those unique characteristics.

i. In order to foster the ability of the trustee to operate effectively, some of the changes would permit the trustee enhanced discretion generally.

ii. Others, recognizing the difficulty in treating large numbers of public customers on a bespoke basis, would permit the trustee to treat public customers on an aggregate basis. These changes represent a move from a model where the trustee receives and complies with instructions from individual public customers, to a model—reflecting actual practice in commodity broker bankruptcies in recent decades—where the trustee transfers as many open commodity contracts as possible on an omnibus basis.

b. These grants of discretion are also supported by the Commission's positive experience working in cooperation and consultation with bankruptcy and SIPA trustees.

c. On a related note, and as discussed further as the third overarching concept in the section below on cost-benefit considerations,[13] part 190 favors cost effectiveness and promptness over precision in certain respects, particularly with respect to the concept of *pro rata* treatment. Following the policy choice made by Congress in section 766(h) of the Bankruptcy Code, the Commission's policy is that it is more important to be cost effective and prompt in the distribution of customer property (*i.e.,* in terms of being able to treat customers as part of a class) than it is to value each customer's entitlements on an individual basis. The Commission believes that this approach would lead to (1) in general, a faster administration of the proceeding, (2) customers receiving their share of the debtor's customer property more quickly, and (3) a decrease in administrative costs (and thus, in case of a shortfall in customer property, a greater return to customers).

(8) Many of the changes are intended to update part 190 in light of changes to the regulatory framework over the past three decades, including cross-references to other Commission regulations. Some of these codify actual practice in prior bankruptcies, such as a requirement that an FCM notify the Commission of its imminent intention to file for voluntary bankruptcy. In another case, the Commission is addressing for the first time the interaction between part 190 and recent revisions to the Commission's customer protection rules.[14]

(9) Other changes follow from changes to the technological ecosystem, in particular changes from paper-based to electronic-based means of communication and recording, (for example, the use of communication to customers' electronic addresses rather than by paper mail, as well as the use of websites as a means for the trustee to communicate with customers on a regular basis). The proposal would also recognize the change from paper-based to electronic recording of ''documents of title.'' Many of these changes also recognize the actual practice in prior bankruptcies.

(10) Finally, many of the changes are intended to clarify language in existing regulations, without any intent to change substantive results. While some of these changes will, as discussed below, address ambiguities that have complicated past bankruptcies, this comprehensive revision of part 190 has also provided opportunities to clarify language in order to avoid future ambiguities, and to add provisions to address circumstances that have not yet arisen, in order to accomplish better and more reliably the goals of promptly and cost-effectively resolving commodity broker bankruptcies while mitigating systemic risk and protecting the commodity broker's customers.

The Commission invited comments on all aspects of the proposed rulemaking and received a total of 16 substantive comment letters in response.[15] The comments generally supported the adoption of revisions to part 190, though several provided suggestions as to particular elements of the proposal that should be modified, clarified, deleted, or otherwise improved. The Commission has adopted many, though not all, of these suggestions, and in some cases has sought to address the concerns raised through alternative drafting.[16]

II. Finalized Regulations

In the discussion below, the Commission highlights topics of interest to commenters and discusses comment letters that are representative of the views expressed on those topics. The discussion does not explicitly respond to every comment submitted; rather, it addresses important issues raised by the proposed rulemaking and analyzes those issues in the context of specific comments.

A. Subpart A—General Provisions [17]

The Commission is adopting as subpart A (§§ 190.00–190.02) general provisions to address both debtors that are both FCMs and debtors that are DCOs.

[12] Those would be FCMs that are also registered as broker-dealers with the Securities and Exchange Commission. *See generally* SIPA, 15 U.S.C. 78aaa *et seq.*

[13] *See* the overarching concept discussed in section III.A.2.c below.

[14] 78 FR 68506 (Nov. 14, 2013). This refers to § 190.05(f) in section II.B.3 below.

[15] The Commission received comment letters submitted by the following: American Council of Life Insurers (ACLI); Better Markets, Inc. (Better Markets); Cboe Global Markets, Inc. (CBOE); CME Group Inc. (CME); Commodity Markets Council (CMC); Futures Industry Association (FIA); Investment Company Institute (ICI); Intercontinental Exchange Inc. (ICE); International Swaps and Derivatives, Inc. (ISDA); LCH Group (LCH); National Grain and Feed Association (NGFA); Options Clearing Corporation (OCC); Part 190 Subcommittee of the Business Law Section of the American Bar Association (ABA Subcommittee); Securities Industry and Financial Markets Asset Management Group and Managed Funds Association (SIFMA AMG/MFA);); Kathryn Trkla; Geoffrey Goodman; and Vincent Lazar, as individuals (Subcommittee Members), and Vanguard Group, Inc. (Vanguard).

[16] The Commission also issued the Supplemental Proposal, which withdrew proposed § 190.14(b)(2) and (3), and proposed an alternative. The Commission received 5 substantive comment letters in response, each of which was from an entity that had also submitted a comment letter on the Proposal. For the reasons discussed in section II.H below, the Commission is not adopting the Supplemental Proposal.

[17] The Commission is adopting the proposed technical corrections and updates to parts 1, 4, and 41, which are discussed in section II.F. below. Moreover, as discussed in section II.B.8, parts of proposed § 190.10 are being adopted, but codified in part 1.

1. Regulation § 190.00: Statutory Authority, Organization, Core Concepts, Scope, and Construction

The Commission is adopting § 190.00 as proposed with the addition of § 190.00(c)(3)(i)(C) and the modification to § 190.00(d)(3)(v), as set forth below. The Commission is adopting § 190.00 to set forth general provisions that state facts and concepts that exist in the Commission's bankruptcy regulations. It is applicable to all of part 190. The Commission's intent is to assist trustees, bankruptcy courts, customers, clearing members, clearing organizations, and other interested parties in understanding the Commission's rationale for, and intent in promulgating, the specific provisions of part 190. The Commission also believes that the regulation may be particularly useful in a time of crisis for those individuals who may not have extensive experience with the CEA or Commission regulations.

The Commission requested comment with respect to all aspects of proposed § 190.00. The Commission also raised specific questions as to whether a regulation setting forth core concepts would be useful; whether the core concepts were under or over inclusive; and whether the definitions and discussions for each core concept would be helpful. The Commission received several comments expressing support for various aspects of proposed § 190.00, including comments from SIFMA AMG/MFA, CME, and the ABA Subcommittee. CME noted in particular that it believed that the regulation ''may prove particularly useful to a trustee who has little experience with the CEA or the Commission's customer funds segregation rules, as they try to get 'up to speed' in the critical early hours and days following the trustee's appointment when the trustee is expected to act quickly on various matters.''

The Commission is adopting § 190.00(a) to set forth the Commission's statutory authority to adopt the proposed part 190 regulations under section 8a(5) of the CEA, which empowers the Commission to make and promulgate such rules and regulations as are necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA, and section 20 of the CEA, which provides that the Commission may, notwithstanding the Bankruptcy Code, adopt certain rules or regulations governing a proceeding involving a commodity broker that is a debtor under subchapter IV of chapter 7 of the Bankruptcy Code. The Commission received comments from CME and the ABA Subcommittee specifically supporting the inclusion of an explanation of the Commission's authority to adopt the part 190 regulations in § 190.00.

The Commission is adopting § 190.00(b) to explain that the part 190 regulations are organized into three subparts. Subpart A contains general provisions applicable in all cases. Subpart B contains provisions that apply when the debtor is an FCM, the definition of which includes acting as a foreign FCM.[18] Subpart C contains provisions that apply when the debtor is a DCO, as defined by the CEA. The Commission received comments from the ABA Subcommittee, CME, and ICI in support of the reorganization of part 190.

The Commission is adopting § 190.00(c) to set forth the core concepts [19] of part 190 that are central to understanding how a commodity broker bankruptcy works. These include concepts related to commodity brokers and commodity contracts, account classes, public customers and non-public customers, Commission segregation requirements, member property,[20] porting of public customer commodity contract positions, *pro rata* distribution, and deliveries.

The Commission is adopting § 190.00(c)(1) to explain that subchapter IV of chapter 7 of the Bankruptcy Code applies to a debtor that is a ''commodity broker,'' the definition of which requires a ''customer.'' [21] Section 190.00(c)(1) states that the regulations in part 190 apply to commodity brokers that are FCMs as defined by the Act, or DCOs as defined by the Act.

The Commission is adopting § 190.00(c)(2) to explain that the CEA and Commission regulations provide separate treatment and protections for different types of cleared commodity contracts or account classes. The four account classes include the (domestic) futures account class (including options on futures),[22] the foreign futures account class (including options on foreign futures),[23] the cleared swaps account class for swaps cleared by a registered DCO (including cleared options other than options on futures or foreign futures),[24] and the delivery account class for property held in an account designated as a delivery account. Delivery accounts are used for effecting delivery under commodity contracts that provide for settlement via delivery of the underlying when a commodity contract is held to expiration or, in the case of an option on a commodity, is exercised.[25]

The Commission is adopting § 190.00(c)(3)(i) to prescribe the separate treatment of ''public customers'' and ''non-public customers,'' as defined in § 190.01, within each account class in the event of a proceeding in which the debtor is an FCM. It explains that, in a bankruptcy, public customers are generally entitled to a priority distribution of cash, securities, or other customer property over ''non-public customers,'' and both are given a priority over all other claimants (except for claims relating to the administration of customer property) pursuant to section 766(h) of the Bankruptcy Code.[26] The Commission is adopting § 190.00(c)(3)(ii) to address the division of customer property and member property in proceedings in which the debtor is a clearing organization. In such a proceeding, customer property consists of member property, which is distributed to pay member claims based on members' house accounts, and

[18] *See* CEA section 1a(28), 7 U.S.C. 1a(28). The definition of foreign FCM involves soliciting or accepting orders for the purchase or sale of a commodity for future delivery executed on a foreign board of trade, or by accepting property or extending credit to margin, guarantee or secure any trade or contract that results from such a solicitation or acceptance. *See* section 761(12) of the Bankruptcy Code, 11 U.S.C. 761(12).

[19] The Commission is using to use the term ''core concepts'' to avoid confusion with the core principles applicable to registered entities. *Cf.* CEA section 5b(c)(2), 7 U.S.C. 7a–1(c)(2).

[20] ''Member property'' is defined in § 190.01 and will be used to identify cash, securities, or property available to pay the net equity claims of clearing members based on their house account at the clearing organization. *Cf.* 11 U.S.C. 761(16).

[21] *See* 11 U.S.C. 101(6) (definition of ''commodity broker''), 761(9) (definition of ''customer'' referred to in 101(6)).

[22] This corresponds to segregation pursuant to section 4d(a) of the CEA, 7 U.S.C. 6d(a).

[23] This corresponds to segregation pursuant to § 30.7 (enacted pursuant to section 4(b)(2)(A) of the CEA, 7 U.S.C. 6(b)(2)(A).

[24] This corresponds to segregation pursuant to section 4d(f) of the CEA, 7 U.S.C. 6d(f).

[25] Delivery accounts are discussed further below in, *e.g.,* §§ 190.00(c)(6), 190.01 (definition of delivery account, cash delivery property, physical delivery property) and 190.06.

[26] Section 766(h) of the Bankruptcy Code explicitly states that the trustee shall distribute property ratably to customers in priority to all other claims, except claims that are attributable to the administration of customer property. Notwithstanding any other provision of this subsection, a customer net equity claim based on a proprietary account may not be paid either in whole or in part, directly or indirectly, out of customer property unless all other customer net equity claims have been paid in full. Thus, all customer property will be allocated to public customers so long as the funded balance in any account class for public customers is less than one hundred percent of public customer net equity claims. Once all account classes for public customers are fully funded (*i.e.,* at one hundred percent of net equity claims), any excess will be allocated to non-public customers' net equity claims until all of those are fully funded.

customer property other than member property, which is reserved for payment of claims for the benefit of members' public customers. The Commission is adopting § 190.00(c)(3)(iii) to address the preferential assignment of property among customer classes and account classes in clearing organization bankruptcies. Certain customer property, as specified in § 190.18(c), will be preferentially assigned to ''customer property other than member property'' (*i.e.,* property for the public customers of members) instead of ''member property'' to the extent that there is a shortfall in funded balances for members' public customer claims. To the extent that there are excess funded balances for members' claims in any customer class/account class combination, that excess will also be assigned preferentially to ''customer property other than member property'' for other account classes to the extent of any shortfall in funded balances for members' public customer claims in such account classes. Where property will be assigned to a particular customer class with more than one account class, it will be assigned on a least funded to most funded basis among the account classes.

The Commission is adopting § 190.00(c)(4) to explain that, in a proceeding in which the debtor is an FCM, part 190 details the policy preference for transferring to another FCM (commonly known as ''porting''), the open commodity contract positions of the debtor's customers along with all or a portion of such customers' account equity.[27]

The Commission is adopting § 190.00(c)(5) to address *pro rata* distribution. It explains that, if the aggregate value of customer property in a particular account class is less than the amount needed to satisfy the net equity claims of public customers in that account class (*i.e.,* there is a ''shortfall''), customer property in that account class will be distributed *pro rata* to those public customers. The *pro rata* distribution principle carries forth the statutory direction in section 766(h) of the Bankruptcy Code. It ensures that all public customers within an account class will suffer the same proportional loss, including those public customers that post as collateral letters of credit or specifically identifiable property.[28] Any customer property that is not attributable to any particular account class or which is in excess of public customer net equity claims for the account class to which it is attributed, will be distributed to public customers in respect of net equity claims in other account classes where there is a shortfall. Thus, as noted in § 190.00(c)(3), all public customer net equity claims would receive priority over non-public customer claims.

The Commission is adopting § 190.00(c)(6) to address deliveries. It explains that the delivery provisions of part 190 apply to any commodity that is subject to delivery under a commodity contract, including agricultural commodities, other non-financial commodities (such as metals or energy), and commodities that are financial in nature (including virtual currencies). In the ordinary course of business, commodity contracts with delivery obligations are offset before reaching the delivery stage (*i.e.,* prior to triggering bilateral delivery obligations). Nonetheless, when delivery obligations do arise, a delivery default could have a disruptive effect on the cash market for the commodity and could adversely impact the parties to the transaction. In a proceeding in which the debtor is an FCM, the delivery provisions in part 190 reflect the policy preferences (A) to liquidate commodity contracts that settle via delivery before they move into a delivery position and (B) when contracts do move into a delivery position, to allow the delivery to occur, where practicable, outside the administration of the debtor's estate (*i.e.,* directly between the debtor's customer and the delivery counterparty assigned by the clearing organization).

The Commission received several comments expressing support for certain provisions in § 190.00(c) and two comments expressing concerns. CME expressed support for ''limiting the scope of part 190 to the bankruptcy of a commodity broker that is an FCM or a DCO and to commodity contracts that are cleared'' as set forth § 190.00(c)(1). CME, OCC, Vanguard, and NGFA supported the concept of preferring the claims of public customers over non-public customers in a bankruptcy proceeding. CME agreed with the inclusion of the core concept set forth § 190.00(c)(3)(ii), noting that ''it aids understanding to explain how the distinction between the public customer class and the non-public customer class is reflected at the DCO-level in the distinctions made between customer accounts and house accounts and between the two categories of customer property—customer property and member property—that are available to satisfy the net equity claims of each.'' Better Markets supported the clarification in § 190.00(c)(5)(ii) that customers relying on letters of credit must carry the same proportional losses as customers posting other forms of acceptable collateral.

NGFA supported the core concept of prioritizing the prompt transfer of customer accounts and positions to another FCM as opposed to liquidating customer accounts. OCC, however, disagreed with this policy preference. OCC supported ''the Commission's objective to mitigate risk to an FCM's customers and limit market volatility,'' noting that ''[p]orting positions and associated collateral in an FCM bankruptcy proceeding can be an effective way to achieve these objectives in some instances.'' OCC believed, however, that the trustee should retain broad discretion to decide, on a case-by-case basis and in consideration of certain factors (*e.g.,* the defaulting FCM's total book of positions and market conditions) whether porting or liquidating positions will achieve the best result for customers involved in an FCM's bankruptcy. OCC further commented that the market risk associated with closing out and reopening positions for certain customers that may be introduced with liquidation should be weighed against potential drawbacks of porting, including that ''(i) a trustee (or DCO) must first identify a transferee to accept the open position[s] and collateral, which depending on market conditions could be a difficult and time consuming process; (ii) until the transfer is complete, the customer may face uncertainty as to how its position and associated collateral will be resolved and may not be able to exit the position in a timely and efficient manner; and (iii) a customer may be required to post additional collateral at a new FCM prior to or immediately after a transfer.''

In response to the concerns raised by OCC, the Commission notes first that, as OCC forthrightly acknowledges,

[27] Transfer or porting of customer positions mitigates risks to both the customers of the debtor FCM and to the markets. Specifically, porting (rather than the alternative, liquidation) of customer positions protects customers' hedges from changes in value between the time they are liquidated and the time, if any, that the customer may be able to re-establish them (and thus mitigates the market risk that some customers use the futures markets to counteract), and similarly protects customers' directional positions. Moreover, not all customers may be able to re-establish positions with the same speed—in particular, smaller customers may be subject to longer delays in re-establishing their positions. In addition, liquidation of an FCM's book of positions can increase volatility in the markets, to the detriment of all market participants (and also contribute to making it more expensive for customers to re-establish their hedges and other positions).

[28] In prior bankruptcies, some customers posting letters of credit or specifically identifiable property as collateral sought to escape *pro rata* treatment for these categories of collateral, contrary to the Commission's intent. *See* discussion of § 190.04(d)(3) in section II.B.2 below.

liquidating customer positions may introduce market risk associated with closing out and reopening positions for certain customers. Additionally, liquidating a mass of customer positions may roil the markets, if any, where those positions are concentrated. For these reasons, the policy preference in favor of transfer is both supported by statute and quite longstanding. It is supported by § 764(b) of the Bankruptcy Code, which explicitly permits transfers of commodity contracts that are authorized by the Commission up to seven calendar days *after* the order for relief. It is also embodied in current § 190.02(e), which requires the trustee to immediately use its best efforts to effect a transfer, and is continued in proposed (and adopted) § 190.04(a)(1).

Furthermore, § 190.00(c)(4) establishes, consistent with § 764(b), a policy *preference* for porting, rather than a *mandate* for porting. This recognizes that finding willing and able transferees for all customer positions may or may not be practicable. Moreover, § 190.04(a)(1) requires the trustee to use its best efforts to effect a transfer no later than the seventh calendar day after the order for relief,[29] and § 190.04(d) requires the trustee promptly to liquidate most remaining contracts after than time. Indeed, as a practical matter, there is cause for doubt that a DCO will permit the trustee of a debtor that is a clearing member to hold open contracts quite that long.[30] Thus, despite the preference for porting, there are practical limits to how long contracts will be held open before being liquidated. This also imposes temporal limits on the uncertainty customers will face as to how their positions will be resolved.

Finally, while a customer may indeed be called for additional collateral at a transferee FCM (particularly if less than 100% of the collateral is transferred along with the positions), a customer that is unwilling to meet such a call will at the least be permitted to have their positions liquidated. That would entitle the customer to prompt return by the transferee FCM of the remaining collateral that was transferred—which may well be more prompt than a distribution in the bankruptcy proceeding of the debtor.

ICI expressed concerns with respect to the discretion granted to the trustee under the part 190 regulations. ICI agreed with the Commission ''that trustees need flexibility given the myriad of decisions they must make in a short period of time and the unique circumstances that each commodity broker insolvency may present,'' and that ''trustees to date have exercised their discretion in a manner that has generally promoted customer protection.'' ICI cautioned, however, that the Commission should take steps to help ensure that the trustee prioritizes the protection of public customers. ICI urged the Commission to make clear in § 190.00 ''that the trustee must exercise [its] discretion in a manner that it determines will result in the greatest recovery for, and the least disruption to, public customers.'' With respect to part 190 regulations that are ''specifically aimed at protecting customers,'' ICI asserted the trustee's discretion should be more limited. While ICI acknowledged that, at times, compliance with such provisions ''may be impractical or impossible or may cause harm to customers,'' ICI was concerned that a ''reasonable efforts'' standard ''could signal that the trustee has wider latitude to depart from the requirement at issue.'' ICI asked the Commission to impose a ''best efforts'' standard in certain cases.

The Commission agrees with ICI that the trustee should exercise its discretion in a manner that best achieves the overarching goal of protecting the interests of public customers as a class, and specifically should act in the manner that it determines will result in the greatest recovery for, and the least disruption to, public customers. The Commission notes that, at times, those two sub-goals may be in tension. Because the Commission does not believe that there is a universally optimal means to reconcile the two sub-goals in aid of best achieving the overarching goal of protecting the interests of public customers, the Commission concludes that it is best to leave the balancing of the two sub-goals to the discretion of the trustee. It is in that context that the Commission has decided to direct the trustee to exercise ''reasonable efforts'' rather than ''best efforts'' to achieve certain standards. In determining what efforts are ''reasonable,'' the trustee should act to achieve the overarching goal.

In light of the foregoing and to provide clarity with respect to the scope of the trustee's discretion, the Commission is adopting new § 190.00(c)(3)(i)(C) which provides that where a provision in part 190 affords the trustee discretion, that discretion should be exercised in a manner that the trustee determines will best achieve the overarching goal of protecting public customers as a class by enhancing recoveries for, and mitigating disruptions to, public customers as a class. In seeking to achieve that overarching goal, the trustee has discretion to balance those two subgoals when they are in tension. Where the trustee is directed to exercise ''reasonable efforts'' to meet a standard, those efforts should only be less than ''best efforts'' to the extent that the trustee determines that such an approach would support the foregoing goals.[31]

The Commission is adopting § 190.00(d)(1) to describe the scope of commodity broker proceedings under subchapter IV of chapter 7 of the Bankruptcy Code,[32] and the relationship between part 190 to SIPA proceedings (where the debtor is a commodity broker) and to resolution of commodity brokers under Title II of the Dodd-Frank Act.''

Section 190.00(d)(1)(i) acknowledges that, while section 101(6) of the Bankruptcy Code recognizes ''commodity options dealers'' and ''leverage transaction merchants'' (as defined in sections 761(6) and (13) of the Bankruptcy Code), as separate categories of commodity brokers, there are no commodity options dealers or leverage transaction merchants currently registered as such. As set forth in the Note to paragraph (d)(1)(i)(B), the Commission is declaring its intent to adopt regulations with respect to commodity options dealers and leverage transaction merchants, respectively, at such time as an entity registers as such.

Section 190.00(d)(1)(ii) explains that, pursuant to section 7(b) of SIPA,[33] the

[29] Indeed, the preference contained § 190.00(c)(4) does not represent a departure from the existing standards under current part 190. It merely highlights the requirement in § 190.04(a)(1) that the trustee use its best efforts to effect a transfer no later than the seventh calendar day after the order for relief; that requirement is substantially identical to the requirement in current § 190.02(e).

[30] For example, OCC Rule 1102(a) provides that OCC may summarily suspend any Clearing Member which is in such financial or operating difficulty that OCC determines and so notifies the Securities and Exchange Commission or the Commodity Futures Trading Commission that suspension is necessary for the protection of the Corporation, other Clearing Members, or the general public. OCC Rule 1106 permits OCC to close out the positions of a suspended clearing member.

[31] While '' '[b]est efforts' is a term which necessarily takes its meaning from the circumstances,'' the trustee in exerting best efforts to meet a standard must diligently exert efforts to meet that standard ''to the extent of its own total capabilities.'' *See generally Bloor* v. *Falstaff Brewing Corp,* 454 F.Supp. 258, 266–67 *aff'd* 601 F.2d 609 (2nd. Cir. 1979). By contrast, in exerting ''reasonable efforts'' to meet a standard, the Commission expects that the trustee will work in good faith to meet the standard, but will also take into account other considerations, including the impact of the effort necessary to meet the standard on the overarching goal of protecting public customers as a class.

[32] 12 U.S.C. 5381 *et seq.*

[33] 15 U.S.C. 78aaa *et seq.*

trustee in a SIPA proceeding where the debtor is also a commodity broker has the same duties as a trustee in a proceeding under subchapter IV of chapter 7 of the Bankruptcy Code, to the extent consistent with SIPA or as ordered by the court.[34] This part implements subchapter IV of chapter 7 by establishing the trustee's duties thereunder, consistent with the broad authority granted to the Commission pursuant to section 20 of the CEA. Therefore, this part also applies to a proceeding commenced under SIPA with respect to a debtor that is registered as a broker or dealer under section 15 of the Securities Exchange Act of 1934 [35] when the debtor also is an FCM.

Moreover, in the context of a resolution proceeding under Title II of Dodd-Frank, section 210(m)(1)(B) [36] provides that the FDIC (in its role as resolution authority) must apply the provisions of subchapter IV of chapter 7 of the Bankruptcy Code in respect of the distribution of customer property and member property of a resolution entity [37] that is a commodity broker as if the resolution entity were a debtor for purposes of subchapter IV. Accordingly, § 190.00(d)(1)(iii) explains that this part shall serve as guidance with respect to the distribution of property in a proceeding in which the FDIC acts as a receiver for an FCM or DCO pursuant to Title II of Dodd-Frank.[38]

The Commission is adopting § 190.00(d)(2)(i) to clarify that a trustee may not recognize any account classes not explicitly provided for in part 190. Section 190.00(d)(2)(ii) provides that no property that would otherwise be included in customer property, as defined in § 190.01, shall be excluded from customer property because it is considered to be held in a constructive trust, resulting trust, or other trust that is implied in equity.

Generally, in a commodity broker bankruptcy, the basis for distributing segregated customer property is *pro rata* treatment. To achieve this goal, the FCM's segregation records (including account statements) and reporting to the Commission and self-regulatory organizations (''SROs'') and DCOs must reflect what is actually available for customers. This is necessary to enable FCMs, SROs, DCOs, and the Commission to ensure, during business as usual, that (a) customer property is being properly protected pursuant to the segregation requirements of section 4d of the CEA and the regulations thereunder, and (b) customer property is not subject to hidden arrangements that cannot be accounted for transparently and reliably. Through § 190.00(d)(2)(ii), the Commission is making clear that customer property cannot be burdened by equitable trusts. Attempting to account for such equitable trusts in a bankruptcy proceeding under part 190 would undermine the Commission's implementation and enforcement of the statutory scheme under the CEA.

Section 190.00(d)(3) provides that certain transactions, contracts, or agreements are excluded from the term ''commodity contract.'' [39] The excluded agreements and transactions traditionally have not been considered to be commodity contracts for purposes of segregation and customer protection, while those that are excepted from these exclusions are so considered, and thus are covered by part 190.

The Commission received four comments supportive of specific provisions of proposed § 190.00(d) and one comment requesting a modification of the regulation. CME agreed that removing provisions relating to commodity option dealers and leverage transaction merchants would ''improve the rules' clarity.'' CME and Cboe expressed support for the clarification in § 190.00(d)(1)(ii) of the applicability of SIPA in the bankruptcy proceeding of a firm that is dually registered as an FCM and a broker-dealer where the bankruptcy must be handled pursuant to SIPA rather than by the FCM rules. Cboe noted that such clarity will be ''beneficial to the entire ecosystem, including customers of FCMs and broker-dealers'' and will ''further the ability of market participants to utilize portfolio margining and the associated efficiencies.'' CME expressed support for § 190.00(d)(1)(iii). CME specifically supported ''setting out that Part 190 'shall serve as guidance' to the FDIC as receiver for an FCM or DCO in a proceeding under Title II of Dodd Frank, with respect to the distribution of customer property and member property.'' Noting that ''Title II [of the Dodd-Frank Act] directs the FDIC to apply the provisions of subchapter IV of chapter 7 of the [Bankruptcy] Code with respect to such distributions,'' CME stated its belief that ''it is reasonable to read Title II's cross-reference to subchapter IV of chapter 7 ''as indirectly bringing [p]art 190 into the scope of that provision given the need for Commission regulations to give specificity and meaning to the general principles set out in subchapter IV.'' SIFMA AMG/MFA supported the principle of excluding property held in a constructive trust from customer property as set forth in § 190.00(d)(2)(ii), noting that this principle ''serves to preserve the integrity of customer property.'' ICI strongly supported setting forth the prohibition on excluding property from ''customer property'' because it is considered to be held in a trust implied in equity in § 190.00(d)(2)(ii), and the exclusion from the term ''commodity contract'' of off-exchange retail foreign currency transactions in § 190.00(d)(3)(iv).

The ABA Subcommittee recommended one modification to this regulation. It asked the Commission to amend proposed § 190.00(d)(3)(v) to clarify that mixed swaps could be commodity contracts subject to part 190. In support of its position, the ABA Subcommittee asserted that a DCO could theoretically provide clearing services to FCMs and their customers with respect to mixed swaps, where the mixed swap positions are carried in accounts subject to part 22 and customers are part of the cleared swap account class under part 190. The ABA Subcommittee analogized the inclusion of mixed swaps within the ''commodity contract'' definition to the Commission's proposal to not exclude security futures products from the commodity contract definition when the security futures product is carried in an account for which there is a corresponding account class under part 190. The Commission agrees with the

[34] *See* SIPA section 7(b), 15 U.S.C. 78fff–1(b) (To the extent consistent with the provisions of [SIPA] or as otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee in a case under chapter 7 of title 11, including, if the debtor is a commodity broker, as defined under section 101 of such title, the duties specified in subchapter IV of such chapter 7).

[35] 15 U.S.C. 78*o*.

[36] 12 U.S.C. 5390(m)(1)(B).

[37] That is, the entity being resolved under Title II. Section 210(m)(1)(b) refers to ''any covered financial company or bridge financial company.''

[38] 12 U.S.C. 5390(m)(1)(B) provides that the FDIC must apply the provisions of subchapter IV of chapter 7 of the Code with respect to the distribution of customer property and member property in connection with the liquidation of a commodity broker that is a ''covered financial company'' or ''bridge financial company'' (terms defined in 12 U.S.C. 5381(a)).

[39] The contracts that would be excluded include: Options on commodities unless cleared by a DCO (or, in the context of a foreign futures clearing member, a foreign clearing organization); forwards (defined as such pursuant to the exclusions in sections 1a(27) or 1a(47)(B)(ii) of the CEA), unless they are cleared by a DCO (or, in the context of a foreign futures clearing member, a foreign clearing organization); security futures products when they are carried in a securities account; retail foreign currency transactions described in sections 2(c)(2)(B) or (C) of the CEA; security-based swaps or other securities carried in a securities account (other than security futures products carried in an enumerated account class); and retail commodity transactions described in section (2)(c)(2)(D) of the CEA (other than transactions executed on or subject to the rules of a designated contract market (''DCM'') or foreign board of trade (''FBOT'') as if they were futures).

ABA Subcommittee's reasoning with respect to proposed § 190.00(d)(3)(v) and is amending § 190.00(d)(3)(v) to read in pertinent part, that ''. . . a security futures product or mixed swap (as defined in 1a(47)(D) of the Act) that is, in either case, carried in an account for which there is a corresponding account class under part 190 is not excluded.''

The Commission is adopting § 190.00(e) to explain the context in which part 190 should be interpreted. It states that any references to other federal rules and regulations refer to the most current versions of these rules and regulations (*i.e.,* ''as the same may be amended, superseded or renumbered'') and that, where they differ, the definitions set forth in § 190.01 shall be used instead of the defined terms set forth in section 761 of the Bankruptcy Code. The Commission notes that other regulations in part 190 are designed to be consistent with subchapter IV of chapter 7 of the Bankruptcy Code.

Section 190.00(e) addresses account classes in the context of portfolio margining and cross margining programs. Where commodity contracts (and associated collateral) that would be attributable to one account class are, instead, commingled with the commodity contracts (and associated collateral) in a second account class (the ''home field''), then the trustee must treat all such commodity contracts and associated collateral as being held in, and consistent with the regulations applicable to, an account of the second account class. The approach of following the rules of the ''home field'' also pertains to securities positions held in a commodity account class (and thus treated in accord with the relevant commodity account class) and commodity contract positions (and associated collateral) held in the securities account, in which case the rules applicable to the securities account will apply, consistent with section 16(2)(b)(ii) of SIPA, 15 U.S.C. 78lll(2)(b)(ii).

The Commission received two comments on proposed § 190.00(e). ICI and Cboe expressed support for the clarity provided by § 190.00(e) with respect to portfolio margining and cross margining programs. ICI strongly supported the ''home field'' rule in proposed § 190.00(e), noting that providing ''clarity regarding how transactions and margin that are portfolio margined in the same account will be treated in the event that an FCM or broker-dealer becomes insolvent is a ''prerequisite for an effective portfolio margining regime.''

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting § 190.00 as proposed with the addition of § 190.00(c)(3)(i)(C) and the modification to § 190.00(d)(3)(v), as set forth above.

2. Regulation § 190.01: Definitions

The Commission is adopting § 190.01 as proposed with modifications set forth below, to update the definitions for revised part 190. Most of the changes in § 190.01 are conforming changes, such as correcting cross-references and deleting definitions of certain terms that are not used in part 190, as amended. Other changes tie the definitions in § 190.01 more closely to the definitions in § 1.3 and other Commission regulations, to reflect changes in Commission regulations. In some cases, the Commission is adopting more substantive changes to the definitions, such as amending or adding definitions to further clarify and provide additional details where the current definitions are silent or unclear, or to reflect concepts that are new to part 190. In particular, the Commission is separating the delivery account class into two subclasses, a physical delivery account class and a cash delivery account class; the relevant terms are defined below. The definitions of commodity contract and physical delivery property codify positions that the Commission has taken in recent commodity broker bankruptcies.[40]

The Commission is also amending § 190.01 to replace the paragraphs identified with an alphabetic designation for each defined term (*e.g.,* ''§ 190.01(ll)'') with a simple alphabetized list, as is recommended by the Office of the Federal Register, and as recently implemented by the Commission with respect to, *e.g.,* § 1.3.[41]

The Commission requested comment with respect to all aspects of proposed § 190.01, including the usefulness and any unintended consequences of the revised definitions. The Commission received a number of comments on the proposed definitions in § 190.01. As further detailed below, the Commission is modifying some of the definitions in response to comments. Unless stated otherwise below, the Commission did not receive any comments on a proposed definition in § 190.01 and is adopting each definition as proposed.[42]

The Commission is adopting the definition of ''account class'' as proposed with the modifications described below. The current definition of the term ''account class'' specifies that it includes certain types of customer accounts, each of which is to be recognized as a separate class of account. The types are ''futures account,'' ''foreign futures accounts,'' ''leverage accounts,'' ''delivery accounts,'' and ''cleared swap accounts.'' The Commission is adding detail to the definition of ''account class'' by including therein definitions of ''futures account,'' ''foreign futures accounts,'' ''cleared swaps accounts,'' and ''delivery accounts.'' However, as discussed above with respect to § 190.00(d)(1)(i), the Commission is removing, at least temporarily, the ''commodity options'' and ''leverage account'' account classes.[43]

[40] Respectively, *In Re Peregrine Financial Group, Inc.,* No. 12–B27488 (Bankr. N.D. Ill.), and *MF Global, Inc.*

[41] *See generally* 83 FR 7979, 7979 & n.6 (Feb. 23, 2018).

[42] The Commission did not receive comments with respect to the following part 190 definitions as proposed in § 190.00: Act, Bankruptcy code, Business day, Calendar day, Cash delivery account class, Cash equivalents, Clearing organization, Commodity broker, Commodity contract account, Court, Cover, Customer, Customer claim of record, Customer class, Dealer option, Debtor, Distribution, Equity, Exchange Act, FDIC, Filing Date, Final net equity determination date, Foreign board of trade, Foreign clearing organization, Foreign future, Foreign futures commission merchant, Foreign futures intermediary, Funded balance, Futures and futures contract, In-the-money amount, Joint account, Leverage contract, Leverage transaction merchant, Member property, Net equity, Open commodity contract, Order for relief, Person, Premium, Primary liquidation date, Principal contract, Securities Account, SIPA, Security, Short term obligation, Specifically identifiable property, Strike price, Substitute customer property, Swap, Trustee, and Undermargined. Accordingly, the Commission is adopting those definitions as proposed, as discussed later in section II.A.2.

[43] The Commission is adopting paragraph (2) of the definition of account class to address commingling orders and rules. Specifically, there are cases where commodity contracts (and associated collateral) that would be attributable to one account class are held separately from contracts and collateral associated with that first account class, and instead are allocated to a different account class and commingled with contracts and collateral in that latter account class. This would take place because the contracts in question are risk-offsetting to contracts in the latter account class. For example, this could involve portfolio margining within a DCO or cross-margining between a DCO and another central counterparty, which may or may not be a DCO. This commingling may be authorized pursuant to a Commission regulation or order, or pursuant to a clearing organization rule that is approved in accordance with § 39.15(b)(2). The Commission is adopting paragraph (2) to confirm that the trustee must treat the commodity contracts in question (and the associated collateral) as being held in an account of the latter account class. The Commission is also adopting paragraph (3) of the definition of account class to address cases where the commodity broker establishes internal books and records in which it records a customer's commodity contracts and

Continued

The Commission is adopting the definition of ''futures account'' to cross-reference the definition of the same term in § 1.3 of the Act, while the definition of ''cleared swaps account'' cross-references the definition of ''cleared swaps customer account'' in § 22.1. These definitions apply to both FCMs and DCOs. The definition of ''foreign futures account'' cross-references the definition of ''30.7 account'' in § 30.1(g). As that latter definition is limited to FCMs, the Commission is adopting a corresponding reference to such accounts at a clearing organization, in the event that a clearing organization clears foreign futures transactions for members that are FCMs, where those accounts are maintained on behalf of those FCM members' 30.7 customers (as that latter term is defined in § 30.1(f)). The Commission clarifies that this would not apply if a foreign clearing organization is clearing foreign futures for clearing members that are not subject to the requirements of § 30.7.

The ABA Subcommittee and CME recommended that the Commission expand the definitions of ''futures account,'' ''foreign futures account,'' and ''cleared swaps account'' within the § 190.01 definition of ''account class'' to cover the accounts of non-public customers. The ABA Subcommittee and CME stated that as proposed, the cross-references to § 1.3, the ''30.7 account'' in 30.1, and the ''cleared swaps customer account'' in § 22.1 within the account class definitions, limited the scope of those definitions to only segregated accounts of public customers despite the Commission's intention to use those same account class distinctions for non-public customers elsewhere in the part 190 rules. The ABA Subcommittee and CME suggested that those account class distinctions are also relevant for the non-public customer class (*i.e.,* the holders of proprietary accounts carried by FCMs and for clearing members' house accounts carried by DCOs).

The Commission is persuaded by the comments that there are, in at least some cases, account class distinctions within the customer class for non-public customers,[44] and thus agrees that the revised definitions of ''futures account,'' ''foreign futures account,'' and ''cleared swaps account'' within the § 190.01 definition of ''account class'' should address separately non-public customers, and has amended the definitions to do so.

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting the ''account class,'' ''futures account,'' foreign futures account,'' and ''cleared swaps account'' definitions in § 190.01 as proposed with the modifications referred to above.

The ''delivery account'' class is the fourth type of account class. It is the relevant account through which an FCM or DCO accounts for the making or taking of physical delivery under commodity contracts whose terms require settlement by delivery of a commodity. The FCM or DCO designates such account as a delivery account on its books and records. The Commission is adopting the definition of ''delivery account'' as proposed within paragraph (1)(iv) of the definition of account class, with a modification to conform to the issue addressed in the preceding paragraph: The delivery account applies to ''both public and non-public customers, considered separately.''[45]

The current definition of ''delivery account'' in § 190.05(a)(2) refers to an account that contains only property described in three of the nine categories of property in the current definition of ''specifically identifiable property.'' The Commission has determined to adopt a more functional definition of ''delivery account'' in § 190.01. This revised definition will focus on an account maintained on the books and records of an FCM or DCO for the purpose of accounting for the making or taking of delivery under commodity contracts whose terms require settlement by delivery of a commodity.[46]

The Commission is thus adopting paragraph (1)(iv)(A)(*1*) to define delivery accounts for FCMs. The Commission is adopting paragraph (1)(iv)(A)(*2*) to incorporate the same concepts for clearing organizations, and also permit a clearing organization to act as a central depository for physical delivery property represented by electronic title documents, or otherwise in electronic (dematerialized) form.

As set forth in paragraph (1)(iv)(B), the delivery account class is being subdivided into separate physical and cash delivery account classes, as provided in § 190.06(b), for purposes of *pro rata* distributions to customers for their delivery claims. The definitions of the terms ''physical delivery property'' and ''cash delivery property'' are addressed in detail later in this section.

As customer property held in a delivery account is not subject to the Commission's segregation requirements, the Commission believes it may be more challenging and time-consuming to identify customer property for the cash delivery account class,[47] (and such cash would thus be commingled with the FCM's own cash intended for operations). Consequently, the Commission believes separating (1) most cash delivery property and customer claims from (2) most physical delivery property and customer claims should promote more efficient and prompter distribution of the latter to customers. For these reasons, the Commission is adopting the delivery account definition to be further divided into physical delivery and cash delivery account classes, for purposes of *pro rata* distributions to customers for their delivery claims.

The claims with respect to the physical delivery and cash delivery subclasses are fixed on the ''filing date.''[48] Thus, the physical delivery account class includes, in addition to certain physical delivery property, cash delivery property received post-filing date in exchange for physical delivery property held on the filing date that has been delivered under a commodity contract. Conversely, the cash delivery account class includes, in addition to certain cash delivery property, physical delivery property that has been received post-filing date in exchange for cash delivery property held on the filing date.

CME and ICE supported separate subaccounts of the delivery account for physical property (the property being delivered) and cash property (cash used

collateral, and related activity. It confirms that the commodity broker is considered to maintain such an account for the customer regardless of whether it has kept such books and records current or accurate.

[44] *See, e.g.,* § 190.09(c)(2)(iv) (allocating residual property to the non-public customer estate for each account class in the same order as is prescribed in paragraphs (c)(2)(i) through (iii) of this section for the allocation of the customer estate among account classes.)

[45] This separate consideration is a consequence of the fact that, pursuant to Bankruptcy Code section 766(h), public customer claims must be paid in full before non-public customer claims.

[46] *See* § 190.01.

[47] The Commission agrees with a point previously made by the ABA Committee: ''Based on lessons learned from the MF Global Bankruptcy, those challenges are likely greater for tracing cash. Physical delivery property, in particular when held in the form of electronic documents of title as is prevalent today, is more readily identifiable and less vulnerable to loss, compared to cash delivery property that an FCM may hold in an operating bank account.'' *See* Transmittal Letter from The Part 190 Subcommittee of the Business Law Section of the American Bar Association accompanying Model Part 190 Rules (''ABA Cover Note''), *available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61330&SearchText* at 14. *See also In re MF Global Inc.,* 2012 WL 1424670 (noting how physical delivery property was traceable).

[48] ''Filing date'' means the date that a petition under the Bankruptcy Code or application under SIPA commencing a proceeding is filed or on which the FDIC is appointed as a receiver pursuant to 12 U.S.C. 5382(a).

to pay for delivery). CME agreed with the proposed definition of the delivery account class and supported the proposed separation of the delivery account class into the cash delivery account and physical delivery account classes, as they delineate the customer property that is available to distribute to customers in each account class on a *pro rata* basis. CME agreed that cash delivery property should include cash or cash equivalents recorded in a customer's delivery account as of the filing date, along with any physical delivery property subsequently received in accepting a delivery, and likewise that physical delivery property should include any cash delivery property received subsequent to the filing date in exchange for making a delivery. CME also had specific comments on each of the two subaccount definitions as discussed below.

CME noted that the Commission does not impose segregation requirements on FCMs with respect to the cash or physical delivery property that an FCM holds on behalf of its customers and records in a delivery account. As learned from the *In re MF Global,* Inc. bankruptcy (hereinafter ''MF Global''),[49] CME agreed that it can be more challenging for a trustee to trace the cash recorded in delivery accounts than to trace physical delivery property. For example, the *MF Global* trustee could more readily identify physical delivery property in the form of electronic title documents, compared to identifying non-segregated cash belonging to the delivery account class given the fungible nature of cash.

CME recommended that the Commission address through a separate rulemaking the broader issues around whether customer property carried in delivery accounts should be subject to any special customer protections, such as requirements that FCMs should hold such property in custody accounts or limitations on how long cash or cash equivalents should be held in delivery accounts that are not subject to custody requirements.[50]

At this time, after consideration of the comments and for the reasons stated above the Commission is adopting the definition of ''delivery account'' as proposed, with the modification to note that it applies to each of public and non-public customers, considered separately.

The Commission is adopting the definition of ''cash delivery property'' as proposed with the modifications described below. The Commission proposed to define cash delivery property to carry through the concepts from current § 190.01(ll)(4) and (5) that the cash or cash equivalents, or the commodity must be identified on the books and records of the debtor as having been received, from or for the account of a particular customer, on or after three calendar days before the relevant (i) first delivery notice date in the case of a futures contract or (ii) exercise date in the case of an option.

The Commission is adopting the cash delivery property definition to mean any cash or cash equivalents recorded in a delivery account that is, as of the filing date: (1) Credited to such account to pay for receipt of delivery of a commodity under a commodity contract; (2) credited to such account to collateralize or guarantee an obligation to make or take delivery of a commodity under a commodity contract, or (3) has been credited to such account as payment received in exchange for making delivery of a commodity under a commodity contract. It includes property in the form of commodities that have been delivered after the filing date in exchange for cash or cash equivalents held in a delivery account as of the filing date. The definition also requires that the cash or cash equivalents, or the commodity, must be identified on the books and the records of the debtor as having been received, from or for the account of a particular customer, on or after seven calendar days before the relevant (i) first delivery notice date in the case of a futures contract or (ii) exercise date in the case of a cleared option.[51] In response to comments discussed below, the Commission is adopting the definition of cash delivery property to also include any cash transferred by a customer to the trustee on or after the filing date for the purpose of paying for delivery, consistent with § 190.06(a)(3)(ii)(B)(*1*). The Commission is also adopting the definition in response to comments that requested that the Commission provide that in the case of a contract where one fiat currency is to be exchanged for another fiat currency, each currency will be considered cash delivery property to the extent that it is recorded in a delivery account.

Commenters generally supported separate subaccounts of the delivery account, and that cash delivery property should include cash or cash equivalents recorded in a customer's delivery accounts as of the filing date, along with any delivery property subsequently received in accepting a delivery. However, the Commission also received several comments on three aspects of the proposed definition of cash delivery property.

First, the ABA Subcommittee, CME, ICE, FIA, and CMC recommended that the Commission remove the three-calendar day restriction proposed in the definition of cash delivery property in § 190.01. While several of these commenters recognized the Commission's intention to encourage customers and their FCMs to hold cash in a segregated account where it is better protected until needed to pay for a delivery that is effected in the delivery account, the commenters were concerned that cash or cash equivalents might be posted to delivery accounts sooner than three days before the first notice date or exercise date, and therefore this property might be denied the cash delivery property protection.

FIA stated that the **Federal Register** release did not explain why the Commission proposed to restrict cash delivery property to cash and cash equivalents received no earlier than three calendar days before the relevant first notice day or exercise date. FIA and ICE could not identify any justification as to why cash or cash equivalents that may be received by a debtor FCM and properly deposited in a cash delivery account prior to this period should receive different protections under part 190 than cash and cash equivalents received within the three-calendar day time frame. The ABA Subcommittee noted that their Committee eliminated this provision in the Model Part 190 Rules to avoid unintended consequences.

CME recognized that the three-day limitation is based on the limitation in current part 190, but stated that it does not make sense and if not eliminated from the definition, it could be detrimental to customers, which is contrary to the goal of enhancing customer protections. CME further explained that if a customer posts cash or cash equivalents to its delivery account in anticipation of paying for an upcoming delivery or to guarantee its obligation to take delivery, the timing of the payment should not matter. If the parties intend to make and take delivery, CME believed the trustee should be able to follow the customers' intention. CME explained that a customer is unlikely to leave cash in an unsegregated delivery account with an FCM for any extended time, without reason, when it would be better

[49] *In re MF Global,* No. 11–2790 (MG) (SIPA) (Bankr. S.D.N.Y.).

[50] This recommendation is addressed in section II.G below.

[51] As discussed below, the proposal had specified a period of three calendar days; after consideration of the comments, that period has been changed to seven calendar days.

protected by holding the cash in a segregated account or withdrawing the cash if not needed to meet upcoming delivery obligations. CME noted that there can be times, though, when a customer will legitimately post cash to its delivery account sooner than the definition would allow, for example, out of caution to assure that the necessary funds are available to pay for a delivery when the first notice date or exercise date immediately follows a weekend or holiday, or to meet payment deadlines imposed by the FCM, or based on market convention. CME noted that some FCMs may require customers to post cash sooner than three days prior to the relevant notice or exercise date, as applicable, to satisfy a delivery-related obligation. CME believed it could be potentially disruptive to the delivery process to deny the customer the protection of having its funds classified as cash delivery property because it posted the cash or cash equivalents needed to complete an upcoming delivery too soon.

CME also believed the three-day timing element does not make sense with respect to cash recorded in a customer's delivery account as of the filing date, which the customer had previously received as payment for delivering a commodity under an expired or exercised contract. CME believed the Commission intended for the timing limitation to apply to this situation, but the proposed definition does not exclude such cash from the requirement.

CME understood that the Commission proposed to keep the timing limitation to encourage FCMs and their delivery customers to hold cash intended to pay for a delivery in a segregated account until bilateral delivery obligations are near at hand. However, CME questioned whether the limitation was effective in encouraging the desired behavior, in particular when it is contained in bankruptcy regulations and parties with delivery obligations may not necessarily be aware of it. As a result, CME recommended that the Commission address the protection of customer property held in delivery accounts in a more direct and transparent matter, through a separate rulemaking. Specifically, CME recommended that the Commission revise the ''cash delivery property'' definition to remove the limitation that cash delivery property must be recorded in the delivery account no sooner than three calendar days before the first notice date or exercise date.

The Commission notes that part 190 currently contains the three-day limitation, which serves to limit delivery property to property that is transferred into a delivery account shortly before the notice or exercise date.[52] Thus, the Commission considered whether a change in the current standard is warranted. As discussed further below, the Commission concludes that while the case has been made to extend the limitation from three calendar days to seven calendar days, the case has not been made to remove the limitation in its entirety at this time.

While delivery accounts provide some customer protection, in that they benefit from favorable treatment in bankruptcy, they lack the protection of segregation requirements, in contrast to futures account, foreign futures account, and cleared swaps accounts. In the case of the latter types of accounts, the FCM must maintain in accounts, protected from the claims of creditors of the FCM other than the customers for whom they are segregated, sufficient funds to repay the claims of such customers in full, at all times. Such segregation protections are a very important means of ensuring that sufficient funds are in fact available to pay customers in full in the (highly unlikely) event of the insolvency of an FCM.

Accordingly, the Commission is of the view that changing current part 190 to completely remove any time limitation for protecting property transferred into a delivery account would, in light of this lack of segregation protection, carry the risk of significant unintended consequences, *e.g.,* customers being encouraged to transfer funds prematurely into an account without such protection, and thus a bankruptcy where a greater number of customers receive less than the full amount of their claims, and greater total shortfalls in repayment of such claims.

CME, while noting their preference for simply deleting the three-day limitation, observed that protection of customer property held in delivery accounts should be addressed in a direct and transparent manner through a separate rulemaking. The Commission concludes that deleting entirely the time limitation on posting cash delivery property should only be undertaken, if at all, in the context of a separate, dedicated, and explicit rulemaking, in which moving property more quickly to a delivery account is considered in conjunction with segregation protection for property in such an account.

However, the Commission believes CME's concerns about long weekends raise important issues. For example, in the context of an FCM's global business, there could be a bank holiday on a Friday in the jurisdiction where a customer is based, a Federal holiday on the following Monday in the U.S., and the exercise or notice date might be on a Tuesday; in which event three calendar days may be too short. Similarly, in the vein of CME's comment, there may be legitimate reasons to transfer the funds a day or two in advance of when they are needed, to account for the possibility of a failure in the transfer process.

Weighing the concerns of having funds for an extended time in an account that is not protected by segregation against the need to provide a modest amount of flexibility in the process, the Commission has determined that a reasonable balance can be achieved by changing the three-day (before notice or exercise date) period to a seven-day period. The Commission believes this extended time period will address completely the concern that a delivery date may come after a holiday weekend, and should mitigate concerns about FCM funding requirements that extend beyond three days. If and when a separate rulemaking results in additional protection for delivery accounts, it will be appropriate to revisit this aspect of part 190 as part of such a rulemaking.

Second, the ABA Subcommittee, CME, and CMC recommended that the Committee revise the definition of cash delivery property to allow for the possibility that cash or cash equivalents could be posted after the filing date for the purpose of paying for a delivery, and to provide protection for such deposits. The commenters requested that the Commission expand the definition to allow for the rare possibility that a customer may be unable to post funds needed to pay for a delivery in advance of the filing date so that the definition should also cover cash delivery property received after the filing date in anticipation of taking delivery of a commodity. CME noted that as has been seen with other FCM bankruptcies, the days prior to actual filing can be chaotic and customers may not have had the opportunity to meet such a deadline. To allow the delivery to be completed reduces a potential disruptive situation to commodities markets during an otherwise tumultuous time.

This issue is illuminated by considering the interplay of other

[52] *See* current § 190.05(a)(2) (tying delivery account to portions of the definition of specifically identifiable property in § 190.01); § 190.01(ll)(4) and (5) (limiting recognition of cash as specifically identifiable property to cases where it is identified on the books and records of the FCM as being received from or for the account of a particular customer on or after three calendar days before the first notice date or exercise date specifically for the purpose of a delivery or exercise).

regulations that affect delivery. The Commission notes that while § 190.04(c) continues the preference for the trustee to liquidate contracts moving into delivery position before they do so, and § 190.06(a)(2) continues the preference, in cases where the trustee is unable to do so, for the trustee to arrange for delivery to occur outside the estate, § 190.06(a)(3) acknowledges that there may be cases where the trustee will need to facilitate the making or taking of delivery. Regulation § 190.06(a)(3)(ii)(B)(*1*) refers to cases where the trustee pays for delivery (in whole or in part) with cash transferred by the customer to the trustee on or after the filing date for the purpose of paying for delivery.

Thus, the Commission agrees with the arguments made by the commenters who suggested that the Commission expand the definition of ''cash delivery property'' in this context, and consequently is adding an explicit reference to the cash transferred from a customer to the trustee after the filing date, consistent with § 190.06(a)(3)(ii)(B)(*1*). Moreover, for consistency, the Commission will amend § 190.08(c)(1)(ii) as proposed to explicitly give such post-petition transfers treatment as 100% funded.

Finally, the ABA Subcommittee suggested that the Commission clarify that the delivery of two different fiat currencies for foreign currency commodity contract constitutes cash delivery property. CME suggested a similar technical change to clarify in the definition that for a commodity contract that settles by delivery of a foreign currency as the underlying commodity or by an exchange of a pair of currencies, the USD or foreign currency recorded to a delivery account in connection with either side of the delivery constitutes cash delivery property.

In response to the ABA Subcommittee comment regarding the delivery of two fiat currencies, ''[g]iven the fungible nature of cash, regardless of currency denomination,'' the Commission has determined to amend further the definition of ''cash delivery property'' to clarify that for foreign exchange contracts, *i.e.,* contracts where one fiat currency is exchanged for another fiat currency, both fiat currencies will be treated as cash delivery property, and neither currency will be considered physical delivery property.

Accordingly, in consideration of the comments and the reasons discussed above, the Commission will adopt the definition of ''cash delivery property'' in § 190.01 as modified, with the additions referred to above.

The Commission is adopting the definition of ''physical delivery property'' in § 190.01 as proposed with modifications, as described below. The Commission is adopting the definition of ''physical delivery property'' to include, under the four specified sets of circumstances discussed below, a commodity, whether tangible or intangible, held in a form that can be delivered to meet and fulfill delivery obligations under a commodity contract that settles via delivery if held to a delivery position.[53] The Commission is adopting the definition to include warehouse receipts, other documents of title, or shipping certificates (including electronic versions of the forgoing), for the commodity, or the commodity itself.

The Commission is amending the physical deliver property definition to address changes in delivery practices since the 1980s. The reference to electronic versions of warehouse receipts, other documents of title, or shipping certificates explicitly recognizes that title documents for commodities are now commonly held in dematerialized, electronic form, in lieu of paper. Moreover, the types of commodities that might be physically delivered would extend beyond tangible commodities to those that are intangible, including Treasury securities, foreign currencies, or virtual currencies.[54]

For purposes of analytical clarity, the Commission is adopting the definition of physical delivery property as subdivided into four categories:

First, the commodities or warehouse receipts, other documents of title, or shipping certificates (including electronic versions of any of the foregoing) for the commodity that the debtor holds for the account of a customer for purposes of making delivery of such property and which, as of the filing date or thereafter, can be identified as held in a delivery account for the benefit of such customer on the books and records of the debtor.[55]

Second, the commodities or warehouse receipts, other documents of title, or shipping certificates (including electronic versions of any of the foregoing) for the commodity that the debtor holds for the account of the customer, where the customer received or acquired such property by taking delivery under an expired or exercised commodity contract, and which, as of the filing date or thereafter, can be identified as held in a delivery account for the benefit of such customer on the books and records of the debtor.[56]

The third category addresses property that (a) is in fact being used, or has in fact been used, for the purpose of making or taking delivery, but (b) is held in a futures, foreign futures, cleared swaps, or (if the commodity is a security) securities account.[57] This property would be considered physical delivery property *solely* for the purpose of the obligations, pursuant to § 190.06, to make or take delivery of physical delivery property. The property in this category would be *distributed* as part of the account class in which it is held (futures, foreign futures, or cleared swaps, or, in the case of a securities account, as part of a SIPA proceeding).

Fourth, where such commodities or documents of title are not held by the debtor, but are delivered or received by a customer in accordance with § 190.06(a)(2) (either by itself in the case of an FCM bankruptcy or in conjunction with § 190.16(a) in the case of a clearing organization bankruptcy), they will be considered physical delivery property, but, again, *solely* for purposes of obligations to make or take delivery of physical delivery property pursuant to § 190.06. As this property is held outside of the debtor's estate (and there was no obligation to transmit it to the debtor's customer accounts), it is not subject to *pro rata* distribution.

The Commission is also adding a special case to correspond with the special case for cash delivery property, which states that where one fiat currency is exchanged for another, neither such currency, to the extent that it is recorded in the delivery account, will be considered physical delivery property. The Commission is also, as discussed further below, additionally amending the physical delivery property definition to address the possibility of a negative delivery price

[53] The current definition is found in § 190.01(ll)(3), and focuses on documents of title and physical commodities.

[54] *See* ABA Cover Note at 10, 12–13.

[55] These first two categories together correspond to current § 190.01(ll)(3), with the first category corresponding to physical delivery property held for the purpose of *making* delivery and the second category corresponding to physical delivery property held as a result of *taking* delivery. The property that is (or should be) within these two categories, as of the filing date, comprises the property that will be distributed as part of the physical delivery class.

[56] The current definition does not prescribe or imply a limit to how long such received property can be held in a delivery account, because there is no principled basis to draw a bright line delineating how long is too long. The definition the Commission is adopting explicitly codifies that position.

[57] As the ABA Cover Note explained at 13, ''[w]hen the FCM has a role in facilitating delivery, deliveries may occur via title transfer in a futures account, foreign futures account, cleared swaps account, delivery account, or, if the commodity is a security . . . in a securities account.''

where the party obliged to delivery physical delivery property under an expiring contract or an expired options contract is also obliged to make a cash payment to the buyer, as such cash or cash equivalents constitute physical delivery property.

CME and CMC agreed that physical delivery property should include any cash delivery property received subsequent to the filing date in exchange for making a delivery.

In light of the evolving nature of intangible assets, and of the manner in which they may be held, custodied or transferred, ICE suggested that the definition of physical delivery property include, as examples (and not by way of limitation), other electronic representations of commodities (whether or not technically ''an electronic title document'') or any property entitlement to a commodity (such as for a commodity held as a financial asset in a securities account under Article 8 of the Uniform Commercial Code (whether or not a security) or similar structure).

ICE strongly agreed with the Commission's proposal to clarify that intangible property received or held for purposes of delivery is appropriately regarded as subject to the delivery account, without regard to whether it is ''physical'' as under the current rule. ICE argued that any asset, tangible or intangible, that can be delivered in settlement of a contract should be eligible to be treated as delivery property, as set out in the proposed definition of ''physical delivery property.'' ICE believed this proposed definition would avoid questions that may otherwise arise in connection with the delivery of digital currencies or other novel digital assets. CME also supported the decision to expand the delivery account class to cover intangible commodities.

Additionally, CME supported modernizing the definition of physical delivery property to recognize the use of electronic delivery documents in effecting deliveries under physical delivery commodity contracts. CME recommended that the Commission further expand the physical delivery property definition to cover within its scope any cash or cash equivalents that a seller may deposit in its delivery account when its obligation to deliver physical delivery property under an expiring futures or exercised options contract also includes an obligation to make a cash payment to the buyer, as could arise if the contract's final settlement price is negative. CME acknowledged that this scenario would be unprecedented and may never occur, but believed it prudent to contemplate the possibility in light of events in April 2020 where certain physical-delivery oil futures contracts traded below zero in the days prior to establishment of the final settlement prices.

CME also recommended a technical correction to the definition relating to the fact that shipping certificates are not electronic title documents, and instead represent the contractual obligation of a facility to deliver the underlying commodity to the buyer. Thus, for clarity CME recommended that the Commission revise the phrase ''including warehouse receipts, shipping certificates or other documents of title (including electronic title documents) for the commodity'' to read ''including warehouse receipts, shipping certificates or *other* similar documents (including electronic *versions thereof*).'' The Commission is not amending the examples to explicitly address additional ''electronic representations of commodities'' within the definition of physical delivery property because the definition already broadly covers ''a commodity, whether tangible or intangible, held in a form that can be delivered to meet and fulfill delivery obligations under a commodity contract. . . .''

The Commission is amending the definition of physical delivery property to address the technical correction recommended by CME by acknowledging that shipping certificates are not documents of title while avoiding the phrase ''similar documents'' by instead amending the last phrase to read ''including warehouse receipts, other documents of title, or shipping certificates (including electronic versions of any of the foregoing) for the commodity, or the commodity itself.''

The Commission is also adding a special case, corresponding to the special case for cash delivery property, stating that where one fiat currency is exchanged for another, neither such currency would be considered physical delivery property.

The Commission is further amending the physical delivery property definition with a second special case in response to CME's suggestion to address the possibility of a negative delivery price. While negative prices for deliverable commodities are rare, they are not unprecedented (*e.g.,* the price of crude oil briefly went negative in April 2020). While a negative price for actual delivery may be even rarer, it is theoretically possible. Thus, the Commission is amending the definition of ''physical delivery property'' to address this special case by adding the following: In a case where the final settlement price is negative, *i.e.,* where the party obliged to deliver physical delivery property under an expiring futures contract or an expired options contract is also obliged to make a cash payment to the buyer, such cash or cash equivalents constitute physical delivery property.

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting the definition of ''physical delivery property'' as proposed with the appropriate modifications to the structure, as set forth above, to correspond to ''(1) *In general.*'' and to address two special cases in ''(2) *Special cases.*'' The Commission is adopting the definition of ''allowed net equity'' as proposed in § 190.01 and as modified to become ''funded net equity'' as described below. The Commission proposed ''allowed net equity'' to update cross-references and allow for two definitions of the term (as used in subparts B and C of part 190).

The ABA Subcommittee expressed concern in their comment letter that the definition and the use of the term ''allowed net equity'' as proposed in §§ 190.01 and 190.08(a) could create inconsistencies and confusion between part 190 and the settled bankruptcy law terminology in which ''allowed'' typically refers to the fixed amount of a creditor's claim rather than the amount distributable on such claim. The ABA Subcommittee recommended three modifications to address this potential confusion, including the deletion of the definition of ''allowed net equity'' in proposed §§ 190.01 and 190.08(a), as the ABA Subcommittee believes the remainder of proposed § 190.08 would address how to calculate a customer's net equity claims and the funded balances for each such claims.[58]

The Commission agrees with the ABA Subcommittee that the inclusion of ''allowed'' in the defined term ''allowed net equity'' could cause confusion in the broader context of established bankruptcy law, where ''allowed'' refers to the trustee's measure of the proper amount of a claim, rather than to the

[58] The ABA Subcommittee also recommended that the Commission further amend § 190.02 by adding new paragraph (g) to proposed § 190.02 to state that the term 'allowed' in this part shall have the meaning ascribed to it in the Bankruptcy Code. The ABA Subcommittee believed that this would confirm that ''allowed'' under part 190 equates with the use of ''allowed'' under the Bankruptcy Code. The ABA Subcommittee also recommended that the Commission add ''funded balance of'' before ''such customer's allowed net equity claim'' in proposed § 190.09(d)(3). The Commission agrees that these recommended amendments would avoid confusion with the meaning of ''allowed'' in § 190.02(g) and is therefore making these suggested changes.

portion of a claim that is funded (in *pro rata* distribution).

Accordingly, after consideration of the comments, including the ABA Subcommittee's suggestion regarding the funded portion of a customer's allowed claim throughout part 190, and for the reasons stated above, the Commission is changing the defined term ''allowed net equity'' to ''funded net equity,'' and adopting the definition as so modified. The Commission is also adding § 190.02(g) (as discussed below) and adding ''funded balance of'' before ''such customer's allowed net equity claim'' in § 190.09(d)(3) as suggested.

The Commission is adopting the definition of ''commodity contract'' in § 190.01 as proposed, in order to amend the definition to incorporate and extend in context (through references to current Commission regulations) the definition in section 761(4) of the Bankruptcy Code.[59]

ICI strongly supported the proposed amendments to the definition of ''commodity contract'' to include any ''futures contract'' and any ''swap'' thereby permitting transactions carried in a futures or cleared swaps account in accordance with the Commission's regulations to be eligible for the protections that part 190 affords.

Accordingly, after consideration of the comment and for the reasons stated above, the Commission is adopting the definition of ''commodity contract'' as proposed.

The Commission is adopting the definition of ''customer property and customer estate'' as proposed to update the definition to clarify cross-references within part 190 and to note that customer property distribution is addressed in section 766(i) of the Bankruptcy Code in addition to section 766(h).

ICE supported the Commission's decision to include forward contracts that are traded on a DCM and cleared by a DCO as customer property.

Accordingly, after consideration of the comment, and for the reasons stated above, the Commission is adopting the definition of ''Customer property, customer estate'' in § 190.01 as proposed.

The Commission is adopting the definition of ''house account'' with modifications, as set forth below to modify the existing definition to (a) clarify the connection between the concept of a ''house account'' in part 190 and the concept of a proprietary account in § 1.3, and (b) separately define the term in relation to an FCM, a foreign futures commission merchant, and a DCO.

The ABA Subcommittee and CME agreed with expanding the current definition to cover the house accounts that DCOs maintain for clearing members. However, the commenters noted that ''house account'' is used in only three places for an FCM proceeding: (i) Proposed § 190.06(a)(5), which addresses deliveries made or taken with respect to the debtor FCM's house account under open commodity contracts; (ii) proposed § 190.07(c), which prohibits transfer of the debtor FCM's house account after the filing date; and (iii) proposed § 190.08(b)(2)(ix), which provides that when a non-debtor FCM maintains an omnibus account and a house account with a debtor FCM, it holds the accounts in a separate capacity for purposes of calculating its net equity claims against the debtor FCM. Assuming the Commission intended to expand the scope of these provisions in each case, the ABA Subcommittee and CME suggested that the Commission modify the three provisions to clarify that they apply to proprietary accounts of FCMs, and to limit the defined term to house accounts maintained by a DCO for clearing members. The ABA Subcommittee believed it was unnecessary, potentially confusing, and could preclude porting of proprietary accounts.

The Commission agrees with the commenters' recommendation to streamline the ''house account'' definition and amend the respective subpart B provisions to limit the use of ''house account'' to the context of clearing organization bankruptcies to avoid any potential confusion regarding the ability to port proprietary accounts. Accordingly, after considering the comments, and for the reasons stated above, the Commission is adopting the definition of ''house account'' in § 190.01, as modified.

The Commission is adopting the definitions of ''non-public customer'' and ''public customer'' as proposed to define who is considered a public versus a non-public customer separately for FCMs and for clearing organizations. These definitions are complements (*i.e.,* every customer is either a ''public customer'' or a ''non-public customer,'' but never both).

In the case of a customer of an FCM, the Commission is adopting the definition of ''public customer,''[60] which would be analyzed separately for each of the relevant account classes (futures, foreign futures, cleared swaps, and delivery) with the relevant cross-references to other Commission regulations. For the ''futures account class,'' this would be a futures customer as defined in § 1.3, whose futures account is subject to the segregation requirements of section 4d(a) of the Act and the Commission regulations thereunder; for the foreign futures account class, a 30.7 customer as defined in § 30.1, whose foreign futures account is subject to the segregation requirements of § 30.7; for the cleared swaps account class, a cleared swaps customer as defined in § 22.1, whose cleared swaps account is subject to the segregation requirements of part 22; and for the delivery account class, a customer that would be classified as a ''public customer'' if the property held in the customer's delivery account had been held in an account described in one of the prior three categories. The Commission is tying the definition of public customer for bankruptcy purposes to the definitions of ''customer'' (and segregation requirements) that apply during business as usual. An FCM's non-public customers are customers that are not public customers.

As part of the process for introducing a bespoke regime for the bankruptcy of a clearing organization, the Commission is differentiating between public and non-public customers such that customers of clearing members (whether such clearing members are FCMs or foreign brokers) acting on behalf of their proprietary (*i.e.,* house) accounts, would be non-public customers, while all other customers of clearing members would be public customers.

In the case of members of a DCO that are foreign brokers, the determination as to whether a customer of such a member is a proprietary member would be based on either the rules of the clearing organization or the jurisdiction of incorporation of such member: If either designates the customer as a proprietary member, then the customer would be treated as a non-public customer.

Vanguard agreed that the proposed definition of public customer in § 190.01 included any customer of an FCM whose commodity contract is subject to the Commission's segregation

[59] It should be noted that, consistent with § 190.00(d)(3)(iv) and the decision *In re Peregrine Financial Group, Inc.,* 866 F.3d 775, 776 (7th Cir. 2017), *adopting by reference Secure Leverage Group, Inc.* v. *Bodenstein,* 558 B.R. 226 (N.D. Ill. 2016), retail foreign exchange contracts do not fit within the definition of commodity contracts.

[60] This is in contrast to the current definition in § 190.01(cc) and (ii), which explicitly define non-public customer, and define public customer as a customer that is not a non-public customer. This change is not substantive, but rather fosters closely tying the account classes to business-as-usual segregation requirements.

requirements, and for a DCO, a person whose account with the FCM is not classified as a proprietary account. CME also supported the proposed definitions of public customer and non-public customer as it believed they are more understandable than the prior part 190 definitions.

CME, however, asked the Commission to reconsider the recommendation of the ABA Subcommittee to include non-U.S. customers of foreign broker clearing members of a DCO within the public customer definition. CME noted that it previously considered admitting foreign brokers as clearing members to clear trades of their non-U.S. customers in futures or options on futures listed on the CME or the other designated contract markets (''DCMs'') owned by CME Group, which would be analogous to a foreign clearing organization admitting FCMs as members to clear trades of their public customers in futures or options on futures listed by a foreign board of trade. While that model does not currently exist for U.S. DCOs and the DCMs for which they provide clearing services, CME believed it is appropriate to include that flexibility in part 190 to accommodate that possibility. OCC also requested clarification as to whether customers of foreign brokers that access a DCO through an FCM clearing member affiliated with the foreign broker would be treated as public customers.

The Commission is of the view that including non-U.S. customers of foreign-broker clearing members as public customers should be considered as part of a comprehensive review of the issues at such time as the model of admitting foreign brokers as clearing members for U.S. DCOs becomes empirical. Such a review of the issues, including issues related to both bankruptcy and risk management, can be more reliably, and more efficiently, be conducted in the context of empirical rather than hypothetical circumstances.

In response to OCC's request for clarification, the Commission notes that where a foreign broker clears the trades of its (foreign) customers through an affiliated FCM that is a clearing member, those trades would be cleared on an omnibus basis through the FCM's customer account, and would be required to be kept separate from the proprietary trades of the affiliated foreign broker. Thus, those customers would be treated as public customers. If a foreign broker clears its own proprietary trades through an unaffiliated FCM (*i.e.,* there is no proprietary relationship between the foreign broker and the FCM as set forth in § 1.3), those trades would be considered as public customer trades at the FCM, but would not be part of the customer omnibus account of the foreign broker at the FCM.

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting the definitions of ''non-public customer'' and ''public customer'' as proposed in § 190.01.

The Commission is adopting the definitions of ''variation settlement'' as proposed to define the payments that a trustee may make with respect to open commodity contracts. The definition of variation settlement includes ''variation margin'' as defined in § 1.3, and also includes ''all other daily settlement amounts (such as price alignment payments) that may be owed or owing on the commodity contract'' to cover all of the potential obligations associated with an open commodity contract.

CME supported defining variation settlement and generally agreed with the substance of the definition, but recommended that the Commission adopt one self-contained definition that does not rely on cross-reference to another Commission definition. CME suggested that the Commission adopt the ABA Subcommittee's variation settlement definition which would cover ''any amount paid or collected (or to be paid or collected) on an open commodity contract relating to changes in the market value of the commodity contract since the trade was executed or the previous time the commodity contract was marked to market along with all other daily settlement amounts (such as price alignment payments) that may be owed or owing on the commodity contract.''

The ABA Subcommittee believed that the definition of variation settlement was not used consistently in the Proposal and identified two places in proposed § 190.14(b) where the term ''variation'' is used instead of ''variation settlement.'' The ABA Committee recommended using ''variation settlement'' in both places, to avoid any confusion as to whether ''variation'' refers to the Commission's variation margin definition or variation settlement definition.

The Commission notes that the cross-references in § 190.01 to definitions in other parts of the Commission's rules is intentional to clarify the relationships with those other definitions, and thus the Commission declines to make the change proposed by the commenters.[61]

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting the definition of ''variation settlement'' in § 190.01 as proposed.

The Commission did not receive comments on the remaining definitions in § 190.01 and is therefore adopting them as proposed.

The Commission is adopting the definition of ''Act'' in § 190.01 to refer to the Commodity Exchange Act.

The Commission is amending the definition of ''Bankruptcy Code'' in § 190.01 to update cross-references.

The Commission is amending the definition of ''Business day'' to define what constitutes a Federal holiday and clarify that the end of a business day is one second before the beginning of the next business day.

The Commission is amending the definition of ''Calendar day'' to include a reference to Washington, DC as the reference location for the Calendar day.

The Commission is adopting the definition of ''Cash delivery account class'' to cross-reference it to the new definition in ''Account class.''

The Commission is adopting the definition of ''Cash equivalents'' to define assets that might be accepted as a substitute for United States dollar cash.

The Commission is amending the definition of ''Cleared swaps account'' in § 190.01 to cross-reference it to the new definition in ''Account class.''

The Commission is adopting the amended definition of ''Clearing organization'' to update cross-references.

The Commission is amending the definition of ''Commodity broker'' to reflect the current definition of commodity broker in the Bankruptcy Code and the relevant cross-references.

The Commission is adding the definition of ''Commodity contract account'' to refer to accounts of a customer based on commodity contracts in one of the four account classes, as well as, for purposes of identifying customer property for the foreign futures account class (subject to § 190.09(a)(1)), accounts maintained by foreign clearing organizations or foreign futures intermediaries reflecting foreign futures or options on futures executed on or subject to the rules of a foreign board of trade, including any account maintained on behalf of the debtor's public customers.

The Commission is amending the definition of ''Court'' to clarify that the court having jurisdiction over the

[61] The technical correction suggested by the ABA subcommittee to § 190.14(b) (change ''variation'' to ''variation settlement'') will be adopted in one case; the subsection where the second case was found has been removed entirely by the supplemental notice of proposed rulemaking.

debtor's estate may not be a bankruptcy court (*e.g.,* in the event of a withdrawal of the reference).[62]

The Commission is amending the definition of ''Cover'' to improve clarity without any substantive change to the current definition.

The Commission is amending the definition of ''Customer'' to reflect the revisions to part 190 through this rulemaking, specifically, noting the different meanings of ''customer'' with respect to an FCM in contrast to with respect to a DCO.

The Commission is amending the definition of ''Customer claim of record'' to improve clarity without any substantive changes to the current definition.

The Commission is amending the definition of ''Customer class'' to reflect the revisions to part 190 through this rulemaking, specifically emphasizing the difference between public customers and non-public customers.

The Commission is deleting the definition of ''Dealer option'' as this term is no longer used.

The Commission is amending the definition of ''Debtor'' to explicitly refer to commodity brokers involved in a bankruptcy proceeding, a proceeding under SIPA, or a proceeding under which the FDIC is appointed as a receiver.

The Commission is newly adopting a definition of ''Distribution'' to include the transfer of property on a customer's behalf, return of property to a customer, as well as distributions to a customer of valuable property that is different than the property posted by that customer.

The Commission is amending the definition of ''Equity'' to update a cross-reference.

The Commission is adding definitions for ''Exchange Act'' and ''FDIC'' to incorporate the statute and regulator, respectively, in part 190.

The Commission is revising the definition of ''Filing date'' to include the commencement date for proceedings under SIPA or Title II of the Dodd-Frank Act.[63]

The Commission is revising the definition of ''Final net equity determination date'' stylistically, to provide updated cross-references, and to further clarify who the parties involved are intended to be.

The Commission is adding the definition of ''Foreign board of trade'' and adopting by reference the definition in § 1.3 (which is consistent with § 48.2(a)).

The Commission is adding the definition of ''Foreign clearing organization'' to refer to a clearing house, clearing association, clearing corporation or similar entity, facility or organization that clears and settles transactions in futures or options on futures executed on or subject to the rules of a foreign board of trade.

The Commission is retaining the definitions of ''Foreign future'' and ''Foreign futures commission merchant'' as proposed to be unchanged.

The Commission is adopting the definition of ''Foreign futures intermediary'' to refer to a foreign futures or options broker, as defined in § 30.1, acting as an intermediary for foreign futures contracts between a foreign futures commission merchant and a foreign clearing organization.

The Commission is revising the definition of ''Funded balance'' to the definition in § 190.08(c). That definition is discussed further below in section II.B.6.

The Commission is adding a definition for ''Futures'' and ''Futures contract,'' used interchangeably, to clarify what these terms mean for purposes of part 190.

The Commission is deleting the definition of ''In-the-money amount'' as the term will no longer be used and replacing it with ''in-the-money,'' a term that is Boolean, and is used in § 190.04(c).

The Commission is amending the definition of ''Joint account'' to reflect that a commodity pool must be a legal entity.[64] Thus, the Commission is removing the reference to a commodity pool that is not a legal entity.

The Commission is deleting the definitions of ''Leverage contract'' and ''Leverage transaction merchant'' consistent with the discussion above with respect to § 190.00(d)(1)(i)(B).

The Commission is removing the definition of ''Member property'' from current § 190.09(a) and addressing it in § 190.01, and clarifying that member property is the property that may be used to pay net equity claims based on both the members' house account as well as claims on behalf of non-public customers of the member.

The Commission is revising the definition of ''Net equity'' to update cross-references, including the difference between bankruptcy of an FCM and of a clearing organization.

The Commission is revising the definition of ''Open commodity contract'' to improve clarity without any substantive changes to the definition.

The Commission is revising the definition of ''Order for relief'' to update cross-references and incorporate stylistic, non-substantive changes.

The Commission is adding the definition of ''Person'' to clarify what this term means in the context of part 190.

The Commission is adding the definition of ''Physical delivery account class'' to be cross-referenced to the new definition in ''Account class.''

The Commission is deleting the definition of ''Premium'' as that term is no longer used.

The Commission is revising the definition of ''Primary liquidation date'' to reflect the removal of the concept of accounts being held open for later transfer. As a result of such removal, the Commission is also deleting current § 190.03(a), which set forth provisions regarding the operation of accounts held open for later transfer, since there will no longer be any such accounts.

The Commission is deleting the definition of ''Principal contract'' as that term is no longer used. This term was previously used to refer to contracts that are not traded on designated contract markets, but the definition excluded cleared swaps.

The Commission is adding the definition of the ''Securities account'' and ''SIPA'' to address the bankruptcy of an FCM that is also subject to the Securities Investor Protection Act. These are based on appropriate cross-references to the Exchange Act and SIPA.

The Commission is amending the definition of ''Security'' to update the cross-reference to the Bankruptcy Code without any substantive changes to the definition.

The Commission is removing the definition of ''Short term obligation'' from § 190.01 as the term is no longer used within the definition of ''specifically identifiable property.'' The Commission is instead amending the ''specifically identifiable property''

[62] *Cf.* 28 U.S.C. 157(d).

[63] In SIPA, the term ''filing date'' is defined to occur earlier than the filing of an application for a protective decree if the debtor is the subject of a proceeding in which a receiver, trustee, or liquidator for the debtor has been appointed and such proceeding is commenced before the date on which the application for a protective decree under SIPA is filed. In such case, the term ''filing date'' is defined to mean the date on which such proceeding is commenced. By contrast, this rulemaking does not define the term ''filing date'' to occur earlier in such a case, although it would (in § 190.02(f) as discussed below) authorize such a to receiver themselves file a voluntary petition for bankruptcy of the FCM.

This difference is due to the different uses of the ''filing date'' in these rules and in SIPA. For purposes of part 190, ''filing date'' refers to the date on and after which a commodity broker is treated as a debtor in bankruptcy. *See, e.g.,* §§ 190.00(c)(4), 190.06(a)(1) and (b)(1), 190.08(b)(4), and 190.09(a)(1)(ii)(A). For purposes of SIPA, by contrast, the ''filing date'' is the date on which securities are valued. *See, e.g.,* SIPA sections 8(b), 8(c)(1), 8(d), 9 ff–2(b), (c)(1), (d), and 78fff–3(a)(3).

[64] *See* § 4.20(a)(1).

definition with respect to securities, as discussed immediately below.

The Commission is amending the definition of ''Specifically identifiable property'' to update and streamline the definition in current § 190.01(ll). Paragraph (1)(i) focuses on ''futures accounts,'' ''foreign futures accounts,'' and ''cleared swaps accounts.'' Paragraph (1)(i)(A) corresponds in major part to paragraphs (ll)(1) and (6) of the current definition. For securities, paragraph (1)(i)(A)(*1*) substantially copies current paragraph (ll)(1)(i), but clarifies that a security, to be included as specifically identifiable property, must have ''a duration or maturity date of more than 180 days.'' Paragraph (1)(i)(A)(*2*) reformats current paragraph (ll)(6). For warehouse receipts, bills of lading, or other documents of title (paragraph (i)(B), corresponding to current paragraph (ll)(1)(ii)), the definition restates the corresponding portion of the current definition.

Paragraph (1)(ii) of the definition furthers the approach of providing discretion to the trustee. It includes as specifically identifiable property commodity contracts that are treated as such in accordance with § 190.03(c)(2). As discussed further below,[65] the latter provision permits (but does not require) the trustee, following consultation with the Commission, to treat open commodity contracts of public customers as specifically identifiable property if they are held in a futures account, foreign futures account, or cleared swaps account that is designated as a hedging account in the debtor's books and records, and if the trustee determines that treating the commodity contracts as specifically identifiable property is reasonably practicable under the circumstances of the case. In contrast, paragraph (ll)(2) of the current definition is more prescriptive.

The Commission is amending the definition of ''Strike price'' for brevity without any substantive change.

The Commission is adding the definition of ''Substitute customer property'' to refer to the property (in the form of cash or cash equivalents) delivered to the trustee by or on behalf of a customer in order to redeem either specifically identifiable property or a letter of credit.

The Commission is adopting the definition of ''Swap'' to replace the current definition of ''Cleared swap'' [66] in part 190. The definition of reflects the current definition and meaning of the term ''swap'' in section 1a(47) of the CEA and Commission regulation § 1.3. The Commission is also adopting the definition to add as a swap, for purposes of this part, ''any other contract, agreement or transaction that is carried in a cleared swaps account pursuant to a rule, regulation or order of the Commission, provided, in each case, that it is cleared by a clearing organization [*i.e.,* a DCO] as, or the same as if it were, a swap.'' [67]

The Commission is amending the definition of ''Trustee'' to include the trustee in a SIPA proceeding.

The Commission is adopting a definition of ''Undermargined'' for purposes of part 190 to mean when the funded balance of a debtor's futures account, foreign futures account, or cleared swaps account is below the minimum amount that the debtor is required to collect and maintain for the open commodity contracts in such account under the rules of the relevant clearing organization, foreign clearing organization, DCM, Swap Execution Facility (''SEF''), or FBOT. If any such rules establish both an initial margin requirement and a lower maintenance margin [68] requirement applicable to any commodity contracts (or to the entire portfolio of commodity contracts or any subset thereof) in a particular commodity contract account of the customer, the trustee will use the lower maintenance margin level to determine the customer's minimum margin requirement for such account. An undermargined account may or may not be in deficit.[69]

Accordingly, after consideration of the comments, and for the reasons discussed above, the Commission will adopt § 190.01 as proposed, with the amendments discussed above.

3. Regulation § 190.02: General

Regulation § 190.02 is being adopted as proposed, with the addition of paragraph (g) as described below. The Commission is adopting § 190.02(a)(1) based on current § 190.10(b)(1) with one substantive change to permit a trustee to request an exemption from the Commission from any procedural provision (rather than limiting such requests to exemptions from, or extension of, a time limit). Such an exemption may be subject to conditions, and must be consistent with the purposes of this part and of subchapter IV of the Bankruptcy Code. The Commission is adopting § 190.02(a)(1) consistent with major theme 7, discussed in section I.B. above regarding enhanced trustee discretion. Section 190.02(a)(1) allows the trustee to request to be permitted to extend a deadline or to amend a form.

The Commission is also adopting § 190.02(a)(2)(i) and (ii), (a)(3), and (b), as derived from current §§ 190.10(b)(2), (3), and (4) and 190.10(d), respectively, with minor editorial and conforming changes.

The Commission is adopting § 190.02(b) to delegate the functions of the Commission set forth in part 190, other than the authority to disapprove pre-relief transfers pursuant to § 190.07(e)(1), to the Director of the Division of Clearing and Risk, after consultation with the Director of the Market Participants Division [70] (with the possibility of further delegations to members of the respective Directors' staffs).

The Commission is adopting § 190.02(c) to exclude from the definition of ''customer'' entities who hold claims against a debtor solely on account of uncleared forward contracts. The Commission is adopting § 190.02(d) to provide that the Bankruptcy Code will not be construed to prohibit a commodity broker from doing certain combinations of business, or to permit any otherwise prohibited operation, trade or business. The Commission is adopting § 190.02(e) to provide that security futures products held in a securities account shall not be considered to be part of commodity futures or options accounts as those terms are used in section 761(9) of the Bankruptcy Code. The Commission is adopting § 190.02(c) (forward contracts), (d) (other), and (e) (rule of construction) as transposed from current § 190.10(e), (g), and (h), respectively.

The Commission continues to believe, as stated in the proposal, that § 190.02(f) should enhance customer protection in cases where a receiver has been

[65] *See* section II.B.1.c.

[66] *See* current § 190.01(pp).

[67] *Cf.* 11 U.S.C. 761(4)(F)(ii) (including as a commodity contract ''with respect to a futures commission merchant or clearing organization, any other contract, option, agreement, or transaction, in each case, that is cleared by a clearing organization'').

[68] For further discussion of maintenance margin and its relationship to initial margin, *see, e.g., https://www.cmegroup.com/education/courses/introduction-to-futures/margin-know-what-isneeded.html.*

[69] An account is in deficit if the balance is negative (*i.e.,* the customer owes the debtor instead of the reverse). An account can be undermargined but not in deficit (if the balance is positive, but less than the required margin). *See* discussion of § 190.04(b)(f). For example, if the margin requirement is $100 and the account balance is $20, the account is undermargined by $80, but is not in deficit. If the account loses a further $35, the balance would be ($15). The account would be in deficit by $15, and would be undermargined by $115.

[70] The Market Participants Division is the successor to the Division of Swap Dealer and Intermediary Oversight, the title of that division at the time of the Proposal.

appointed (pursuant to *e.g.,* section 6c of the CEA) for an FCM due to a violation or imminent violation [71] of the customer property protection requirements of section 4d of the CEA or of the regulations thereunder, or of the Commission's capital rule (§ 1.17). Section 190.02(f) explicitly permits such a receiver to file a voluntary petition for bankruptcy of such FCM in appropriate cases. For example, the receiver may determine that, due to a deficiency in property in segregation, bankruptcy is necessary to protect customers' interests in customer property.

The Commission requested comment with respect to all aspects of proposed § 190.02. In particular, the Commission requested comment as to whether it would be appropriate to permit trustees to request relief from procedural provisions such as requirements as to forms, in addition to requesting relief from deadlines; whether it would be appropriate to permit receivers for FCMs to file voluntary petitions in bankruptcy; and whether any portion of proposed § 190.02 would likely to lead to unintended consequences, and, if so, how may these be mitigated.

The Commission received two comments on proposed § 190.02. CME generally supported proposed § 190.02, including adding a provision that would allow the trustee to request an exemption from the procedural requirements of the rules. CME also favored adding the proposed provision to clarify that a receiver appointed for an FCM due to segregation or net capital violations may, in an appropriate case, file a petition for bankruptcy of the FCM pursuant to section 301 of the Bankruptcy Code. In contrast, FIA recommended that the Commission require a receiver to obtain the Commission's consent before the receiver may file a voluntary petition in bankruptcy on behalf of an FCM. FIA believed that any receiver that may be appointed by a court would be in response to a proceeding initiated by the Commission pursuant to section 6c of the Act, which authorizes the Commission to file an action in the appropriate U.S. District Court when it appears that a person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order thereunder. FIA noted that there may be circumstances in which a receiver may determine that a voluntary petition under the Bankruptcy Code is warranted. However, in light of the fact that such a petition would effectively close the FCM, FIA believed that § 190.02(f) should provide that the receiver may file a voluntary petition only with the prior consent of the Commission.

The Commission notes that § 190.02(f) is limited to cases where the receiver was appointed due to concerns about either protection of customer property, or of capital inadequacy, and the appointment would be in response to a proceeding initiated by the Commission. In such a case, the Commission believes that it would be appropriate and most effective to defer to the judgment of the appointed receiver as to the necessity of the filing of a petition in bankruptcy.

As a technical point, the ABA Subcommittee recommended (consistent with their recommendation in the definitions section, § 190.01, to more precisely use the term ''allowed net equity'') [72] that the Commission further amend § 190.02 by adding new paragraph (g) to proposed § 190.02 to state that the term ''allowed'' in this part shall have the meaning ascribed to it in the Bankruptcy Code. The ABA Subcommittee believed that this would confirm that ''allowed'' under part 190 equates with the use of ''allowed'' under the Bankruptcy Code. The Commission agrees, and is making the change.

Accordingly, after consideration of the comments, and for the reasons stated above, the Commission is adopting § 190.02 as proposed, with the addition of paragraph (g).

B. Subpart B—Futures Commission Merchant (FCM) as Debtor

The Commission is adopting subpart B (§§ 190.03–190.10) to address debtors that are FCMs.

1. Regulation § 190.03: Notices and Proofs of Claims

The Commission is adopting § 190.03 as proposed with modifications to § 190.03(c)(2), as set forth below.

The Commission is adopting § 190.03 to set forth requirements for the notices and proofs of claim that are applicable to subpart B of part 190. It reorganizes and revises much of current § 190.02, and incorporates some portions of current § 190.10.

a. Regulation § 190.03(a): Notices—Means of Providing

The Commission is adopting § 190.03(a) to set forth the means by which notices required under subpart B of part 190 are to be provided. Section 190.03(a)(1) is substantially similar to current § 190.10(a), but, in an effort to modernize part 190, the Commission is deleting the requirement that notices be given to it via overnight mail (*i.e.,* in hard copy). The Commission is retaining the requirement that all such notices be sent via electronic mail. The Commission believes that overnight hard copy delivery is unnecessary and that removing the requirement to send notices to the Commission via overnight mail will result in cost savings.

The Commission is adopting § 190.03(a)(2) to provide a generalized approach for giving notice to customers under part 190. In light of evolving technology, § 190.03(a)(2) replaces the specific procedures for providing notice to customers that appear in current § 190.02(b) with the requirement that the trustee must establish and follow procedures ''reasonably designed'' for giving notice to customers under subpart B of part 190. Such notice procedures should generally include the use of a website and customers' electronic addresses. In the Commission's view, this new approach provides trustees with the necessary flexibility to determine the best way to provide notice and is consistent with the manner in which bankruptcy trustees in recent FCM bankruptcy cases have provided notice to customers. The Commission also believes that adopting a generalized notice requirement in lieu of retaining more specific notice obligations (*e.g.,* newspaper publication) will result in both cost savings for the debtor's estate, and more efficient and effective notification of customers.

The Commission requested comment on the approach to the notice requirements set forth in proposed § 190.03(a). The Commission specifically asked whether the proposed changes would be helpful; would be likely to lead to unintended consequences; and how any unintended consequences could be mitigated. CME supported providing trustees with the flexibility, in consultation with the Commission, to establish appropriate procedures for giving notice to customers and moving away from outdated and impractical notice requirements. CME also agreed that the changes align with how trustees in recent FCM cases have communicated with the FCM's customers and are more customer-friendly.

[71] Section 6c of the CEA provides in relevant part that whenever it shall appear to the Commission that any person has engaged, is engaging, or *is about to engage* in any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order thereunder the Commission may bring an action in the proper district court to enjoin such act or practice, or to enforce compliance with this Act (emphasis supplied). Section 6c also refers to an order appointing a temporary receiver to administer such restraining order and to perform such other duties as the court may consider appropriate. 7 U.S.C. 13a–1.

[72] *See* section II.A.2. (recommending that the Commission instead use ''funded net equity'' as the defined term in the § 190.01 definitions.)

b. Regulation § 190.03(b): Notices to the Commission and Designated Self-Regulatory Organizations

Section 190.03(b)(1) is derived from current § 190.02(a)(1), but includes revised notice requirements that are designed to ensure that the Commission and the relevant designated self-regulatory organization (''DSRO'') [73] will be aware of a voluntary or involuntary bankruptcy filing or SIPA application as soon as is practicable and to codify the practices observed in recent bankruptcy and SIPA cases.[74] First, § 190.03(b)(1) provides that, in the event of a voluntary bankruptcy filing, the commodity broker must notify the Commission and the appropriate DSRO as soon as practicable before, and in any event no later than, the time of filing. Second, § 190.03(b)(1) provides that, in the event of an involuntary bankruptcy filing or an application for a protective decree under SIPA,[75] the commodity broker must notify the Commission and the appropriate DSRO immediately upon the filing of such petition or application. The Commission notes that, as a practical matter, a decision to file for bankruptcy takes measurable time, as does the preparation of the necessary papers. In previous FCM voluntary bankruptcy filings, the commodity broker has provided the Commission and its DSRO with notice ahead of the bankruptcy filing. Section 190.03(b)(1) merely codifies the expectation that such advance notice should, in fact, occur to the extent practicable. Section 190.03(b)(1) allows the commodity broker to provide the relevant docket number of the bankruptcy or SIPA proceeding to the Commission and the DSRO ''as soon as known,'' in order to account for the fact that there may be a time lag between the filing of a proceeding and the assignment of a docket number.

Section 190.03(b)(2) sets forth the requirements for the provision of notice to the Commission of an intent to transfer or to apply to transfer open commodity contracts in accordance with section 764(b) of the Bankruptcy Code and relevant provisions of part 190. It is derived from current § 190.02(a)(2). While § 190.03(b)(2) retains the requirement that such notice be provided ''[a]s soon as possible,'' it removes the requirement that such notice be provided no later than three days after the order for relief. The Commission believes that the three-day deadline set forth in current § 190.02(a)(2) is likely in many cases to be too long, but may, in some cases, be too short.

The Commission expects that the bankruptcy trustee would begin working on transferring any open commodity contracts as soon as the trustee is appointed and that, by the end of three days following entry of the order for relief, any such transfers likely will be either completed, actively in process, or determined not to be possible. Indeed, the Commission expects that a DCO would, in most cases, be reluctant to hold a position open for more than three days following the entry of the order for relief unless a transfer is actively in process and imminent. Thus, while the Commission recognizes that the ''[a]s soon as possible'' language is somewhat vague, given past experience, the Commission views the current timeframe of three days after the entry of the order for relief as generally too long, and it is not clear what precise shorter period of time would be generally appropriate, given the uniqueness of each case. Under different circumstances, that is, where transfer arrangements cannot be made within three days after the order for relief, a specified deadline for notification may in fact be harmful, in that it could be interpreted to prohibit notification after the expiration of such deadline (and thus, impliedly prohibit the trustee from forming the intent to transfer after that time).

In the event of an FCM bankruptcy, the Commission anticipates that there will be frequent contact between the trustee, the relevant DSRO, any relevant clearing organization(s), and Commission staff. Thus, a specified deadline for such notification would not appear to be helpful. Section 190.03(b)(2) also clarifies that notification should be made with respect to a transfer of customer property.

The Commission requested comment on proposed § 190.03(b). Specifically, the Commission asked whether proposed § 190.03 would meet the objective of ensuring that the Commission and the relevant DSRO will be aware of a bankruptcy filing or SIPA proceeding as soon as is practicable. LCH expressed support for the requirement that FCMs notify DSROs, in addition to the CFTC, of involuntary bankruptcy filings. LCH also requested that the Commission consider ways in which this information could be quickly transmitted to the DCOs that may be impacted, given the interconnectedness of the derivatives market. While, as noted above, staff would be in contact with DCOs that might be impacted by a bankruptcy proceeding involving an FCM as a matter of supervisory practice, this practice does not need to be incorporated into regulation. Moreover, the Commission notes that many DCOs, including LCH, require as part of their own rules and procedures that their clearing members provide prompt notice of a bankruptcy filing affecting the clearing member.[76]

c. Regulation § 190.03(c): Notices to Customers; Treatment of Hedging Accounts and Treatment of Specifically Identifiable Property

The Commission is adopting § 190.03(c) to address notices to customers and the treatment of hedging accounts and specifically identifiable property.

Section 190.03(c)(1) requires the trustee to use all reasonable efforts to notify promptly any customer whose futures account, foreign futures account, or cleared swaps account includes specifically identifiable property, other than open commodity contracts, which has not been liquidated, that such property may be liquidated on and after the seventh day after the order for relief if the customer has not instructed the trustee in writing before the deadline specified in the notice to return such property pursuant to the terms for distribution of customer property contained in part 190. It also requires that the trustee's notice to customers with specifically identifiable property include, where applicable, a reference to substitute property.

Section 190.03(c)(1) is derived from current § 190.02(b)(1), but replaces the requirement that the trustee publish such notice to customers in a newspaper for two consecutive days prior to liquidating the specifically identifiable property with the requirement that the trustee notify customers in accordance with § 190.03(a)(2). This change is intended to provide the trustee with flexibility in notifying customers regarding specifically identifiable

[73] For further detail regarding SROs and DSROs *see generally* § 1.52.

[74] A voluntary case under a chapter of the Bankruptcy Code is commenced by the debtor by filing a petition under that chapter. Section 301(a) of the Bankruptcy Code, 11 U.S.C. 301(a). Under certain circumstances, creditors of a person may file an involuntary case against that person pursuant to section 303 of the Bankruptcy Code, 11 U.S.C. 303. In such cases, the order for relief will be granted only if the petition is not timely controverted or if the court makes specific findings. *Id.* There is no historical precedent for an involuntary petition in bankruptcy being filed against a commodity broker.

[75] A SIPA proceeding is commenced when the Securities Investors Protection Corporation (''SIPC'') files a petition for a protective order. *See generally* SIPA section 5, 15 U.S.C. 78eee.

[76] *See, e.g.,* LCH Ltd.: FCM Procedures of the Clearing House 1.6(b)(G) (''All FCM Clearing Members must provide the Clearing House in a prompt and timely manner with: . . . notice if the FCM Clearing Member becomes the subject of a bankruptcy petition.'').

property and to modernize part 190 to allow the trustee to provide notice to customers in a way that will maximize the number of customers reached. The timeframe in which the Commission would allow the trustee to commence liquidation of specifically identifiable property has been modified to reflect the revised notice requirements. Because § 190.03(c)(1) does not require newspaper publication of customer notice, the Commission is allowing the trustee to commence liquidation of specifically identifiable property on the seventh day after the order for relief (or such other date as specified by the trustee with the approval of the Commission or the court), so long as the trustee has used all reasonable efforts promptly to notify the customer under § 190.03(a)(2) and the customer has not instructed the trustee in writing to return such specifically identifiable property.

The Commission is adopting § 190.03(c)(2) to address how a bankruptcy trustee may treat open commodity contracts carried in hedging accounts. This regulation moves from the bespoke approach of current § 190.02(b)(2) to a categorical approach, in light of the practical difficulties of treating large numbers of customers with similar open contracts on a bespoke basis.[77] The Commission notes that recent commodity broker bankruptcies have involved thousands of customers, with as many as hundreds of thousands of commodity contracts. Trustees must make decisions as to how to handle such customers and contracts within days—in some cases, hours—after being appointed. Therefore, the Commission is giving the trustee the authority (*i.e.,* an option, but not an obligation) to treat open commodity contracts of public customers held in hedging accounts designated as such in the debtor's records as specifically identifiable property, after consulting with the Commission and when practical under the circumstances. To the extent the trustee exercises such authority, the trustee is required to notify each relevant public customer in accordance with § 190.03(a)(2). As proposed, § 190.03(c)(2) would have required the trustee, in all cases, to request that the customer provide instructions as to whether to transfer or liquidate the relevant open commodity contracts.[78] As discussed further below, in response to a comment, the Commission is modifying this proposal to address cases where, in the judgment of the trustee, the books and records of the debtor reveal a clear preference by the public customer with respect to transfer or liquidation of open commodity contracts.

Section 190.03(c)(2) also delineates certain information that the trustee must include in the notice. As proposed, the notice must inform the customer that (1) if the customer does not provide instructions in the prescribed manner and by the prescribed deadline, the customer's open commodity contracts will not be treated as specifically identifiable property; (2) any transfer of the open commodity contracts is subject to the terms for distribution contained in § 190.09(d)(2); (3) absent compliance with any terms imposed by the trustee or the court, the trustee may liquidate the open commodity contracts; and (4) providing instructions may not prevent the open commodity contracts from being liquidated. The Commission is making conforming changes to this portion of proposed § 190.03(c)(2) to reflect the modification referenced above. To the extent the trustee does not exercise its authority to treat public customer positions carried in a hedging account as specifically identifiable property, the trustee must endeavor to, as the baseline expectation, treat open commodity contracts of public customers carried in hedging accounts the same as other customer property and effect a transfer of such contracts to the extent possible.[79] The Commission is making these changes to reflect the policy preference to port *all* positions of public customers. Requiring a trustee to identify hedging accounts and provide hedging account holders the opportunity to keep their positions open may be a resource and time intensive process, which the Commission believes could interfere with the trustee's ability to take prudent and timely action to manage the debtor FCM's estate to protect all of the FCM's customers. The Commission believes that allowing the FCM to rely on representations made by customers during business-as-usual will alleviate this concern. In cases where it may be practical, the trustee may elect to provide special hedging account treatment.

The Commission is adopting § 190.03(c)(3) to make minor modifications to the notice of the commencement of an involuntary proceeding that the trustee may provide to customers prior to entry of an order for relief, and upon leave of the court. Such modifications include clarifying that such notice must be in accordance with the notice provisions set forth § 190.03(a)(2), amending certain terminology, and removing unnecessary references.

Section 190.03(c)(4) requires the bankruptcy trustee to notify customers that an order for relief has been entered and instruct customers to file a proof of customer claim. The regulation is derived from current § 190.02(b)(4), but adds that the notice must be provided in accordance with § 190.03(a)(2). Section 190.03(c)(4) replaces the term ''customer of record'' with the term ''customer,'' as ''customer of record'' is not a defined term in part 190 and all customers should receive notice that an order of relief has been entered. Section 190.03(c)(4) also provides that the trustee shall cause the proof of customer claim form to set forth the bar date for its filing consistent with the current § 190.03(a)(2).

The Commission requested comment on proposed § 190.03(c). It specifically asked whether the proposed changes to the notice requirements would be helpful; whether the discretion granted to the trustee concerning the treatment of hedging accounts as specifically identifiable property is appropriately tailored; whether the proposed revisions appeared likely to lead to unintended consequences; and how such consequences; if any, could be mitigated.

The Commission received three comments on proposed § 190.03. CME fully endorsed the policy preference that the trustee should use their best efforts to transfer all public customer positions and related customer property from the debtor FCM to one or more other FCMs. Accordingly, CME supported the provisions in § 190.03(c) that grant the trustee the discretion to not treat customer positions carried in hedge accounts as specifically identifiable property, unless the trustee determines that doing so would be practicable under the circumstances, following consultation with the Commission. CME asserted that this discretion will allow the trustee to devote their attention to transferring open positions of all public customers, along with their proportionate share of the customer property, in the aggregate.

[77] *See* major theme 7 in section I.B. above.

[78] The Commission is also making other changes that are intended to make it simpler for the trustee to identify hedging positions and allow an FCM to designate an account as a hedging account by relying on explicit customer representations that the account contains a hedging position. *See* § 1.41. This would simplify the existing requirement that FCMs provide a hedging instructions form when a customer first opens up a hedging account. For commodity contract accounts opened prior to the effective date of the part 190 revisions, the Commission is proposing that FCMs may rely on written hedging instructions received from the customer in accordance with current § 190.06(d). *See* § 1.41(c).

[79] *See* § 190.00(c)(4).

SIFMA AMG/MFA also generally agreed with § 190.03(c)(2) in that it grants to the trustee the authority (that is, the option but not the obligation) to treat open commodity contracts of public customers held in hedging accounts designated as such in the debtor's record as specifically identifiable property. SIFMA AMG/MFA stated that permitting the trustee this flexibility would serve the interest of customers as a whole by facilitating a more rapid transfer of customer positions and property. SIFMA AMG/MFA recommended, however, that the Commission explicitly clarify that § 190.03(c)(2) is not intended to affect the treatment of hedging accounts under part 39 of the Commission's regulations and that, to the extent reasonably practicable, the trustee's goal will be to maximize value to the public customer.[80] Additionally, in the context of the treatment of hedging accounts, SIFMA AMG/MFA recommended that, if the trustee exercises the authority as granted in this provision, the trustee should be first required to consult the instructions (regarding preferences with respect to transfer or liquidation of open commodity contracts) provided by a public customer to the debtor at the time of opening the relevant hedging account, and only if such instructions are missing or unclear should the trustee require such customer to provide it with written instructions as contemplated by proposed § 190.03(c)(2). SIFMA AMG/MFA noted that the notice sent by the trustee to the customer can still provide that existing or previously provided instructions may not prevent the open commodity contracts from being liquidated. SIFMA AMG/MFA asserted that adding this first step would further the goal of expediency.

The Commission agrees with the suggestion by SIFMA AMG/MFA that it is more efficient to endeavor to follow clear instructions previously provided rather than to request new instructions. Moreover, this approach mitigates the risk that a customer who has already made their preference patent will fail to reply to the request and thus be treated in a manner contrary to that previously expressed preference.

Accordingly, the Commission is amending and reorganizing § 190.03(c)(2) to implement that suggestion. Specifically, § 190.03(c)(2)(ii)(B) is being amended to provide, in pertinent part that: (1) Where, in the judgment of the trustee, the books and records of the debtor reveal a clear preference by a relevant public customer with respect to transfer or liquidation of open commodity contracts, the trustee shall endeavor, to the extent reasonably practicable, to comply with that preference; and (2) Where, in the judgment of the trustee, the books and records of the debtor do not reveal a clear preference by a relevant public customer with respect to transfer or liquidation of open commodity contracts, the trustee will request the customer to provide written instructions whether to transfer or liquidate such open commodity contracts. Such notice must specify the manner for providing such instructions and the deadline by which the customer must provide instructions.

Other conforming changes are being made to § 190.03(c)(2). With respect to SIFMA AMG/MFA's request that the Commission explicitly clarify that proposed § 190.03(c)(2) is not intended to affect the treatment of hedging accounts under part 39, the Commission notes that § 190.03(c)(2) governs the trustee's actions, and does not govern the actions a DCO may take under its default rules or otherwise.

ACLI recommended that the Commission amend proposed § 190.03(c)(2) to require a trustee to transfer a public customer's hedge positions where the customer has requested the transfer and met the required terms unless, in consultation with the Commission, it is determined that it would be unreasonable to transfer such positions. ACLI further recommended that the Commission add a threshold such as ''impossibility'' or ''exigent circumstances'' to limit a trustee's ability to liquidate a customer's hedge position in lieu of a requested transfer. ACLI asserted that the Commission's oversight should be specifically mandated. In response to ACLI's comment, the Commission notes that § 190.00(c)(4) sets forth a preference for the porting of *all* open commodity contract positions of public customers, along with all or a portion of such customers' account equity, and § 190.04(a)(1) instructs the trustee promptly to use its best efforts to effect a transfer of such positions and property in accordance with § 190.07(c) and (d) not later than seven calendar days after the order for relief. The discretion granted to the trustee in § 190.03(c)(2) is based on the reality that, in light of limited time and administrative resources, achieving porting to the maximum extent is fostered by treating customers on an omnibus, rather than an individualized, basis. For these reasons, the Commission declines to adopt ACLI's specific suggestions.

d. Regulation § 190.03(d): Notice of Court Filings

Section 190.03(d) addresses notices of court filings. It is derived from current § 190.10(f), but makes modernizing changes to the terminology and method of providing notice to the Commission. The Commission requested comment on proposed § 190.03(d). The Commission specifically asked whether the proposed revisions appeared likely to lead to unintended consequences, and, if so, how such consequences could be mitigated. The Commission did not receive any comments on proposed § 190.03(d).

e. Regulation § 190.03(e): Proof of Customer Claim

The Commission is adopting § 190.03(e) to require a trustee to request that customers provide information sufficient to determine a customer's claim in accordance with the regulations contained in part 190. Section 190.03(e) lists certain information that customers shall be requested to provide, to the extent reasonably practicable, but grants the trustee discretion to adapt the request to the facts of the particular case. Such discretion is being granted to the trustee in order to enable the trustee to tailor the proof of claim form to the information that is most appropriate in light of the specifics of the types of business that the debtor did (and did not do), the way in which such types of business were organized, and the available records of the debtor (as well as the reliability of those records). Section 190.03(e) is generally derived from current § 190.02(d), although certain items on the list of information to be requested of customers have been revised and reorganized to: *Inter alia,* improve clarity; tie the questions to definitions of terms in part 190; give the claimant an opportunity to provide a more complete picture of its claims; and provide its own view as to the value of such open positions, unliquidated securities or other unliquidated property in order to support its claim against the debtor.

The Commission requested comment on proposed § 190.03(e). Specifically, the Commission asked whether the proposed changes would be helpful; whether the discretion granted to the trustee was appropriately tailored; whether the proposed revisions appeared likely to lead to unintended consequences; and how such consequences, if any, could be mitigated. The Commission received one comment on proposed § 190.03(e). CME noted that the proposed regulation

[80] This last point is addressed with the addition of § 190.00(c)(3)(i)(C).

is a major improvement over the current regulation.

f. Regulation § 190.03(f): Proof of Claim Form

Regulation § 190.03(f) provides that a template proof of claim form is included as appendix A to part 190.[81] The Commission substantially revised the customer proof of claim form in order to streamline it and better map it to the information listed in § 190.03(e). The revised customer proof of claim form now includes, in each section, citations to the location in the text of § 190.03(e) where such information is listed.

Section 190.03(f)(1) provides that, to the extent there are no open commodity contracts that are being treated as specifically identifiable property, the bankruptcy trustee should modify the proof of claim form to delete any references to open commodity contracts as specifically identifiable property. For example, this would be the case if all open commodity contracts had been transferred or liquidated before the proof of claim form is sent. Section 190.03(f)(2) makes clear that the trustee has discretion as to whether to use the template proof of claim form, and that the proof of claim form should be modified to reflect the specific facts and circumstances of the case. The provisions of § 190.03(f), taken together, are meant to provide bankruptcy trustees with appropriate flexibility to determine the best and most efficient way to compose the customer proof of claim.

The Commission requested comment on proposed § 190.03(f). Specifically, the Commission asked whether the proposed changes to the treatment of the proof of customer claim form would be helpful; whether they would lead to unintended consequences; and how such consequences, if any, could be mitigated. The Commission also asked whether the discretion granted to the trustee was appropriately tailored and, if not, what changes should be made. CME commented that the proof of claim form had been improved and supported the flexibility provided to the trustee.

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting § 190.03 as proposed, with modifications to § 190.03(c)(2), as set forth above.

2. Regulation § 190.04: Operation of the Debtor's Estate—Customer Property

The Commission is adopting § 190.04 as proposed with modifications, as set forth below to address the collection of margin and variation settlement, as well as the liquidation and valuation of positions. The Commission is adopting § 190.04 to clarify and update portions of §§ 190.02, 190.03, and 190.04.

The Commission requested comment with respect to all aspects of proposed § 190.04 including: Whether the revisions create any unintended conflicts with customer protection regulations set forth in parts 1, 22, and 30; how any such conflicts may be resolved; whether there are any proposed clarification changes that are likely to create unintended consequences; and, if so, how might those be avoided or mitigated.

a. Regulation § 190.04(a): Transfers

The Commission is adopting § 190.04(a) as proposed. Section 190.04(a) largely retains the current provisions in current § 190.02(e) regarding transfers for customers in a bankruptcy proceeding. It also retains the policy preference[82] that the trustee should use its best efforts to transfer open commodity contracts and property held by the failed FCM for or on behalf of its public customers to one or more solvent FCMs.[83] Regulation § 190.04(a)(1) provides that the trustee ''shall promptly'' use its best efforts to effect such transfers, while current § 190.02(e)(1) states that the trustee must ''must immediately'' do so. This revision signals that the trustee must take action to transfer open commodity contracts as soon as practicable, while avoiding potential pressure of the term ''immediately'' in light of the challenges presented in an FCM bankruptcy. Regulation § 190.04(a)(2) replaces the term ''equity'' with ''property'' to clarify that the trustee should endeavor to transfer all types of property that the commodity broker is holding on behalf of customers; the transfer is not limited to equity. The Commission is also adding the word ''public'' before ''customers'' to clarify that the transfers discussed in § 190.04(a)(1) relate to the open commodity contracts and property of the debtor's public customers.[84]

The Commission is adopting § 190.04(a)(2), as derived from § 190.02(e)(2), to remove the liquidation-only trading limitations on an FCM that is subject to an involuntary bankruptcy petition unless otherwise directed by the Commission, by any applicable self-regulatory organization, or by court. The Commission is instead adopting limitations on the business of an FCM in bankruptcy in § 190.04(g) to more generally address involuntary proceedings.[85]

The Commission is adopting § 190.04(a)(2), as derived from current § 190.02(e)(2), to provide that if such commodity broker demonstrates to the Commission within a specified period of time that it is in compliance with the Commission's segregation and financial requirements on the filing date, the Commission may determine to allow the commodity broker to continue in business. The Commission is retaining this provision because any requirement to transfer customers is properly addressed pursuant to § 1.17(a)(4), which deals with FCMs that do not meet minimum financial requirements. The Commission is of the view that an FCM that does meet such requirements should not be compelled to cease business and transfer its customers absent an appropriate finding by a court or the Commission.

In addition, similar to § 190.04(a)(1), as discussed above, the Commission is replacing the term ''equity'' with ''property'' to clarify that the transfers discussed in § 190.04(a)(2) are for all types of property that the commodity broker is holding on behalf of customers, rather than limited to only equity. Also, the Commission is adding the word ''public'' before ''customers'' to clarify in § 190.04(a)(2) that the transfers discussed in § 190.04(a)(1) relate to the open commodity contracts and property of the debtor's public customers.

The Commission did not receive any comments on this aspect of the Proposal. Accordingly, for the reasons stated above, the Commission is adopting § 190.04(a) as proposed.

b. Regulation § 190.04(b): Treatment of Open Commodity Contracts

The Commission is adopting § 190.04(b) as proposed to clarify and update the provisions in current § 190.02(g)(1), which allow a trustee to make ''variation and maintenance margin payments'' on behalf of the

[81] Appendix A is discussed in section II.D below.

[82] The Commission discussed the rationale for this policy preference in the discussion of § 190.00(c)(4). *See* section II.A.1. *See also* ABA Cover Note at 14 (recommending explicitly identifying in § 190.04(a) a clear policy that the trustee should use best efforts to transfer open commodity contracts and property held by the failed FCM for or on behalf of its public customers to one or more solvent FCMs).

[83] The Commission is also adopting cross-references in § 190.04(a) to other provisions within proposed part 190 that discuss transfers of customer property.

[84] The Commission is adopting the same change—addition of the word ''public'' before ''customers''—to § 190.04(a)(2), as discussed below.

[85] The Commission is deleting the reference to ''liquidation'' in § 190.02(e)(4) accordingly since the limitation to trading for liquidation only is being deleted from § 190.04(a)(2).

debtor FCM's customers. The Commission is adopting § 190.04(b) to be generally consistent with the current regulation but with a number of substantive changes.

First, the Commission is adopting § 190.04(b) to permit the trustee to make margin payments pending *transfer or* liquidation; not just pending liquidation as required by current § 190.02(g)(1). The amendment is consistent with the Commission's longstanding policy for the trustee to endeavor to *transfer* open commodity contracts. The trustee has *two* paths for the treatment of such contracts: Transfer and, if transfer is not possible, liquidation.

Second, the Commission is adopting § 190.04(b)(1) to delete the phrase ''required to be liquidated under paragraph (f)(1) of this section'' in current § 190.02(g)(1) to eliminate a complete prohibition against paying margin on open contracts. While holding contracts open may or may not be practicable given the particular circumstances of the bankruptcy, a complete prohibition against paying margin on such open contracts would undermine the point of having the possibility to hold those contracts open. Accordingly, the Commission is deleting the phrase ''required to be liquidated under paragraph (f)(1) of this section'' and thus will instead apply more broadly to any open commodity contracts.

The Commission is also adopting several technical amendments. Third, the Commission is replacing the phrase ''variation and maintenance margin payments'' with ''payments of initial margin and variation settlement'' which, in the Commission's view, more accurately describes the types of payments being reflected in this provision. Fourth, the Commission is replacing the phrase ''to a commodity broker'' with ''to a clearing organization, commodity broker, foreign clearing organization or foreign futures intermediary'' to account for the various types of entities to which a margin payment described in this provision may be made. Lastly, the Commission is replacing the phrase ''specifically identifiable to a particular customer'' with ''specifically identifiable property of a particular customer'' in order to be consistent with the definitions in part 190, which includes as a defined term ''specifically identifiable property.''

The Commission is adopting § 190.04(b)(1)(i), as derived from current § 190.02(g)(1)(i), to prevent the trustee from making any payments on behalf of any commodity contract account that is in deficit, to the extent within the trustee's control. The Commission is including the phrase ''to the extent within the trustee's control'' to recognize that certain commodity contract accounts may be held on an omnibus basis (*i.e.,* on behalf of several customers), so to the extent the trustee is making a margin payment on behalf of the omnibus account, it may be out of the trustee's control to identify and only pay on behalf of those underlying customer accounts (within the omnibus account) that are not in deficit. The Commission is including a proviso to note that § 190.04(b)(1)(i) shall not be construed to prevent a clearing organization, foreign clearing organization, FCM, or foreign futures intermediary from exercising its rights to the extent permitted under applicable law. This proviso is intended to remove any doubt that the right of these ''upstream'' entities to use collateral posted by the FCM on an omnibus basis is not affected by the prohibition on making margin payments on behalf of accounts that are in deficit.

The Commission is adopting § 190.04(b)(1)(ii) as a new provision to prohibit the trustee from making an upstream margin payment with respect to a specific customer account that would exceed the funded balance of that account. This restriction is consistent with the *pro rata* distribution principle discussed in § 190.00(c)(5), in that any payment in excess of a customer's funded balance would be to the detriment of other customers.

The Commission is adopting some non-substantive clarifications in § 190.04(b)(1)(iii), as derived from current § 190.02(g)(1)(ii), to retain the limitation that the trustee may not make payments on behalf of non-public customers of the debtor from funds that are segregated for the benefit of public customers.

The Commission is adopting § 190.04(b)(1)(iv)–(v) to clarify and expand upon current § 190.02(g)(1)(iii),[86] to require that margin is used consistent with the requirements of section 4d of the CEA.[87] First, the Commission is adopting § 190.04(b)(1)(iv) to provide that, if the trustee receives payments from a customer in response to a margin call, then to the extent within the trustee's control,[88] the trustee must use such payments to make margin payments for the open commodity contract positions of such customer. Second, the Commission is adopting § 190.04(b)(1)(v) to provide that the trustee may not use payments received from one public customer to meet the margin (or any other) obligations of any other customer. Given the restriction in paragraph (b)(1)(v), the Commission believes it may in some cases be impracticable for a trustee to follow paragraph (b)(1)(iv). In such a situation, therefore the trustee would hold onto the funds received in response to a margin payment and such funds would be credited to the account of the customer that made the payment.[89]

Regulation § 190.04(b)(1)(vi) builds upon current § 190.02(g)(1)(iv), which provides that no payments need to be made to restore initial margin, thus noting that such payments are not required but implicitly allowed to be made. Revised § 190.04(b)(1)(vi) explains in this in more detail and provides more comprehensive guidance to the trustee about when such payments may be made. Specifically, § 190.04(b)(1)(vi) provides that, in the event that the funds segregated for the benefit of public customers in a particular account class exceed the aggregate net equity claims for all customers in that account class, the trustee is permitted to use such funds to meet the margin obligations for any public customer in such account class whose account is undermargined, but not in deficit, and sets conditions around such use.

Regulation § 190.04(b)(2) updates current § 190.02(g)(2), which concerns margin calls made by trustee with respect to undermargined accounts of public customers. The Commission is removing the current requirement in § 190.02(g)(2) that the trustee issue margin calls, by replacing the term ''must issue margin calls'' with ''may issue a margin call,'' in light of the possibility that the trustee will determine it impracticable or inefficient to do so. Current § 190.02(g)(2), which sets up a retail-level analysis on issuing mandatory margin calls based on the funded balance of the account, is based on a model of the FCM continuing in business. Revised § 190.04(b)(d) recognizes that an FCM in bankruptcy will be operated in crisis mode, and may be pending wholesale transfer or liquidation of open positions.[90] Therefore, the Commission is allowing for the possibility that the trustee may issue margin calls. The specification of

[86] Current § 190.02(g)(1)(iii) provides that the trustee must make margin payments if payments of margin are received from customers after bankruptcy in response to margin calls.

[87] *See* 7 U.S.C. 6d.

[88] The phrase ''to the extent within the trustee's control'' recognizes the reality that certain accounts are held on an omnibus basis. *See* discussion of § 190.04(b)(1)(i) above.

[89] *See* § 190.08(c)(1)(ii).

[90] *See generally* major theme 7 discussed in section I.B. above.

highly prescriptive conditions for issuing such calls is no longer appropriate, given the Commission whether or not to make a margin call is now based on the trustee's discretion.

Regulation § 190.04(b)(3), as derived from current § 190.02(g)(3) with updated cross-references, retains the important concept that margin payments made by a customer in response to a trustee's margin call are fully credited to the customer's funded balance. As these post-petition payments made by the customer are fully counted toward the customer's funded net equity claims under § 190.04(b)(3), they are not subject to *pro rata* distribution (in contrast to the treatment of the debtor commodity broker's pre-petition obligations to customers).

Regulation § 190.04(b)(4) is derived from a combination of current §§ 190.03(b)(1) and (2) and 190.04(e)(4), and addresses the trustee's obligation to liquidate certain open commodity contracts; in particular, those in deficit and those where the customer has failed to promptly meet a margin call. During business-as-usual, an FCM is required to cover, at all times, any customer accounts in deficit (*i.e.,* those with debit balances) with its own capital.[91] The FCM is also required to cover with its own capital any undermargined amounts in customer accounts each day by no later than the Residual Interest Deadline.[92] These ongoing requirements are intended to protect other customers with positive account balances.

An FCM in bankruptcy will generally not have capital available to protect other customers by covering these obligations; rather, any loss suffered by customers whose accounts are in deficit will be at the risk of those other customers.[93] The Commission intends for § 190.04(b)(4) to mitigate the risk to those other customers by directing the trustee to liquidate such accounts.

In light of the importance of mitigating this fellow-customer risk, § 190.04(b)(4), in contrast to many of the other proposed changes to part 190, curtails the trustee's discretion. Specifically, § 190.04(b)(4), as derived from current § 190.03(b)(1) and (2), provides that the trustee shall, as soon as practicable, liquidate all open commodity contract accounts in any commodity contract account (i) that is in deficit; (ii) for which any mark-to-market calculation would result in a deficit; or (iii) for which the customer fails to meet a margin call made by the trustee within a reasonable time. Pursuant to current § 190.03(b)(1), a trustee must liquidate open commodity contracts if any payment of margin would result in a deficit in the account in which they are held.[94] Revised § 190.04(b)(4) adds a requirement to liquidate all open commodity contracts in any commodity contract account that is in deficit. The existing language applies to an account that is on the threshold of deficit; the Commission is revising the language to clarify that the provision also applies to an account that is already in deficit. Moreover, the change from ''payment of margin'' to ''mark-to-market'' calculations addresses the case where the trustee is aware, based on mark-to-market calculations, that the account is in deficit. In order to protect other customers more effectively, the trustee should begin the liquidation process immediately upon gaining that awareness, rather than delaying until the time when a margin payment is due.

Regulation § 190.04(b)(4) also provides that, absent exigent circumstances or unless otherwise provided, a reasonable time for meeting margin calls made by a trustee shall be one hour or such greater period not to exceed one business day, as determined by the trustee.[95] This language is largely reflective of current § 190.04(e)(4), but adds the concept of ''exigent circumstances'' as a new exception to the general and long-established rule that a minimum of one hour is sufficient notice for a trustee to liquidate an undermargined account. The Commission intends this revision to provide the trustee with the discretion to deem a period of less than one hour as sufficient notice to liquidate an undermargined account if the ''exigent circumstances'' so require.

The Commission is deleting current § 190.03(b)(3) to permit the trustee to liquidate open commodity contracts where the trustee has received no customer instructions with respect to such contracts by the sixth calendar day following the entry of the order for relief. The Commission is adopting this change as part of a model where the trustee receives and complies with instructions from individual customers to a model—that reflects actual practice in commodity broker bankruptcies in recent decades—where the trustee transfers as many open commodity contracts as possible.[96]

The Commission is adopting new § 190.04(b)(5) to provide guidance to the trustee in assigning liquidating positions[97] to the debtor FCM's customers when only a portion of the open commodity contracts in an omnibus account are liquidated. The new guidance is designed to protect the customer account as a whole, in light of the fact that any losses which cause a customer account to go into deficit are, as discussed in connection with § 190.04(b)(4), at the risk of other customers. To mitigate the risk of such losses, § 190.04(b)(5) establishes a preference, subject to the trustee's exercise of reasonable business judgment, for assigning liquidating transactions to individual customer accounts in a risk-reducing manner. Specifically, the trustee should endeavor to assign such liquidating transactions first, in a risk-reducing manner, to commodity contract accounts that *are* in deficit; second, in a risk-reducing manner, to commodity contract accounts that are undermargined;[98] and finally to liquidate any remaining open commodity contracts. Where there are multiple accounts in any of these groups, the trustee is instructed to, as practicable, to allocate such liquidating transactions *pro rata.* The term ''risk-reducing manner'' is measured by the margin methodology and parameters

[91] *See, e.g.,* §§ 1.22(i)(4), 1.23(a)(2).

[92] *See, e.g.,* § 1.22(c)(3).

[93] While the trustee may seek to recover any debit balance from a customer, *see* § 190.09(a)(1)(ii)(E), § 190.04(b)(4) proceeds from the conservative assumption that such efforts will be unsuccessful.

[94] An account is in deficit if the balance is negative (*i.e.,* the customer owes the debtor instead of the reverse). An account can be undermargined but not in deficit (if the balance is positive, but less than the amount of required margin). For example, a customer may have a margin requirement of $100 and an equity balance of $80. Such customer is undermargined by $20, but is not in deficit, because the liquidation value of the commodity contracts is positive.

[95] *See Morgan Stanley & Co. Inc.* v. *Peak Ridge Master SPC Ltd.,* 930 F.Supp.2d 532, 539–540 (S.D.N.Y. 2013)(Morgan Stanley, in its business discretion, determined Peak Ridge's account had assumed overly risky positions, necessitating an increase in the margin requirement and giving Peak Ridge a limited amount of time to bring the account into compliance. ''Courts have held that as little as one hour is sufficient notice under similar circumstances.''). *See also Capital Options Invs., Inc.* v. *Goldberg Bros. Commodities, Inc.,* 958 F.2d 186, 190 (7th Cir. 1992) (''One-hour notice to post additional margin . . . is reasonable where a contract specifically provides for margin calls on options at any time and without notice.''); *Prudential–Bache Sec., Inc.* v. *Stricklin,* 890 F.2d 704, 706–07 (4th Cir. 1989) (rejecting a claim that 24-hour notice, which the broker normally gave to customers, was necessary before broker could liquidate an under-margined account and upholding notice of one hour as in accordance with the customer agreement); *Modern Settings, Inc.* v. *Prudential–Bache Sec. Inc.,* 936 F.2d 640, 645 (2d Cir. 1991) (upholding a provision of a customer agreement allowing Defendant-broker to liquidate an under-margined account without notice).

[96] *Cf.* major theme 7 in section I.B above.

[97] A liquidating position or transaction is one that offsets a position held by the debtor, in whole or in part. Thus, if the debtor has three long March '21 corn contracts, then three (or two, or one) short March '21 corn contracts would be a liquidating transaction.

[98] And thus are next at risk of going into deficit.

followed by the DCO at which such contracts are cleared. Specifically, where allocating a transaction to a particular customer account reduces the margin requirement for that account, such an allocation is ''risk-reducing.''

The Commission requested comment on whether the revised approach in proposed § 190.04(b)(4) regarding the required liquidation of certain open commodity contract accounts would provide the trustee with an appropriate amount of discretion and is practicable; whether customers, who believe they did not benefit from those decisions, would likely challenge the trustee's choices given the level of discretion provided; whether such challenges could materially slow down the distribution of customer property relative to a context where the trustee was granted less discretion; and whether the proposed approach in § 190.04(b)(5) for the assignment of liquidating positions to debtor FCM customers in a ''risk-reducing manner'' is practicable when only a portion of the open commodity contracts in an omnibus account are liquidated.

SIFMA AMG/MFA supported most of the substantive amendments in subpart B of part 190 and believed such changes are generally helpful for purposes of reducing risk for market participants and allowing the trustee to act as efficiently as possible. SIFMA AMG/MFA approved of the inclusion of transfers in addition to liquidation, and the clarification to apply the proposed regulation to any open commodity contracts in proposed § 190.04(b).

CME agreed with the general concept of providing the trustee for a debtor FCM with significant flexibility to operate the FCM and favored any provision that encourages the transfer of customer positions and property and continuation of margin payments on behalf of the debtor FCM pending transfer or liquidation of positions. ICE suggested that the Commission should clarify that any trustee discretion proposed in § 190.04 for managing a failed FCM should be subject to the obligations of the defaulting clearing member and the rights of the DCO as provided by the DCO's rules.

ICE supported the Commission's proposal in § 190.04(b)(1) to clarify that a trustee may make variation margin payments on open contracts, pending their liquidation or transfer. ICI agreed with proposed § 190.04(b)(1)(ii), which prohibits a trustee from making any margin payments with respect to a customer account that would exceed the funded balance for that account.

ICI and Vanguard agreed with the preservation of the existing requirement within proposed § 190.04(b)(3) that the trustee fully credit the customer's funded balance for any margin payment made by a customer in response to trustee's margin call. Vanguard noted that any customer concerns as to the ability to fully recover margin would surely de-incentivize customers to post additional margin in critical times.

SIFMA AMG/MFA generally supported proposed § 190.04(b), but had concerns regarding the calculation of whether a customer is undermargined, and the timing of margin calls. SIFMA AMG/MFA questioned whether the trustee would be able to calculate accurately whether a customer is undermargined, particularly if the FCM's books and records do not accurately reflect margin amounts transferred by such customer to the FCM. SIFMA AMG/MFA requested that the Commission clarify how the trustee will try to protect customers from being called upon to provide duplicate margin amounts. SIFMA AMG/MFA recommended that the Commission amend proposed § 190.04(b) to provide customers with the opportunity to demonstrate that a margin payment was made even if the FCM's books and records do not yet reflect its receipt.

SIFMA AMG/MFA disagreed that absent exigent circumstances, a reasonable time for meeting margin calls made by the trustee shall be deemed to be one hour, or such greater period not to exceed one business day, as the trustee may determine in its sole discretion. SIFMA AMG/MFA stated that the necessary assets may not be readily available to customers and urged the Commission to require the trustee to defer to the margin call timings present in the applicable underlying agreements entered into by the customer pursuant to § 39.13 when determining a reasonable time for meeting margin calls. SIFMA AMG/MFA opined that this is a reasonable level of deference, since the trustee will have access to these agreements, which are already in place with the Commission regulations, and will allow for customers to satisfy margin calls without causing needless market panic.

ICI and Vanguard agreed with proposed § 190.04(b)(4), which would require the trustee to liquidate any customer account in deficit. ICI supported maintaining the existing requirement that the trustee promptly liquidate any customer account when a customer fails to meet a margin call in a reasonable time or where any payment of margin from the account would result in an account deficit. ICI agreed with the proposal that a debtor FCM will generally not have capital available to protect other customers by covering account deficits, so any loss suffered by customers whose accounts are in deficit will be at risk of those other non-defaulting customers. As a result, ICI noted that it is vital that the trustee be required to swiftly crystallize, and therefore cap the losses resulting from, such deficits by promptly liquidating accounts in deficit or for which a customer has failed to meet a margin call. ICI cautioned that if the accounts were allowed to remain open, additional losses on the delinquent customers' transactions would be borne by the FCM's non-defaulting customers, which could dissuade non-defaulting customers from continuing to meet their margin obligations post-petition.

OCC was concerned that the proposed definition of ''undermargined'' in §§ 190.01 and 190.04(b)(2) and (4) could create a situation in which a trustee offers one public customer an opportunity to deposit additional margin that ultimately prevents an account deficit and resulting liquidation of the public customer's account, but exercises discretion not to offer another public customer the same opportunity to deposit margin and subsequently must liquidate the account because it is in deficit, notwithstanding the customer's willingness to post additional margin to keep its positions open. OCC was concerned that the use of such trustee discretion would expose a trustee to challenge by a public customer that asserts, though it was similarly situated to a public customer that was given this opportunity, it was not given this opportunity and received inequitable treatment.

In response to SIFMA AMG/MFA's comment, the Commission notes that, in the case of an FCM in bankruptcy, any deficit in the account of one customer may come at the expense of distributions to other customers. As ICI noted, the normal buffer of the capital of an FCM in continuing operation cannot be relied upon. Accordingly, where a trustee believes, based on the records and limited time available to them, that a customer is undermargined, it is important that they act on that belief in order to protect other customers. Similarly, in a case where a customer fails to meet a margin call within what the trustee determines, in their sole discretion, is a reasonable time, the trustee should liquidate the contracts of that customer to protect other customers. Forcing the trustee to defer to margin call timings in pre-bankruptcy agreements, or to give the customer an opportunity to demonstrate that a margin payment was made, as requested by the comment, may

increase: (1) The risk that such customer would default; (2) the risk that delaying liquidation of such a customer's positions increases the potential for and likelihood that they would do so with a debit balance; and (3) the risk that the size of that debit balance would increase as a result of that delay, thereby reducing the funded balances of other customers. The Commission is of the view that timeframes that may have been acceptable during business-as-usual cannot bind the trustee in addressing the context of an FCM in bankruptcy, because any post-petition losses incurred by a customer will be at the cost of other customers (without the normal buffer of the capital of a going-concern FCM). Moreover, the Commission agrees with the view championed by ICI and Vanguard that the trustee should be required to swiftly crystallize and therefore cap the losses resulting from deficit balances by promptly liquidating accounts in deficit and those for which a customer has failed to meet a margin call. OCC's concerns about treating customers equitably *inter se* are understandable, but, in the Commission's view, ensuring complete equity may not be practicable. A trustee must make decisions within a severely limited timeframe in a situation that is likely to be chaotic and with information that is limited and may be imperfect. In these circumstances, the Commission is of the view that it is appropriate to defer to the trustee's discretion to make the best decisions they can under the circumstances. Accordingly, the Commission believes that, where a trustee makes in good faith decisions with regard to margin and liquidation of accounts, that are, in retrospect, inequitable, the Commission's regulations should discourage challenges to such a decision (and, if such a challenge is made, should reduce the likelihood that it is successful).

While the trustee retains discretion, as specified in, *inter alia,* proposed § 190.04, to manage the affairs of the debtor FCM, the Commission can confirm, as requested by ICE, that a DCO of which that FCM is a member retains its rights to act under its rules.[99]

SIFMA AMG/MFA recommended that the Commission amend proposed § 190.04(b) to clearly state that, to the extent gains-based haircutting has been utilized by a DCO in respect of customer positions, the trustee should give customers of an FCM credit for any gains that were haircut during such gains-based haircutting. With respect to this suggestion, the Commission notes that, where a DCO at which a debtor FCM is a member applies gains-based haircutting under that DCO's rules, the measure of the claim of a customer whose account at the debtor FCM contains contracts cleared on that DCO will be based on the customer agreement between that customer and the debtor FCM. If, outside of the FCM's bankruptcy and pursuant to that customer agreement, the customer's gains would have been reduced by *X*% or $*Y,* then the amount of the customer's claim in bankruptcy would be adjusted accordingly.[100] Accordingly, the Commission does not accept that suggestion.

ICI and Vanguard agreed with proposed § 190.04(b)(5) which prohibits a trustee from making margin payments that would exceed the customer's funded account balance or transfer a customer's transactions or property and thereby increase the exposure of other customers. Vanguard supported addressing situations where the trustee could allow certain customers to avoid the core customer protection of *pro rata* treatment at the expense of other customers.

Accordingly, after consideration of the comments, and for the reasons stated above, § 190.04(b) will be adopted as proposed.

c. Regulation § 190.04(c): Contracts Moving Into Delivery

The Commission is adopting § 190.04(c), as proposed, to direct the trustee to use its best efforts to avoid delivery obligations concerning contracts held through the debtor FCM by transferring or liquidating such contracts before they move into delivery position. The Commission is adopting § 190.04(c) based on its analog in current § 190.03(b)(5) and is incorporating a portion of current § 190.02(f)(1)(ii). Current § 190.03(b)(5) instructs the trustee to liquidate promptly, and in an orderly manner, commodity contracts that are not settled in cash (implicitly, those that settle via physical delivery of a commodity) where the contract would remain open beyond the earlier of (i) the last day of trading or (ii) the first day on which notice of delivery may be tendered—that is, where the contract would move into delivery position. The Commission intends § 190.04(c) to have the same purpose as its predecessors, but uses more explicit language regarding physical delivery to refer to ''any open commodity contract that settles upon expiration or exercise via the making or taking of delivery of a commodity,'' and that is moving into the delivery position. The Commission also intends § 190.04(c) to expand current § 190.03(b)(5), with the incorporation of some aspects of current § 190.02(f)(1)(ii), to include an explicit reference to how options on commodities move into delivery position.

CME supported proposed § 190.04(c), which directs the trustee to use their best efforts to liquidate open physical delivery commodity contracts that have not been transferred before the contracts move into a delivery position as CME believed this would avoid unnecessary disruptions to the delivery process by customers that did not intend to participate in making or taking delivery. ICI supported adding provisions that clarify the standards applicable to an FCM's liquidation of a debtor FCM's transactions and the way a trustee must assign liquidating transactions in the context of a partial liquidation.

According, after consideration of the comments, and for the reasons stated above, the Commission is adopting § 190.04(c) as proposed.

d. Regulation § 190.04(d): Liquidation or Offset

The Commission is adopting § 190.04(d) as proposed with modifications, as set forth below. Regulation § 190.04(d), as derived from current §§ 190.02(f) and 190.04(d), sets forth the categories of commodity contracts and other property held by or for the account of a debtor that must be liquidated by the trustee in the market or by book entry offset, promptly, and in an orderly manner.[101]

Importantly, the Commission is retaining the requirement, present in the header language to current § 190.02(f), that the trustee must effect such

[99] *See, e.g.,* § 190.04(b)(1) (while trustee shall, to the extent within its control, not make payments on behalf of an account in deficit, this shall not be construed to prevent a clearing organization from exercising its rights to the extent permitted under applicable law).

[100] Moreover, there are other reasons to forego an approach that would reverse the effects of gains-based haircutting. As discussed in more detail in section II.C.7 below, there is a limited amount of customer property available. Any increase in some customers claims (and thus their distributions) due to the reversal of gains-based haircutting would thus come at the expense of a reduced share of that limited customer property, and thus reduced distributions, to other customers.

[101] The Commission is also adopting three non-substantive changes in the header language to proposed § 190.04(d) from that in current § 190.02(f): (1) The addition of the phrase ''except as otherwise set forth in this paragraph (d)'' to account for any exceptions that are included in the paragraphs under the header language; (2) the addition of cross-references to proposed § 190.04(e) when discussing liquidation, as that provision contains instructions on how to effect liquidation; and (3) the deletion of the phrase ''subject to limit moves and to applicable procedures under the Bankruptcy Code.''

liquidation ''in an orderly manner.'' Regulation § 190.04(d) recognizes that any factor which, in the trustee's discretion, makes it imprudent to liquidate a position at a particular point in time would contribute to the trustee's judgment as to what constitutes liquidation ''in an orderly manner.''

Section 190.04(d)(1), as derived from § 190.02(f)(1), requires that all open commodity contracts must be liquidated, subject to two exceptions: (1) Commodity contracts that are specifically identifiable property and are subject to customer instructions to transfer as provided in proposed § 190.03(c)(2); and (2) open commodity contract positions that are in a delivery position.[102] In the former case (specifically identifiable property), the Commission is adopting § 190.04(d)(1) to revise the language of current § 190.02(f)(1)(ii) to add references to the provisions of § 190.03(c)(2) (concerning the trustee's option to treat hedging accounts as specifically identifiable property) and § 190.09(d)(2) (concerning the payments that customers on whose behalf specifically identifiable commodity contracts will be transferred must make to ensure that they do not receive property in excess of their *pro rata* share).[103] The latter exception, for open commodity contract positions that are in a delivery position is new, and provides that such positions should be treated in accordance with § 190.06, which concerns delivery.[104]

Regulation § 190.04(d)(2) describes when specifically identifiable property, other than open commodity contracts or physical delivery property, must be liquidated. The Commission derived § 190.04(d)(2) from current § 190.02(f)(2), with a number of revisions.

First, the provision applies to specifically identifiable property, other than open commodity contracts *or physical delivery property,* while the current regulation applies only to specifically identifiable property other than open commodity contracts. The Commission intends for this change to provide the trustee with discretion to avoid interfering with the physical delivery process.

Second, while the current regulation would require liquidation of such property if the fair market value of the property drops below 90% of its value on the date of the entry of the order for relief,[105] § 190.04(d)(2)(i) changes that standard to 75% of the fair market value, in order to provide greater discretion to the trustee to forego or postpone liquidation in appropriate cases.

Third, revised § 190.04(d)(2)(ii) adds an additional condition that will require liquidation where failure to liquidate the specifically identifiable property may result in a deficit balance in the applicable customer account, which corresponds to the general policy of liquidating any accounts that are in deficit.

Lastly, § 190.04(d)(2)(iii), which is similar to current § 190.02(f)(2)(ii), includes updated cross-references to the provisions in proposed part 190 that discuss the return of specifically identifiable property.

Regulation § 190.04(d)(3) is a new provision that codifies the Commission's longstanding policies of *pro rata* distribution and equitable treatment of customers in bankruptcy, as described in § 190.00(c)(5) above, as applied to letters of credit posted as margin.[106] Accordingly, customers who post letters of credit as margin will be treated no differently than other customers and thus would suffer the same *pro rata* loss.

The implementation of this policy in current § 190.08(a)(1)(i)(E) was challenged in an adversary proceeding in the *MF Global* bankruptcy;[107] the codification of this policy in §§ 190.00(c)(5) (clarifying policy), 190.04(d)(3) (treatment in bankruptcy), and 1.43 (treatment during business-as-usual) are intended to implement the policy effectively and to forestall any future challenge.

Regulation § 190.04(d)(3) provides that the trustee may request that such a customer deliver substitute customer property with respect to any letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract. This applies whether the letter of credit is held by the trustee on behalf of the debtor's estate, a DCO, a foreign broker, or foreign clearing organization, and whether it is held on a pass-through or other basis. The amount of the substitute customer property to be posted may be less than the full-face amount of the letter of credit, in the trustee's discretion, if such lesser amount is sufficient to ensure *pro rata* treatment consistent with proposed §§ 190.08 and 190.09. If required, the trustee may require the customer to post property equal to the full-face amount of the letter of credit to ensure *pro rata* treatment. Regulation § 190.04(d)(3)(i) provides that, if such a customer fails to provide substitute customer property within a reasonable time specified by the trustee, the trustee may draw upon the full amount of the letter of credit or any portion thereof.

Regulation § 190.04(d)(3)(ii) addresses cases where a letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract is not fully drawn upon. The trustee is instructed to treat any portion of the letter of credit that is not fully drawn upon as having been distributed to the customer. However, the amount treated as having been distributed will be reduced by the value of any substitute customer property delivered by the customer to the trustee. For example, if the face amount of the letter of credit is $1,000,000, the customer delivers $250,000 in substitute customer property, and no portion of the letter of credit is drawn upon, then the trustee will treat the customer as having received a distribution of $750,000. In order to avoid an effective transfer of value, due to an expiration of the letter of credit on or after the date of the order for relief, to the customer who posted the letter of credit, this calculation will not be changed due to such an expiration.

Regulation § 190.04(d)(3)(iii) confirms that any proceeds of a letter of credit drawn by the trustee, or substitute customer property posted by a customer, shall be considered customer property in the account class applicable to the original letter of credit.

Regulation § 190.04(d)(4), as derived from current § 190.02(f)(3), provides for the liquidation of all other property not required to be transferred or returned pursuant to customer instructions and which has not been liquidated. Regulation § 190.04(d)(4) excepts from the liquidation requirement any ''physical delivery property held for delivery in accordance with the provision of'' § 190.06, in order to avoid interfering with the physical delivery process.

[102] Regulation § 190.04(d)(1) deletes the reference in current § 190.02(f)(1)(i) to dealer option contracts since such term is no longer used.

[103] The Commission is incorporating part of current § 190.02(f)(1)(ii) into § 190.04(c), and therefore that will not appear in § 190.04(d)(1).

[104] As noted in section II.A.1 above in the discussion of § 190.00(c)(6), a delivery default could have a disruptive effect on the cash market for the commodity and could adversely impact the parties to the transaction.

[105] *See* current § 190.02(f)(2)(i).

[106] *See, e.g.,* 48 FR 8716, 8718–19 (March 1, 1983) (Commission intends to assure that customers using a letter of credit to meet original margin obligations would be treated no differently than customers depositing other forms of non-cash margin or customers with excess cash margin deposits. If letters of credit are treated differently than Treasury bills or other non-cash deposits, there would be a substantial incentive to use and accept such letters of credit as margin as they would be a means of avoiding the *pro rata* distribution of margin funds, contrary to the intent of the Bankruptcy Code (11 U.S.C. 766).)

[107] *See ConocoPhillips* v. *Giddens,* No. 12 Civ. 6014, 2012 WL 4757866 (S.D.N.Y. 2012).

Several commenters supported proposed § 190.04(d)(3). SIFMA AMG/MFA, ICI, and Vanguard strongly supported proposed § 190.04(d)(3) because it permits a trustee to demand substitute margin so that other customers' margin need not be accessed to meet any shortfall occasioned by the inability to draw on the letters of credit. SIFMA AMG/MFA noted that the addition of proposed § 190.04(d)(3) would ensure that customers using letters of credit to meet original margin obligations will be treated no differently from customers depositing other forms of non-cash margin or excess cash margin deposits. SIFMA AMG/MFA ''agree[d] that most letters of credit currently in use by the industry follow the Joint Audit Committee forms [and believed] that the impact of these additional requirements concerning letters of credit will result in clearer guidance for more equitable treatment of customers within each account class.'' However, SIFMA AMG/MFA ''questione[d] the one-year transition period and urge[d] the Commission to shorten it in the interest of investor protection. For example, if an FCM were to enter bankruptcy proceedings during the one-year transition period,'' SIFMA AMG/MFA inquired as to how the letters of credit would be treated in such proceeding.

OCC also supported proposed § 190.04(d)(3) and the *pro rata* loss policy objective. OCC stated that it ''expects that it would generally, to the extent permitted by OCC's rules and default management arrangements, draw on a defaulted member's letter of credit collateral as soon as practicable after a declaration of default. OCC would attempt to do so, whether or not it has immediately identified a need to draw on a letter of credit to meet the defaulted member's settlement obligations, as a protective action in anticipation of any potential increase in the credit risk associated with the letter of credit. In such cases, a trustee would obtain any remaining proceeds from the drawn-down letter to distribute *pro rata* among the FCM's customers as appropriate.''

However, several commenters including CME, FIA, and CMC believed the policy reasons for the trustee's general right to demand substitute collateral do not exist with respect in the narrow context of a delivery letter of credit.

CME agreed ''that a letter of credit posted to secure obligations under open commodity contracts (whether drawn upon or not) must be deemed as part of the customer's property, in addition to any additional collateral posted by the customer, for purposes of distribution calculations. [CME agreed] that it is prudent to make clear that the trustee in either an FCM or DCO bankruptcy can draw upon posted letters of credit.'' CME supported ''granting the trustee the power to require a customer to deliver substitute customer property to the estate and allowing the trustee to draw on the letter of credit if the customer does not post additional collateral, provided that those conditions apply only to letters of credit letter that are received, acquired, or held to guarantee or secure a customer's obligations under open commodity contracts, and do not apply to delivery letters of credit.''

With respect to a delivery letter of credit posted as collateral to secure the customer's obligation to pay for delivery of a commodity it will receive, CME and CMC believed it was ''critically important that the letter of credit be available to draw upon if the customer defaults or is expected to default on its obligation to pay the seller.'' However, CME, CMC, and FIA recommended that the Commission revise proposed § 190.04(d)(3) to confirm that the authority of the trustee to require a customer that posts a letter of credit to deliver substitute customer property does not extend to letters of credit posted to a delivery account.

CME argued that ''[c]ustomers routinely post letters of credit in connection with delivery obligations under certain physical delivery futures contracts held to maturity.'' CME noted that this is the case for deliveries under certain oil futures listed on the New York Mercantile Exchange. ''The buyers are required to post collateral for the full payment amount owed because actual delivery is effected via physical transfer of oil and thus is typically completed 30 days or so after buyers and sellers are matched for bilateral delivery obligations. Given the substantial dollar amounts involved, often hundreds of millions, letters of credit are often posted as collateral.'' CMC emphasized that ''unlike other situations, a delivery [letter of credit] simply serves as collateral for delivery of a futures contract after expiry but before delivery is taken and while the seller still has possession of the commodity for delivery.'' CME stated that ''[t]he value available to CME under such a letter of credit is wholly independent from the solvency of an FCM, unlike a letter of credit posted as performance bond, which decays when utilized to meet margin or variation calls post-FCM bankruptcy.'' CME posited that the delivery letter of credit does not pose the same issues that the Commission encountered in the *MF Global* bankruptcy. FIA argued that ''[a] purchaser that takes delivery under a commodity contract frequently is not required to take delivery for a significant period of time after the purchaser and seller have been matched. In these circumstances, the purchaser may be required to post a letter of credit as security for full payment when delivery is made.''

CME, CMC, and FIA warned that a trustee's decision to request substitute collateral of cash or cash equivalents for a delivery letter of credit or risk having the letter of credit drawn down prior to the time that delivery is made would create a sudden and unexpected liquidity need for the delivery participant and introduce unnecessary strain into physical and derivatives markets. The commenters were concerned that because the parties' obligations under the delivery account arise from a commodity account, a trustee's authority under proposed § 190.04(d)(3) could be interpreted to apply to letters of credit held in a delivery account. Accordingly, CME and CMC recommended ''that the Commission limit or eliminate the trustee's powers to request that a market participant substitute other forms of collateral for a delivery letter of credit upon which the DCO is a beneficiary.'' Specifically, CME and FIA recommended that the Commission revise proposed § 190.04(d)(3) to exclude delivery letters of credit, *i.e.,* letters of credit posted by buyers to guarantee their payment for commodities that they are contractually obligated to purchase under an expired futures or exercised commodity option contract.

CME also requested clarity in the context of § 190.06 ''that when a customer posts a delivery letter of credit directly with the DCO or with its delivery counterparty, and not with or through the FCM, the letter of credit is outside the delivery account class, *i.e.,* it does not constitute cash delivery property (or property of the debtor's estate), and the provisions in other parts of the proposed revisions regarding treatment of letters of credit posted with or through the debtor FCM do not apply.''

The Commission notes that, despite the comments of CME, CMC, and FIA, there are reasons to forego excluding delivery letters of credit as a class from the application of § 190.04(d)(3), and to adopt § 190.04(d)(3) as proposed, as supported by ICI, SIFMA AMG/MFA, and Vanguard: If, at the end of the bankruptcy proceeding, there are shortfalls in customer property in the cash delivery account class, those

shortfalls will necessarily be borne by public customers. If public customers posting letters of credit (including in the delivery account) are shielded from such losses, they will be borne in greater proportion by other public customers. That result would be inconsistent with the Commission's longstanding policy, embodied in section 766(h) of the Bankruptcy Code, to treat all customers on a *pro rata* basis.[108]

However, the concerns raised by commenters regarding sudden and unexpected liquidity needs are important ones. They are important both in the context of delivery letters of credit, as discussed by some commenters, and more broadly as well.[109] The Commission agrees that these concerns can and should be mitigated. Specifically, the trustee has discretion in managing this process with respect to letters of credit, and should exercise that discretion with the goal of achieving *pro rata* treatment among customers in a manner that mitigates, to the extent practicable, the adverse effects upon customers that have posted letters of credit.

First, with regard to timing, the commenters expressed concern that requests for substitute property would cause ''sudden'' liquidity needs. Regulation § 190.04(d)(3)(i) states that the trustee may draw upon the letter of credit if the customer fails to provide substitute customer property within a reasonable time specified by the trustee. If the expiry date of the letter of credit is not imminent, the Commission expects that a ''reasonable time'' would be sufficiently long to enable the customer to mitigate liquidity concerns (consistent with the trustee's plans to make distributions). If the expiry date of the letter of credit *is* imminent, and the customer can and does arrange to have that expiry date extended, the parties could work in the context of that extended expiry date. However, if the expiry date is imminent, and cannot be extended, then the trustee will need to take promptly whatever steps are, in their discretion, necessary to ensure *pro rata* treatment among customers.

Second, with regard to the amount requested, § 190.04(d)(3) provides that the trustee may request that a customer deliver substitute customer property with respect to a letter of credit, and that the amount of the request may equal the full face amount of the letter of credit *or any portion thereof, to the extent required or may be required, in the trustee's discretion to ensure pro rata treatment among customer claims within each account class,* consistent with §§ 190.08 and 190.09. Thus, the amount of the substitute customer property requested (or, if substitute customer property is not provided, the amount of the letter of credit drawn upon (if partial draws are permitted)) should be proportionate to the amount required or may be required, in the trustee's discretion, to ensure *pro rata* treatment among customer claims. If the amount of the shortfall in the relevant account class (whether cash delivery property or otherwise) is estimated to be a small percentage, the amount of substitute customer property requested would also be a small percentage (subject to the trustee adding an appropriate buffer for later corrections in estimates, and taking into account any need to use the letter of credit as ongoing performance bond for the customer's obligations).

To re-enforce these concepts, the Commission is adding a new § 190.04(d)(3)(iv), which provides that the trustee shall, in exercising their discretion with regard to addressing letters of credit, including as to the timing and amount of a request for substitute customer property, endeavor to mitigate, to the extent practicable, the adverse effects upon customers that have posted letters of credit in a manner that achieves *pro rata* treatment among customer claims. The Commission intends that this new paragraph will confirm to trustees that they should steer their discretion in the specified manner, and will provide assurance to customers that have posted letters of credit that the trustees will exercise their discretion in that manner. The Commission believes that this provision will appropriately address concerns regarding the manner in which the trustee ensures that customers that have posted letters of credit are treated economically in the same manner as customers who have posted other forms of collateral

Moreover, in the context of § 190.06, CME requested that the Commission confirm that ''when a customer posts a delivery letter of credit directly with the DCO or with its delivery counterparty, and not with or through the FCM, the letter of credit is outside the delivery account class, *i.e.,* it does not constitute cash delivery property (or property of the debtor's estate), and the provisions in other parts of the proposed revisions regarding treatment of letters of credit posted with or through the debtor FCM do not apply.''

For example, the Commission understands that upon expiry of certain deliverable contracts and assignment of delivery obligation, the long/buyer of the contract must post collateral to the DCO against its final payment obligation on the delivery. In certain cases, collateral in the form of a delivery letter of credit collateral is posted by the customer directly to the DCO. The delivery letters of credit in these cases are subject to uniform terms that name the DCO as the sole beneficiary on the instrument. These delivery letters of credit do not create an obligation of or to a customer's FCM as they are posted directly to the DCO and the FCM is not a named beneficiary on the instrument.[110]

In the context of a delivery letter of credit that is posted directly with the DCO or with the delivery counterparty, rather than with or through the FCM, and for which the FCM is not a named beneficiary, the Commission confirms that the letter of credit is outside the delivery account class, *i.e.,* it does not constitute cash delivery property (or property of the debtor's estate), and the provisions in other parts of the proposed revisions regarding treatment of letters of credit posted with or through the debtor FCM do not apply.[111]

The Commission believes that this clarification, in combination with the new provision directing the trustee's discretion in the context of letters of credit, will ameliorate the commenters concerns regarding delivery letters of credit.

The foregoing applies to the trustee. DCOs remain free to exercise any of the rights and powers in their rules vis-à-vis their clearing members, in particular with respect to risk management, limited only by requirements within the Commission's regulations.[112] However, in this context, the Commission would encourage DCOs holding letters of credit posted by customers of FCMs in bankruptcy to exercise their rights under such letters of credit in a

[108] Pursuant to § 190.08(c)(1)(ii), the customer's funded balance includes 100% of margin posted after the order for relief. Accordingly, this principle would not apply to a delivery letter of credit posted after the order for relief (unless the letter of credit was delivered in substitution for a pre-bankruptcy letter of credit).

[109] Moreover, and for the avoidance of doubt, as delivery is simply a stage in the life of a commodity contract, § 190.04(d)(3) applies to letters of credit in connection with delivery obligations under a commodity contract.

[110] Similarly, CMC's concerns focus on ''a delivery LOC upon which the DCO is beneficiary.''

[111] The Commission was not requested to opine on whether this approach vis-à-vis letters of credit is permissible outside of the context of the delivery account class, and expresses no view on that question.

[112] *See, e.g.,* § 190.04(e) (Rules providing for liquidation other than on the open market shall be designed to achieve, to the extent feasible under market conditions at the time of liquidation, a process for liquidating open commodity contracts that results in competitive pricing.)

measured fashion, in order to achieve risk management goals fully but in a manner that mitigates, to the extent practicable, adverse effects upon customers that have posted letters of credit.[113]

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting § 190.04(d) as proposed, with the addition of new § 190.04(d)(3)(iv) as set forth above.

e. Regulation § 190.04(e): Liquidation of Open Commodity Contracts

The Commission is adopting § 190.04(e) as proposed to provide details regarding the liquidation and valuation of open positions.[114] Paragraph (e) is derived from current § 190.04(d), subject to a number of changes.

The Commission is adopting § 190.04(e)(1)(i), as derived from current § 190.04(d)(1)(ii), to describe the process of liquidating open commodity contracts when the debtor is a member of a clearing organization. Regulation § 190.04(e)(1)(i), like its predecessor, emphasizes the goal of competitive pricing to the extent feasible under market conditions at the time of liquidation. Treatment under the CEA of clearing organization rules has evolved from a pre-approval regime to a primarily self-certification regime. The Commission is of the view that the various processes set forth in part 40 of the Commission's regulations (including self-certifications under § 40.6, voluntary submission for rule approval under § 40.5, and Commission review of certain rules of systemically important DCOs under § 40.10) are sufficient, and that a separate rule approval process for rules regarding settlement price in the context of a bankruptcy is no longer necessary. The Commission is accordingly adopting § 190.04(e)(1)(i) to delete the requirement contained in current § 190.04(d)(1)(i) that a clearing organization must obtain approval pursuant to section 5c(c) of the CEA for its rules regarding liquidation of open commodity contracts.

Section 190.04(e)(1)(i) also adds a provision regarding open commodity contracts that are futures or options on futures that were established on or subject to the rules of a foreign board of trade and cleared by the debtor as a member of a foreign clearing organization, providing that such contracts shall by liquidated pursuant to the rules of the foreign clearing organization or foreign board of trade or, in the absence of such rules, in the manner the trustee deems appropriate. This the new provision is analogous to the existing provision but would extend to cases where the debtor FCM is a member of a foreign clearing organization.

Section 190.04(e)(1)(ii) provides instructions to the trustee regarding the liquidation of open commodity contracts where the debtor is not a member of a DCO or foreign clearing organization, but instead clears through one or more accounts established with an FCM or a foreign futures intermediary. In such a case, § 190.04(e)(1)(ii) provides that the trustee shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation. The Commission is adding this provision to account for those circumstances where the trustee must liquidate open commodity contracts for a debtor that is not a clearing member.

As with § 190.04(e)(1)(i), the Commission is adopting § 190.04(e)(2) to delete the rule approval requirement, for the same reasons stated above. Regulation § 190.04(e)(2) is derived from current § 190.04(d)(1)(ii) which requires a trustee or clearing organization to apply to the Commission for permission to liquidate open commodity contracts by book entry. In such a case, the settlement price for such commodity contracts shall be determined by the clearing organization in accordance with its rules, which shall be designed to establish, to the extent feasible under market conditions at the time of liquidation, such settlement prices in a competitive manner.

The Commission is adopting § 190.04(e)(3) to recognize that an FCM or foreign futures intermediary through which a debtor FCM carries open commodity contracts will generally have enforceable contractual rights to liquidate such commodity contracts. New § 190.04(e)(3) confirms that the upstream intermediary may exercise such rights. However, the liquidating FCM or foreign futures intermediary shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation and subject to any rules or orders of the relevant clearing organization, foreign clearing organization, DCM, SEF or foreign board of trade governing its liquidation of such open commodity contracts.

If the liquidating FCM or foreign futures intermediary fails to do so, the trustee may seek damages reflecting the difference in price(s) resulting from such failure. However, such damages would be the trustee's sole available remedy as the regulation makes clear that ''[i]n no event shall any such liquidation be voided.''

The Commission is adopting § 190.04(e)(4)(i) and (ii) based on current § 190.04(d)(2) and (3), respectively, with some minor non-substantive language changes and updated cross-references.

The Commission requested comment in particular on the treatment of letters of credit in bankruptcy, as set forth in proposed § 190.04(e). The Commission did not receive any comments on this aspect of the Proposal. Accordingly, for the reasons stated above, the Commission is adopting § 190.04(e) as proposed.

f. Regulation § 190.04(f): Long Option Contracts

The Commission is adopting § 190.04(f) as proposed to contain only minor non-substantive changes from the current § 190.04(e)(5), including (1) a cross-reference to the liquidation provisions in proposed § 190.04(d) and (e), and (2) a clarification that the provision is referring to commodity contracts that are long option contracts, rather than to long option contracts more generally.

The Commission did not receive any comments on this aspect of the Proposal. Accordingly, for the reasons stated above, the Commission is adopting § 190.04(f) as proposed.

3. Regulation § 190.05: Operation of the Debtor's Estate—General

The Commission is adopting § 190.05 to revise parts of current § 190.04 and add new provisions to (1) require a trustee to use all reasonable efforts to continue to issue account statements for customer accounts holding open commodity contracts or other property and (2) clarify the trustee's obligation with respect to residual interest. The Commission requested comment with respect to all aspects of proposed § 190.05.

The Commission is adopting § 190.05(a) to amend the requirement in current § 190.04(a) that the trustee ''shall'' comply with all provisions of

[113] In this connection, the Commission notes that OCC Rule 1104(a)(ii) permits OCC, if the issuer of a letter of credit agrees to extend the irrevocability of its commitment thereunder in a manner satisfactory to OCC, to ''demand only such amounts as it may from time to time deem necessary to meet anticipated disbursements.''

[114] The Commission is amending § 190.08(d) to also clarify the process by which customer positions and other customer property are valued for purposes of determining the amount of a customer's claim.

the CEA and of the regulations thereunder as if it were the debtor, to state that the trustee ''shall use reasonable efforts to comply'' with all provisions of the CEA and of the regulations thereunder as if it were the debtor. This change is intended to provide the trustee with some flexibility in making decisions in an emergency bankruptcy situation, subject to the requirements of the Bankruptcy Code. Given that an FCM bankruptcy will likely be a fast-paced situation requiring the trustee to make decisions with little time for consideration, the Commission recognizes that there may be circumstances under which strict compliance with the CEA and the regulations thereunder may not be practicable. The Commission did not receive any comments on proposed § 190.05(a).[115]

The Commission is adopting § 190.05(b) to address the computation of funded balances. It is derived from, and makes several revisions to, § 190.04(b). The Commission's objective in making such revisions is to provide the bankruptcy trustee with the latitude to act reasonably given the circumstances with which the trustee is confronted, recognizing that information may be more reliable and/or accurate in some insolvency situations than in others and permitting an approach that, to an appropriate extent, favors cost effectiveness and promptness over precision.[116] First, whereas current § 190.04(b) provides that a trustee ''must'' compute a daily funded balance for the relevant customer accounts, § 190.05(b) requires the trustee to use ''reasonable efforts'' to make such computations. Such computations are required to be ''as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.'' Second, § 190.05(b) increases the scope of customer accounts for which the bankruptcy trustee is obligated to compute a funded balance from accounts that contain open commodity contracts to accounts that contain open commodity contracts or other property. In the Commission's view, there is no reason to exclude customer accounts that contain only property (the value of which may change) from the scope of those for which bankruptcy trustees must compute a daily funded balance. Third, § 190.05(b) revises the length of time that the trustee is obligated to compute the funded balance of customer accounts from ''until the final liquidation date'' to until the open commodity contracts and other property in the account have been transferred or liquidated. This change ties the computation requirement to each specific account, such that a bankruptcy trustee is not required to continue to compute the funded balance of customer accounts that do not contain any open commodity contracts or other property. Lastly, the specific deadline by which the computation must be completed is being removed. The Commission does not believe that the deadline in current § 190.04(b) (by noon the next business day) is crucial in a bankruptcy context (as it is with respect to an FCM conducting ongoing daily business).[117] Such computation would, however, inherently need to be accomplished prior to performing any action where knowledge of funded balances is essential, such as transfers of accounts or property.

The Commission received one comment regarding proposed § 190.05(b). CME agreed that allowing the trustee to compute the funded balance for customers' accounts before transferring or liquidating customer positions or property using ''reasonable efforts'' to be ''as accurate as reasonably practicable under the circumstances, including the reliability and availability of information'' ''should allow the trustee to act more promptly to transfer the positions of public customers and their *pro rata* share of the customer property than if the trustee were held to a strict standard of precision in calculating funded balances before it could undertake such transfers.'' This is consistent with the Commission's view. The Commission is adopting § 190.05(c)(1) to amend the record retention requirements in current § 190.04(c) to be more comprehensive. Section 190.05(c)(1) expands the referenced records from ''computations required by this [p]art'' to ''records required under this chapter to be maintained by the debtor, including records of the computations required by this part.'' To enable the trustee to mitigate the expenses of record retention, however, it reduces the time that records are required to be retained from ''the greater of the period required by § 1.31 of this chapter or for a period of one year after the close of the bankruptcy proceeding for which they were compiled'' to ''until such time as the debtor's case is closed.'' Section 190.05(c)(2) simplifies the corresponding portion of current § 190.04(c)(2) by omitting the requirement that the records required in § 190.05(c)(1) be available to the Court and parties in interest. The requirement that such records be available to the Commission and the United States Department of Justice is being retained. A court generally will not itself look at records, and any parties in interest should have access to records under the discovery provisions of the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure, as applicable. The Commission did not receive any comments on proposed § 190.05(c).

The Commission is adopting new § 190.05(d) to facilitate the ability of customers of the bankrupt FCM with open commodity contracts or property to keep track of such open commodity contracts or property even during insolvency, and promptly to make them aware of the specifics of the liquidation or transfer of such contracts or property. Section 190.05(d) requires the trustee to use all reasonable efforts to continue to issue account statements with respect to any customer for whose account open commodity contracts or other property is held that has not been liquidated or transferred. Section 190.05(d) also requires the trustee to issue an account statement reflecting any liquidation or transfer that has taken place with respect to a customer account promptly after such liquidation or transfer has occurred.

The Commission sought comment on the practicability of the proposed requirements regarding the issuance of account statements. ICI commented in support of the account statement requirements.

The Commission is adopting § 190.05(e)(1) to amend the requirement in current § 190.04(e)(2) that a trustee must obtain court approval to make disbursements to customers, to specifically carve out transfers of customer property made in accordance with § 190.07. The Commission is making this change to reflect the policy preference to transfer as many public customer positions as practicable in the event of an FCM insolvency.[118] The Commission notes, however, that this

[115] To the extent that ICI's comment raising concerns about trustee discretion applies here, the Commission notes that the addition of § 190.00(c)(3)(i)(C), which directs the trustee to use their discretion with the overarching goal of protecting public customers, should mitigate that concern.

[116] *See* major theme 7 discussed in section I.B above.

[117] *See, e.g.,* § 1.32(d).

[118] The Commission notes that current § 190.08(d) provides for the return of specifically identifiable property other than commodity contracts under certain circumstances (namely, where the customer makes good any *pro rata* loss related to that property) without court approval; however, the Commission is deleting this provision in favor of allowing transfers without court approval for the reasons stated above.

carve out does not detract from the trustee's ability to, in their discretion, nonetheless seek and obtain court approval for certain transfers of property. The Commission recognizes that there is an inherent tension between distributing to public customers as much customer property as possible from the debtor's estate, as quickly as possible, and ensuring accuracy in distribution, and believes that § 190.05(e)(1) strikes the right balance between these competing objectives.[119]

Section 190.05(e)(2) addresses how a bankruptcy trustee may invest the proceeds [120] from the liquidation of open commodity contracts and specifically identifiable property, and other customer property. It is derived from, and retains much of, current § 190.04(e)(3), but it expands the provision permitting the bankruptcy trustee to ''invest any customer equity in accounts which remain open in accordance with § 190.03'' to permit the investment of ''any other customer property.'' It continues to limit the permissible investments to obligations of, or fully guaranteed by, the United States, and to limit the location of permissible depositories to those located in the United States or its territories or possessions. The Commission did not receive any comments on proposed § 190.05(e).

The Commission is adopting new § 190.05(f) to require a bankruptcy trustee to apply the residual interest provisions contained in § 1.11 ''in a manner appropriate to the context of their responsibilities as a bankruptcy trustee'' and ''in light of the existence of a surplus or deficit in customer property available to pay customer claims.'' The purpose of the residual interest provisions is to have the FCM maintain a sufficient buffer in segregated funds ''to reasonably ensure that the [FCM] . . . remains in compliance with the segregated funds requirements at all times.'' [121] The Commission requested comment with respect to all aspects of proposed § 190.05. Specifically, the Commission sought comment on the practicability and appropriateness of proposed § 190.05(f).

The Commission received supportive comments from CME, SIFMA AMG/MFA, ICI, and Vanguard. CME supported adding clarity that the trustee should use reasonable efforts to operate the debtor FCM's estate in compliance with the CEA and CFTC regulations governing FCMs, including to apply the residual interest provisions in § 1.11, in a manner appropriate to the context of their responsibilities and in light of the existence of a surplus or deficit in customer property available to pay customer claims. ICI and Vanguard supported the clarification in proposed § 190.05(f) that an FCM's residual interest is to be applied to public customer claims. Vanguard noted its belief that ''FCM residual interest is a valuable buffer to insulate FCM customers from the risk of delayed or failed margin transfers from other customers.'' Vanguard was ''pleased that the Commission has confirmed that, while residual interest is fronted by FCMs, it must be used to support customers through an FCM insolvency,'' noting that its ''purpose is to enhance core customer protections.'' SIFMA AMG/MFA also believed that ''the proposed use of residual interest as contemplated by proposed §§ 190.05(f) and 190.09 is appropriate,'' and agreed with the Commission that ''the residual interest provisions contained in § 1.11 remain important.''

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting § 190.05 as proposed.

4. Regulation § 190.06: Making and Taking Delivery Under Commodity Contracts

The Commission is adopting § 190.06 as proposed. The Commission is adopting § 190.06 to provide more specificity regarding making and taking deliveries on commodity contracts in the context of an FCM bankruptcy and to reflect current delivery practices. Section 190.06 is derived from current § 190.05, but implements new concepts (with respect to delivery practices, intangible commodities, and separation of physical and cash delivery property), as discussed further below.

Generally, open positions may enter a delivery position where the parties incur bilateral contractual delivery obligations.[122] It is important to address deliveries to avoid disruption to the cash market for the commodity and to avoid adverse consequences to parties that may be relying on delivery taking place in connection with their business operations.

The delivery provisions in the current regulations largely reflect the delivery practices at the time current part 190 was adopted in 1983. At that time, delivery was effected largely by tendering paper warehouse receipts or certificates. In contrast, most deliverable title documents today are held and transferred in electronic form, typically with the clearing organization serving as the central depository for such instruments. Under the terms of some contracts (such as oil or gas futures) the party with the contractual obligation to make delivery will physically transfer a tangible commodity to meet its obligations. In other cases, intangible commodities may be delivered, including virtual currencies. As noted previously, in the definitions section (§ 190.01), the Commission is dividing the delivery account class into physical delivery and cash delivery account subclasses to recognize the differing issues that apply to physical delivery property versus cash delivery property. The Commission is also recognizing that, consistent with current practice, physical deliveries [123] may be effected in different types of accounts.[124] For example, when an FCM has a role in facilitating delivery, deliveries may occur via title transfer in a futures account, foreign futures account, cleared swaps account, delivery account, or, if the commodity is a security, in a securities account. [125]

Section 190.06(a) applies to commodity contracts that settle upon expiration or exercise by making or taking delivery of physical delivery property, if such commodity contracts are in a delivery position on the filing date or the trustee is unable to liquidate such commodity contracts in accordance with § 190.04(c) to prevent them from moving into a delivery position.[126] The Commission is

[119] The concept of prioritizing cost effectiveness and promptness over precision is discussed in detail in major theme 7 in section I.B above and in overarching concept three in the cost-benefit considerations, section III.A.2.iii below.

[120] Section 190.05(e)(2) uses the term ''proceeds'' rather than the term ''equity,'' which is used in current § 190.04(e)(3). This change in wording is not meant to be a substantive.

[121] Section 1.11(e)(3)(i)(D).

[122] The timing of the entry of the order for relief in a subchapter IV proceeding relative to when physical delivery contracts move into a delivery positions will generally influence whether a delivery issue may arise. Additionally, during business as usual, market participants typically offset contracts before incurring delivery obligations.

[123] Current § 190.05 applies to the delivery of a physical commodity, or of documents of title to physical commodities. Section 190.06 applies to any type of commodity that is subject to delivery, whether tangible or intangible. This is captured in the definition of physical property. Given the different ways in which delivery may take place, physical delivery property is not limited to property that an FCM holds for or on behalf of a customer in a delivery account. For a discussion of those different ways, *see* the third and fourth categories under the definition of physical delivery property in § 190.01 in section II.A.2 above.

[124] *See also* § 1.42.

[125] *See also* § 1.42.

[126] As discussed above, § 190.04(c) directs the trustee to use its best efforts to avoid delivery obligations concerning contracts held through the

Continued

adopting § 190.06(a)(2) to address delivery made or taken on behalf of a customer outside of the administration of the debtor's estate, (*i.e.,* directly between the debtor's customer and the delivery counterparty assigned by the clearing organization). It replaces current § 190.05(b). Current § 190.05(b) requires a DCO, DCM, or SEF to enact rules that permit parties to make or take delivery under a commodity contract outside the debtor's estate, through substitution of the customer for the commodity broker. The Commission believes that deliveries should occur in this manner only where feasible. Deliveries may not always happen in this manner, as customers largely rely on their FCMs to hold physical delivery property on their behalf in electronic form.[127]

Section 190.06(a)(2)(i)[128] directs the trustee to use ''reasonable efforts'' to allow a customer to deliver physical delivery property that is held directly by the customer in settlement of a commodity contract, and to allow payment in exchange for such delivery, to occur outside the debtor's estate, where the rules of the exchange or clearing organization prescribe a process for delivery that allows delivery to be fulfilled either (A) in the ordinary course by the customer, (B) by substitution of the customer for the commodity broker, or (C) through agreement of the buyer and seller to alternative delivery procedures. In adopting a ''reasonable efforts'' standard rather than (as in current § 190.05(a)(1)) ''best efforts,'' the Commission is recognizing that, in the event that the trustee is unable to transfer or earlier liquidate the positions, delivery involves a significant degree of bespoke administration. Moreover, requiring the trustee's ''best efforts'' for delivery might require the trustee to spend an inordinate amount of time focusing on the needs of a few customers and detract from the trustee's ability to manage the short term challenges of the administration of the estate in the days immediately following the filing date.

Section 190.06(a)(2)(ii) addresses the circumstance where, while the customer makes physical delivery in satisfaction of a commodity contract using property that is outside the administration of the estate of the debtor, the customer nonetheless has property held in connection with that contract at the debtor (*i.e.,* collateral posted in connection with that contract pre-petition). Consistent with current § 190.05(b)(2), § 190.06(a)(2)(ii) provides that the property held at the debtor becomes part of the customer's claim and can only be distributed *pro rata,* despite the customer fulfilling the delivery obligation outside the administration of the debtor's estate.

Section 190.06(a)(3) applies when it is not practicable to effect delivery outside the estate. Section 190.06(a)(3) clarifies that which was implied, but was not addressed, in current § 190.05(c)(1)–(2), by providing additional details for when delivery is made or taken within the debtor's estate. It contains provisions for the trustee to deliver physical or cash delivery property on a customer's behalf, or return such property to the customer so that the customer may fulfill its delivery obligation. The regulation also includes restrictions designed to assure that a customer does not receive (or otherwise benefit from) a distribution of customer property (or other use of such property that benefits the customer) that exceeds the customer's *pro rata* share of the relevant customer property pool.

The Commission is adopting new § 190.06(a)(4) to recognize that delivery may need to be made in a securities account if an open commodity contract held in a futures account, foreign futures account, or cleared swaps account requires the delivery of securities, and property from any of these accounts is transferred to the securities account for the purpose of effecting delivery. The value of the property transferred to the securities account must be limited to the customer's funded balance for a commodity contract account, and only to the extent that funded balance exceeds (*i.e.,* the surplus over) the customer's minimum margin requirements for that account. Such a transfer may not be made if the customer is undermargined or has a deficit balance in any other commodity contract accounts.

Section 190.06(a)(5), as proposed, addressed deliveries made or taken on behalf of ''a house account of the debtor.'' It was derived from current § 190.05(c)(3), with some clarifying wording. Consistent with the suggestion from the ABA Subcommittee, as discussed in section II.A.2 above, the Commission is deleting in this final rule the definition of house account as it applies to FCMs. The reference in the provision as proposed to ''a house account of the debtor'' is being replaced in the final rule with a reference to ''the debtor's own account or the account of any non-public customer of the debtor.'' No substantive change vis-à-vis either the current regulation or the regulation as proposed is intended.

The Commission is adopting new § 190.06(b) to divide the delivery account class into separate physical delivery and cash delivery account subclasses, for purposes of *pro rata* distributions to customers in the delivery account class on their net equity claims. Because claims in each subclass are fixed as of the filing date, § 190.06(b)(1)(i) provides that the physical delivery account class includes physical delivery property held in delivery accounts as of the filing date, and the proceeds of any such physical delivery property received subsequently (*i.e.,* cash received after the filing date, in exchange for physical delivery property on which delivery was made), and § 190.06(b)(ii) provides the cash delivery account class includes cash delivery property in delivery accounts as of the filing date, along with physical delivery property for which delivery is subsequently taken (*i.e.,* in exchange for cash delivery property paid after the filing date) on behalf of a customer in accordance with § 190.06(a)(3).

Section 190.06(b)(2) describes the customer property included in the cash delivery account class and in the physical delivery account class. Section 190.06(b)(2) provides that customer property in the cash delivery account class includes cash or cash equivalents that are held in an account under a name, or in a manner, that clearly indicates that the account holds property for the purpose of making payment for taking delivery of a commodity under commodity contracts. Customer property in the cash delivery account class also includes any other property that is (A) not segregated for the benefit of customers in the futures, foreign futures, or cleared swaps account classes) and (B) traceable (through, *e.g.,* account statements) as having been received after the filing date as part of taking delivery.

Section 190.06(b)(2) also provides, conversely, that customer property in the physical delivery account class includes cash or cash equivalents that are held in an account under a name, or in a manner, that clearly indicates that the account holds property received in payment for making delivery of a commodity under a commodity contract. Customer property in the

debtor FCM by transferring or liquidating such contracts before they move into delivery position.

[127] The requirement for registered entity rules to be submitted for approval in accordance with section 5c(c) of the Act has been deleted for reasons discussed in section II.B.2 above with respect to § 190.04(e)(1) and (2).

[128] The Commission notes that § 190.04(c) directs the trustee to use its best efforts to avoid delivery obligations concerning contracts held through the debtor FCM by transferring or liquidating such contracts before they move into delivery position. Section 190.06(a)(2) applies where the trustee is unable to do so.

physical delivery account class also includes any other property that is (A) not segregated for the benefit of customers in the futures, foreign futures, or cleared swaps account classes) and (B) traceable (through, *e.g.,* account statements) as having been held for the purpose of making delivery of a commodity under a commodity contract, or held as of the filing date as a result of taking delivery.

The Commission requested comment on all aspects of proposed § 190.06. In particular, the Commission sought comment on the implications of subdividing the delivery account class into separate physical delivery and cash delivery account subclasses, including any additional challenges or benefits that the Commission did not consider. CME expressed support for specific aspects of proposed § 190.06, such as: (1) The proposed enhancements to the delivery account class, including separating the account class into physical and cash delivery account classes; (2) the additional detail provided to the trustee on how to facilitate the completion of deliveries including, in particular, the requirement for the trustee to use reasonable efforts to allow delivery to occur outside administration of the debtor FCM's estate when the rules of the relevant exchange or DCO prescribe a process for allowing deliveries to be accomplished as set forth in the proposal; and (3) the clarification that cash or cash equivalents held by the debtor FCM in an account maintained at a bank, DCO, foreign clearing organization or elsewhere constitutes customer property when it is held under a name or in a manner clearly indicating the property in the account relates to deliveries. As to the latter, CME believes that this will facilitate identifying cash delivery property available to distribute to customers in the cash delivery account class.[129]

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting § 190.06 as proposed, with modifications to § 190.06(a)(5) as set forth above.

5. Regulation § 190.07: Transfers

Regulation § 190.07 was proposed to set forth detailed provisions governing transfers, consistent with the policy preference, explained in § 190.00(c)(4), for transferring (or ''porting'') public customer commodity contract positions, as well as all or a portion of such customers' account equity. It is being adopted as proposed with modifications to § 190.07(b), (d), and (e), as set forth below.

The Commission requested comment with respect to all aspects of proposed § 190.07, and raised particular questions with respect to the proposed six-month post-transfer period to complete customer diligence, partial transfers, and estimates of customer claims.

Section 190.07(a) addresses rules that clearing organizations and SROs may ''adopt, maintain in effect, or enforce'' that may affect transfers.

In § 190.07, paragraphs (a)(1) and (2) states that these organizations may not have such rules that, respectively, ''are inconsistent with the provisions of'' part 190 or that interfere with the acceptance by their members of commodity contracts and collateral from FCMs that are required to transfer accounts pursuant to § 1.17(a)(4). These provisions are derived from current § 190.06(a)(1) and (2), with technical changes. No comments were received with respect to these provisions.

Section 190.07(a)(3) is intended to promote transfers, to the extent consistent with good risk management. It provides that no clearing organization or other SRO may adopt, maintain in effect, or enforce rules that ''interfere with the acceptance by its members of transfers of commodity contracts, and the property margining or securing such contracts, from [an FCM that is a debtor] if such transfers have been approved by the Commission . . .'' Paragraph (a)(3) includes a proviso, however, that it shall not (i) ''[l]imit the exercise of any contractual right of a clearing organization or other registered entity to liquidate or transfer open commodity contracts''; or (ii) ''[b]e interpreted to limit a clearing organization's ability adequately to manage risk.''

FIA supported the proviso, and CME ''agree[ed] that transfers should be made consistent with sound risk management principles, and in that regard welcome[d] the proposed clarification that the requirements under the proposed rule do not limit the rights of a DCO (or a DCM or swap execution facility as ''registered entities'' as defined in the CEA) to liquidate or transfer open commodity contracts.'' ICE, by contrast, was concerned that the term ''interfere with'' is overly broad, and requested that the Commission ''clarify that a clearing organization is not precluded from managing the risks presented by any such transfer, including through bona fide changes in margin requirements and guarantee fund contributions for transferee clearing members.''

As discussed immediately above, the provision already states that ''this paragraph (a)(3) shall not . . . be interpreted to limit a clearing organization's ability adequately to manage risk.'' Moreover, recognizing the different or additional margin requirements or guarantee fund contribution requirements resulting from the additional positions carried by a transferee clearing member is not a rule that interferes with the acceptance of a transfer of commodity contracts.[130] Accordingly, the Commission concludes that § 190.07(a)(3) appropriately meets the goal of promoting transfers to the extent consistent with good risk management.

Regulation § 190.07(b) concerns requirements for transferees. Paragraph (b)(1) clarifies that it is the duty of the transferee—not of anyone else—to assure that the transfer will not cause the transferee to be in violation of the minimum financial requirements. Paragraph (b)(2) notes that the transferee accepts the transfer subject to any loss arising from deficit balances that cannot be recovered from the customer, and, in the case of customer accounts, must keep such counts open for at least one business day (unless the customer fails to respond to a margin call within a reasonable time) and may not collect commissions with respect to the transfer.

As stated in the proposal, the Commission understands that customer diligence processes would have already been required to have been completed by the debtor FCM with respect to each of its customers as part of opening their accounts. Regulation § 190.07(b)(3) thus provides that a transferee may accept open commodity contracts and property, and may open accounts on its records prior to completing customer diligence, provided that account opening diligence as required is performed as soon as practicable but no later than six months after transfer, unless the time is extended, by the Commission, for a particular account, transfer, or debtor. This provision is consistent with past practice in FCM bankruptcies.

CME supported this provision as a ''practical change'' that should assist in finding willing transferees, while ICI believed that it will help mitigate or

[129] CME noted that its support was ''subject to CME's comments which request changes to the cash delivery property and physical delivery property definitions.'' Specifically, CME requested that the Commission adopt more formal requirements with respect to delivery accounts through a separate rulemaking. That request is addressed in section II.G below.

[130] The Commission understands ICE's reference to ''bona fide changes in margin requirements and guarantee fund contributions'' to mean changes that are not based on the fact that positions were acquired by transfer.

eliminate ''speed bumps'' to porting. Vanguard supported the flexibility advanced by the Commission here, but urged the Commission to work to harmonize that flexibility across other regulatory regimes applicable at FCMs, particularly for those dually registered as broker-dealers.

FIA supported the policy underlying paragraph (b)(3), and noted that it is essential to realize the policy of favoring porting over liquidation of customer accounts. FIA also agreed that six months is a reasonable period of time for this process, subject to the Commission's authority to grant additional time in particular circumstances. FIA was, however, of the view that this regulation should ''provide transferee FCMs more specific relief from applicable law relating to 'customer diligence.' ''

FIA encouraged the Commission to specify the customer diligence rules from which transferee FCMs will have temporary relief. FIA stated that

> ''such rules may include, but not be limited to: (i) rules relating to anti-money laundering requirements (including rules requiring FCMs to implement customer identification programs and know your customer requirements and all corresponding self-regulatory organization (''SRO'') requirements); (ii) rules relating to risk and other disclosures (§§ 1.55, 30.6, 33.7 and similar SRO disclosure requirements); (iii) rules relating to capital and residual interest requirements (§§ 1.11, 1.17, 1.22, 1.23, 22.2, 22.17, 30.7 and 41.48 and related SRO requirements); (iv) rules relating to account statements required under § 1.33 in the event positions transfer with inadequate contact information (§ 1.33 and related SRO requirements); and [(v)] rules relating to margin in the event accounts transfer without adequate margin (§§ 1.17, 39.13, 41.42–41.49 and related SRO requirements).''

The Commission has considered each of the five types of requirements discussed by FIA:

With respect to anti-money laundering requirements, the Commission notes that, for purposes of the Customer Identification Program (''CIP'') requirements applicable to futures commission merchants pursuant to 31 CFR 1026.220, the term ''account'' is defined to *exclude* ''[a]n account that the futures commission merchant acquires through any acquisition, merger, purchase of assets, or assumption of liabilities.'' 31 CFR 1026.100(a)(2)(i). Thus, transferred accounts are not subject to the CIP requirements.

However, the Customer Due Diligence (''CDD'') requirements of 31 CFR 1026.210(b)(5) do appear to apply. These include a requirement for ''[a]ppropriate risk-based procedures for conducting ongoing customer due diligence, to include . . . [u]nderstanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile . . . .'' 31 CFR 1026.210(b)(5)(i). The Commission is of the view that § 190.07(b)(3) would inform the determination of what constitutes *appropriate* risk-based procedures in the exigent context of an FCM accepting a transfer of accounts from an FCM that is a debtor in bankruptcy.

While FIA appears to request a reference to the account opening disclosure requirements in §§ 1.55, 30.6, and 33.7, these would appear to be addressed by the bulk transfer provisions of § 1.65. The Commission is amending § 190.07(b)(3) to include a parenthetical statement that explicitly refers to ''the risk disclosures referred to in § 1.65(a)(3).'' This will modify the sixty-day requirement of that paragraph.

The Commission declines to amend the regulation to extend the time to comply with capital and residual interest requirements. To do so would risk permitting a transfer of accounts to result in contagion of financial weakness. The Commission reiterates the importance of § 190.07(b)(1), which provides that ''it is the duty of each transferee to assure that it will not accept a transfer that would cause the transferee to be in violation of the minimum financial requirements set forth in this chapter.''

However, to the extent that shortfalls in compliance with these requirements are due to errors or shortfalls in the data received by the transferee from the transferor FCM, and the transferee acts with reasonable and appropriate diligence in seeking to detect such errors or shortfalls in data, and, where detected, in investigating and correcting them, such shortfalls in compliance would not be considered violations of such requirements.

Similarly, where account statements required by § 1.33 do not reach the customer due to errors or shortfalls in the contact information provided to the transferee, there would be no violation so long as the transferee takes reasonable steps to detect such errors or shortfalls (*e.g.,* by reacting promptly to rejected email or returned postal mail, or to complaints by a transferred customer that they are not receiving such statements) and to correct the situation once detected. The proposed regulation does not need to be amended to achieve this result.

Finally, with respect to FIA's request for relief with respect to regulations ''relating to margin in the event accounts transfer without adequate margin,'' the Commission believes that the determination of whether a transferee FCM is *promptly* collecting such margin should be informed by the exigencies of the situation. There is, however, no basis for a general exemption for transferee accounts from the requirements of § 39.13(g)(8)(iii), providing that a DCO shall require that its members do not permit customers to withdraw funds from their accounts unless the accounts would be fully margined after such withdrawal. If the transferee FCM is not confident of the information it has regarding the transferred account, it would seem appropriate to risk manage with caution. Once the transferee FCM is confident that it fully understands the situation, the transferee can act in accordance with its normal procedures.[131] Similarly, there is no basis to provide a general exemption from undermargined account capital charges in accordance with § 1.17.

In all of these cases, the Commission encourages DCOs and SROs to take similar approaches.

While the Commission has declined, in many of the above cases, to provide general relief by regulation, this is without prejudice to the possibility that more targeted relief may be appropriate in particular cases. Specifically, any further relief that might be appropriate in a particular situation could be requested by, *e.g.,* the transferee, in light of the relevant facts and circumstances.

The Commission observes that its staff have traditionally responded to requests for relief in emergency situations with great dispatch, and expects, and thus instructs staff, to continue to do so in this context in the future.[132]

OCC recommended that ''the Commission adopt a parallel regulation permitting a DCO to postpone any due diligence the DCO would typically have to perform on an FCM member accepting transferred positions from a bankrupt FCM.'' This would include the requirements of, *e.g.,* § 39.12, requiring a DCO to have ''continuing participation requirements for clearing members of the [DCO] that are objective, publicly available, and risk-based.''

The Commission does not agree that the situations are parallel: An FCM is required to perform individualized due

[131] Such normal procedures would include the ''ordinary course of business'' referred to in Letter 19–17, or any successor letter or regulation. *See* CFTC Letter 19–17, *https://www.cftc.gov/node/217076.*

[132] For the avoidance of doubt, the nature of the expectation and the instruction is that staff will provide *a* response to such requests with great dispatch. The nature of the response, whether affirmative, affirmative in part, or negative, will depend on the relevant facts and circumstances.

diligence on each of its customers, which in the case of a transfer such as was seen in historical situations such as *MF Global,* would amount to hundreds or even thousands of customers. By contrast, the focus of a DCO is on the financial and operational capability of each of its clearing members that is a transferee to manage, *in the aggregate,* the customer portfolios of which it accepts transfer. The number of transferee FCM clearing members is likely to be no more than a dozen.

In any event, the Commission expects that a DCO would, and would be permitted to, conduct its due diligence procedures in a manner consistent with balancing risk management requirements (*see, e.g.,* § 190.07(a)(3)(ii) (restrictions on a DCO interfering with the acceptance of transfers from a debtor FCM ''shall not be interpreted to limit a clearing organization's ability adequately to manage risk'') with the exigencies of the situation.

Section 190.07(b)(4) is designed to clarify what the account agreement between the transferred customer and the transferee is at and after the time the transfer becomes effective. This includes situations where an account is partially transferred. As proposed, it provides that any account agreements governing a transferred account shall be deemed assigned to the transferee and shall govern the customer's relationship unless and until a new agreement is reached. It also provides that a breach of the agreement prior to a transfer does not constitute a breach on the part of the transferee. CME, ICI, and Vanguard supported this provision.

FIA appreciated the need for legal certainty as to the terms of the relationship between a transferee FCM and each transferred customer, but was concerned that the transferee FCM might be disadvantaged by being subject to an account agreement between the transferred customer and the transferor (debtor) FCM. There are two possible situations with respect to each customer: Either the customer does, or does not, have a pre-existing account agreement with the transferee FCM.

FIA noted that many large customers, in particular, may maintain accounts at more than one FCM, and thus it may be the case that the customer already has an account agreement in place with the transferee FCM. FIA asked the Commission to confirm their view that, in this context, the transferee would not be required to manage the ported account(s) in accordance with the agreement with the transferor FCM. The Commission agrees with this view, and is modifying proposed § 190.07(b)(4) to state this explicitly: The proposed text will be renumbered as § 190.07(b)(4)(i), and paragraph (b)(4)(ii) will be added to provide that paragraph (b)(4)(i) shall not apply where the customer has a pre-existing account agreement with the transferee futures commission merchant. In such a case, the transferred account will be governed by that pre-existing account agreement.

However, where the transferred customer does not have a pre-existing account agreement with the transferee FCM, FIA conceded that ''the account agreement [between the transferor and the customer] should stay in place for a short defined interim period during which the parties may renegotiate. . . .'' FIA did not specify how long that ''short defined interim period'' should last, nor what should happen at the end of that period if the parties fail to reach agreement. The Commission notes that nothing prevents either the transferee FCM or customer from negotiating at any time to change the (in this case, assigned) account agreement between them, and that, aside from § 190.07(b)(2)(ii)(A) (requiring the transferee to keep the customer's commodity contracts open at least one business day after their receipt unless the customer fails to meet promptly a margin call), nothing in the Commission's regulations prevents either the transferee or customer from terminating their relationship if they cannot reach agreement as to the terms under which that relationship should continue, on what either party believes is a timely basis. Accordingly, the Commission declines to modify § 190.07(b)(4) in this context.

Lastly, FIA observed that a customer's account may not always be able to be physically transferred from the debtor FCM to the transferee FCM. The Commission notes that the reference in § 190.07(b)(4) to assignment of account agreements does not refer to the movement of physical documents.[133] As requested by FIA, the Commission can thus confirm that assignment of the agreement does not depend upon such movement.

Regulation § 190.07(b)(5) provides that customer instructions received by the debtor with respect to open commodity contracts or specifically identifiable property that has been, or will be, transferred in accordance with section 764(b) of the Bankruptcy Code, should be transmitted to any transferee, which shall comply therewith to the extent practicable (if the transferee subsequently enters insolvency).

Regulation § 190.07(c) addresses eligibility of accounts for transfer under section 764(b) of the Bankruptcy Code. This provision states that ''[a]ll commodity contract accounts (including accounts with no open commodity contract positions) are eligible for transfer. . . .'' This language recognizes that accounts can be transferred even if they are intended for trading commodities but do not include any open commodity contracts at the time of the order for relief.[134]

Regulation § 190.07(d) addresses special rules for transfers under section 764(b) of the Bankruptcy Code. Paragraph (d)(1) instructs the trustee to ''use its best efforts to effect a transfer to one or more other commodity brokers of all eligible commodity contract accounts, open commodity contracts and property held by the debtor for or on behalf of its customers, based on customer claims of record, no later than the seventh calendar day after the order for relief.'' The Commission will correct a typographical error in the proposal, and refer to ''customer claims *of* record'' rather than ''customer claims *or* record.''

Regulation § 190.07(d)(2) addresses cases of partial transfers and multiple transferees. It includes a requirement that ''a partial transfer of contracts and property may be made *so long as such transfer would not result in an increase in the amount of any customer's net equity claim.*'' The added language is intended to caution against partial transfers that would break netting sets and make the customer worse off. The Commission has also decided to state that one way to accomplish a partial transfer is ''by liquidating a portion of the open commodity contracts held by a customer such that sufficient value is realized, or margin requirements are reduced to an extent sufficient, to permit the transfer of some or all of the remaining open commodity contracts and property.'' This language is intended to clarify that the liquidation may either crystalize gains or have the effect of reducing the required margin. Finally, with regards to the transfer of part of a spread or a straddle,

[133] To be sure, a transfer agreement would likely include transfers of records or at least copies of records as a matter of good practice.

[134] *Cf.* 11 U.S.C. 761(9)(A)(ii)(II) (customer means, with respect to an FCM, an entity that holds a claim against the FCM arising out of ''a deposit or payment of cash, security, or other property with such [FCM] *for the purpose of* making or margining [a] commodity contract'') (emphasis added).

Thus, where a person opens a customer account and deposits collateral on day 1, intending to trade on day 3 (or some subsequent day when the customer determines that it is propitious to trade) and the FCM becomes a debtor on day 2 (or some other day when the customer has no positions open) such person nonetheless qualifies as a customer, and their claim would be a customer claim.

§ 190.07(d)(2)(ii) states that ''to the extent practicable under the circumstances,'' each side of the spread or straddle must be transferred or none of the open commodity contracts comprising the spread or straddle may be transferred. This language is intended to clarify that the trustee is required to protect customers holding spread or straddle positions from the breaking of netting sets, but only to the extent practicable given the circumstances.

Regulation § 190.07(d)(3) provides details regarding the treatment and transfer of letters of credit used as margin, consistent with other proposed provisions related to letters of credit. In particular, this provision states that a transfer of a letter of credit cannot be made if it would result in a recovery that exceeds the amount to which the customer is entitled in §§ 190.08 and 190.09. If the letter of credit cannot be transferred and the customer does not deliver substitute property, the trustee may draw upon a portion or upon all of the letter of credit, the proceeds of which will be treated as customer property in the applicable account class. The Commission believes a regulation detailing how letters of credit are to be treated in a transfer will provide more certainty, as there is currently no such regulation, and that the proposed treatment is both practical and consistent with the policy of *pro rata* distribution.[135]

Regulation § 190.07(d)(4) requires a trustee to use reasonable efforts to prevent physical delivery property from being separated from commodity contract positions under which the property is deliverable. The Commission is proposing this regulation to clarify its expectations in such situations, specifically, to promote the delivery process.

Regulation § 190.07(d)(5) is intended to prevent prejudice to customers generally by prohibiting the trustee from making a transfer that would result in insufficient customer property being available to make equivalent percentage distributions to all equity claim holders in the applicable account class. It clarifies that the trustee should make determinations in this context based on customer claims reflected in the FCM's records, and, for customer claims that are not consistent with those records, should make estimates using reasonable discretion based in each case on available information as of the calendar day immediately preceding transfer.

Regulation § 190.07(e) addresses the prohibition on avoidance of transfers under section 764(b) of the Bankruptcy Code. It explicitly approves specific types of transfers, unless such transfers are disapproved by the Commission.

Section 190.07(e)(1) approves (i) transfers that were made before the order for relief in compliance with § 1.17(a)(4) (FCM fails to meet capital requirements); (ii) pre-relief transfers, withdrawals or settlements at the request of public customers, unless the customer acted in collusion with the debtor to obtain a greater share than it would otherwise be entitled to; and (iii) pre-relief transfers of customer accounts or commodity contracts and other related property, either by a clearing organization or a receiver that has been appointed for the FCM that is now a debtor. In this context, ''public customers'' would include a lower-level (*i.e.,* downstream) FCM acting on behalf of its own public customers (*e.g.,* cleared at the debtor on an omnibus basis).

Regulation § 190.07(e)(2) pertains to post-relief transfers. Section 764(b) of the bankruptcy code permits the Commission to approve, and thus protect from avoidance, transfers that occur up to seven days after the order for relief. Section 190.07(e)(2)(i) approves transfers of eligible commodity contract accounts or customer property made by the trustee or any clearing organization. Section 190.07(e)(2)(ii) approves transfers made at the direction of the Commission upon such terms and conditions as the Commission may deem appropriate and in the public interest.

Regulation § 190.07(e)(3) was referred to in preamble to the proposal as derived from current § 190.06(g)(3). It was inadvertently omitted from the rule text in the proposal.

Section 190.07(e)(3) pertains to pre-relief withdrawals by customers (in contrast to the transfers dealt with previously in § 190.07(e)(1)(ii)). It states (in terms analogous to § 190.07(e)(1)(ii)) that notwithstanding the provisions of paragraphs (c) and (d) of this section, the following transfers are approved and may not be avoided under sections 544, 546, 547, 548, 549 or 724(a) of the Bankruptcy Code: The withdrawal or settlement of a commodity contract account by a public customer, including a public customer which is a commodity broker, prior to the filing date unless: (i) The customer making the withdrawal or settlement acted in collusion with the debtor or its principals to obtain a greater share of the bankruptcy estate than that to which such customer would be entitled in a bankruptcy distribution; or (ii) The withdrawal or settlement is disapproved by the Commission.

Regulation § 190.07(f) provides that, notwithstanding the other provisions of this section (with exceptions discussed below), the Commission may prohibit the transfer of a particular set or sets of the commodity contract accounts and customer property, or permit the transfer of a particular set or sets of commodity contract accounts and customer property that do not comply with the requirements of the section. The exceptions are the policy in favor of avoiding the breaking of netting sets in § 190.07(d)(2)(ii), and the avoidance of prejudice to other customers in § 190.07(d)(5).

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting § 190.07 as proposed with modifications to § 190.07(b), (d), and (e), as set forth above.

6. Regulation § 190.08: Calculation of Funded Net Equity

Section 190.08 is being adopted as proposed with a number of technical modifications, as set forth below.

The Commission requested comment with respect to all aspects of proposed § 190.08, and raised particular questions with respect to the revisions to the calculation of the equity balance of a commodity contract set forth in proposed § 190.08(b)(1), and the appropriateness of the proposal to determine the value of an open commodity contract at the end of the last settlement cycle on the day preceding the transfer rather than at the end of the day of the transfer, as set forth in § 190.08(d)(1)–(2).

As proposed, § 190.08(a) stated that the ''allowed net equity claim of a customer shall be equal to the aggregate of the funded balances of such customer's net equity claim for each account class.'' As discussed above, the ABA Subcommittee urged that there should be more precise use of the term ''allowed claim.''[136] The Commission agrees with this recommendation. Accordingly, the Commission is amending the language in the proposal to replace the term ''allowed net equity'' with the term ''funded net equity'' in the final rule in both § 190.08(a) and in the title of § 190.08.[137]

[135] *See also* discussion of treatment of letters of credit in bankruptcy under § 190.04(d)(3) in section II.B.2.

[136] *See* discussion of ''funded claim'' in section II.A.2 above.

[137] Proposed § 190.08(a) is derived from current § 190.07(a), but reflects the fact that, under the revised definition of the term ''primary liquidation date,'' all commodity contracts will be liquidated or transferred prior to the primary liquidation date. Since no (relevant) operations will occur

Section 190.08(b) sets forth the steps for a trustee to follow when calculating each customer's net equity.[138] Section 190.08(b)(1), equity determination, sets forth the steps for a trustee to follow when calculating the equity balance of each commodity contract account of a customer. When calculating the customer's claim against the debtor, the basis for calculating such claim is the data that appears in the debtor's records. Once the customer's claim based on the debtor's records is calculated, the customer will have the opportunity to dispute such claim based on their own records, and the trustee may adjust the debtor's records if it is persuaded by the customer. There were no comments directed specifically to this provision.

Section 190.08(b)(2), customer determination (aggregation), provides instructions to the trustee regarding how to aggregate the credit and debit equity balances of all accounts of the same class held by a customer. Specifically, the regulation sets forth how to determine whether accounts are held in the same capacity or in separate capacities. There were two comments applicable to this provision.

As proposed, § 190.08(b)(2)(ix) referred to the fact that an omnibus customer accounts is held in a separate capacity from the ''house account.'' As noted above,[139] the ABA Subcommittee has suggested the deletion of the term ''house account'' in the context of FCM bankruptcies, and the Commission has accepted this suggestion. Consistent with that approach, the Commission is accepting the ABA Subcommittee's revised drafting for this provision: An omnibus customer account *for public customers* of a futures commission merchant maintained with a debtor shall be deemed to be held in a separate capacity from any omnibus customer account for non-public customers of such futures commission merchant *and from any account maintained with the debtor on its own behalf or on behalf of any non-public customer* (emphasis added only for illustration).

As proposed, § 190.08(b)(2)(xii) provided that except as otherwise provided in this section, an account maintained with a debtor by an agent or nominee for a principal or a beneficial owner shall be deemed to be an account held in the individual capacity of such principal or beneficial owner.

SIFMA AMG/MFA urged the Commission to amend this provision to ''treat accounts of the same principal or beneficial owner maintained by different agents or nominees as separate accounts,'' noting that this approach would ''reduce the administrative difficulties the trustee would face in consolidating all accounts of the same principal or beneficial owner'' and would ''avoid[] any confusion as to the treatment of separate accounts that could arise with the overlay of the time-limited relief provided by Letter 19–17.'' [140] SIFMA AMG/MFA asserted that this change would be similar to the approach taken by the Commission in proposed § 190.08(b)(2)(xiv), which provides that accounts held by a customer in separate capacities shall be deemed to be accounts of different customers.

The Commission notes that CFTC Letter 19–17 conditioned such relief on the FCM performing ''stress testing and credit limits . . . on a combined account basis'' and ''provid[ing] each beneficial owner using separate accounts with a disclosure that under CFTC [p]art 190 rules all separate accounts of the beneficial owner will be combined in the event of an FCM bankruptcy.'' [141] Thus, treating separate accounts of the same beneficial owner on a combined basis is entirely consistent with the approach taken in Letter 19–17. Nor is the situation of separate accounts for the same beneficial owner analogous to a customer holding accounts in separate capacities, as referred to in § 190.08(b)(2)(xiv) (*e.g.,* in their personal capacity versus in their capacity as trustee for X, or in their capacity as trustee for Y versus their capacity as trustee for Z.). In those latter cases, the same legal owner is acting for separate beneficial owners. Accordingly, the Commission is declining to amend § 190.08(b)(2)(xii).

Section 190.08(b)(3), setoffs, sets forth instructions regarding how and when to set off positive and negative equity balances.

Section 190.08(b)(4), correction for distributions, provides that the value of property that has been transferred or distributed must be added to the net equity amount calculated for that customer after performing the steps contained in § 190.08(b)(1) through (3). Section 190.08(b)(4) also includes a proviso that clarifies that the calculation of net equity for any late-filed claims (in cases where all accounts for which there are customer claims of record as of the filing date are transferred with all of the equity pertaining thereto) will be based on the allowed amount of such claims.

Section 190.08(b)(5), correction for ongoing events, provides that the calculation of net equity will be adjusted to correct for misestimates or errors, including corrections for the liquidation of claims or specifically identifiable property at a value different from the estimate value previously used in computing net equity.

As proposed, § 190.08(c) set forth the method for calculation of a customer's funded balance, *i.e.,* ''a customer's *pro rata* share of the customer estate with respect to each account class available for distribution to customers of the same customer class.'' Section 190.08(c)(1) sets forth instructions for calculating the funded balance of any customer claim, while § 190.08(c)(2) requires the funded balance to be adjusted to correct for ongoing events.

One change is being made to paragraph (c)(1), as a result of addressing a comment that affected a prior section. As proposed, § 190.08(c)(1)(ii) addressed giving customers credit for 100% of margin payments made after the order for relief.

As discussed above,[142] a number of commenters (ABA Subcommittee, CME, CMC), suggested that the definition of cash delivery property be expanded to address the possibility of post-filing-date payments made by customers to the FCM to pay for delivery. Such payments should be credited in full to the customer's funded balance. Indeed, § 190.06(a)(3)(ii)(B)(*2*) provides that the trustee could issue payment calls in this context and that ''the full amount of any payment made by the customer in response to a payment call must be credited to the funded balance of the particular account for which such payment is made.''

In order to be consistent with the principle that 100% of post-filing-date payments are credited to a customer's funded balance, proposed § 190.08(c)(1)(ii) is being amended, with the proposed language addressing post-filing-date margin payments to be codified as § 190.08(c)(1)(ii)(A), and the addition of § 190.08(c)(1)(ii)(B) to address post-filing-date payments for deliveries, to read as follows: ''[then adding 100% of] . . . [f]or cash delivery property, any cash transferred to the trustee on or after the filing date for the purpose of paying for delivery.''

Section 190.08(d), valuation, sets forth instructions about how to value

subsequent to the liquidation date, provisions that address how to deal with commodity contracts after that time are moot.

[138] Pursuant to section 20(a)(5) of the CEA, 7 U.S.C. 24(a)(5), the Commission has the power to provide how the net equity of a customer is to be determined.

[139] *See* section II.A.2 above.

[140] *See* CFTC Letter 19–17, *https://www.cftc.gov/node/217076.*

[141] *Id.* at 5 (emphasis supplied).

[142] *See* discussion of cash delivery property in section II.A.2, above.

commodity contracts and other property for purposes of calculating net equity as set forth in the rest of § 190.08.

Section 190.08(d)(1) sets forth instructions regarding how to value commodity contracts, separately addressing: (i) Open commodity contracts, and (ii) liquidated commodity contracts.

As proposed, § 190.08(d)(1)(i), regarding the valuation of open commodity contracts, states that ''if an open commodity contract is transferred to another commodity broker, its value on the debtor's books and records shall be determined as of the end of the last settlement cycle on the day preceding such transfer.'' The Commission noted in the proposal that ''[t]his would allow the value of the open commodity contract to be known prior to the transfer,'' [143] and, as discussed above, specifically sought comments on this issue.

The Commission received contrasting comments on this provision. ICE ''d[id] not believe that valuation is the right one, particularly because the market may move significantly on the date of transfer.'' By contrast, CME ''agree[d]'' with valuation as of the end the last settlement cycle on the day preceding transfer, because it aligns with calculations of funded balances under proposed § 190.08(c), and noted that ''any mark-to-market gains or losses on the date of the transfer should be reflected by the receiving FCM(s) in the customer account statements as a result of that day's settlement cycle.'' The Commission is persuaded by the latter comment, and will adopt the provision as proposed, both for the reasons stated by the latter commenter, and because of concerns regarding practicability. Markets move on a continuous basis so long as they are open and, considering markets around the world, some markets on which futures, foreign futures, or cleared swaps are traded are moving at all times other than over a weekend.

Section 190.08(d)(1)(ii)(A) allows the trustee to use the weighted average of liquidation prices for identical commodity contracts that are liquidated within a 24-hour period or business day, but not at the same price.

Section 190.08(d)(1)(ii)(B) provides instructions on how to value commodity contracts that are liquidated as part of a bulk auction by a clearing organization or similarly outside of the open market. As proposed, this provision would value a commodity contract that is liquidated as part of a bulk auction at the settlement price calculated by the clearing organization as of the end of the settlement cycle during which the commodity contract was liquidated. ICE disagreed with this approach, stating that ''the price achieved in the auction should be used.'' However, as the Commission noted in the proposing release, the units being auctioned will often be a heterogenous (though risk-related) set of products, tenors (*e.g.,* contract months), and directions (*e.g.,* long or short). Different auctioned portfolios may contain the same or similar contracts. In this context, setting the price of a particular contract based on the auction price for a portfolio would require considerable interpretation. Accordingly, the Commission will implement the approach from the proposal.

Section 190.08(d)(2) sets forth the approach for valuing listed securities, and incorporates the same weighted average concept discussed above with respect to § 190.08(d)(1)(ii)(A).

Section 190.08(d)(3) sets forth the approach for valuing commodities held in inventory, directing the trustee to use fair market value. If such fair market value is not readily ascertainable from public sources of prices, the trustee is directed to use the approach in § 190.08(d)(5), discussed below.

Section 190.08(d)(4) addresses the valuation of letters of credit. The trustee is directed to use the face amount (less amounts, if any, drawn and outstanding). However, if the trustee makes a determination in good faith that a draw is unlikely to be honored on either a temporary or permanent basis, they are directed to use the approach in paragraph (d)(5).

Section 190.08(d)(5) provides the trustee with pragmatic flexibility in determining the value of customer property by allowing the trustee, in their sole discretion, to enlist the use of professional assistance to value all other customer property.[144] This provision further notes that, if such property is sold, its value for purposes of the calculations required by this part is equal to the actual value realized on sale of such property (the trustee, of course, retains discretion to engage professional assistance to allocate such value among a heterogenous set of items sold as a unit). Finally, the provision notes that any such sale shall be made in compliance with all applicable statutes, rules, and orders of any court or governmental entity with jurisdiction thereover.

Accordingly, after consideration of the comments and for the reasons stated above, § 190.08 is being adopted as proposed, with modifications to the title and to § 190.08(a), (b), and (c), as set forth above.

7. Regulation § 190.09: Allocation of Property and Allowance of Claims

Section 190.09 is being adopted to set forth rules governing the scope of customer property, the allocation of customer property between customer and account classes, and distribution of customer property. It was derived from current § 190.08. It is being adopted as proposed with modifications to § 190.09(d)(3), as set forth below.

The Commission requested comment with respect to all aspects of proposed § 190.09. The Commission also raised particular questions with respect to: Whether the proposed revisions to § 190.09(a)(1) would appropriately preserve customer property for the benefit of customers; whether proposed § 190.09(a)(1)(ii)(G), concerning property that other regulations require to be placed into segregation, and § 190.09(a)(1)(ii)(L), concerning remaining shortfalls, are appropriately crafted; whether it is advisable to permit customers to post ''substitute customer property'' rather than ''cash'' in proposed § 190.09(d); and whether it is appropriate to clarify the term ''like-kind securities'' by reference to the concept, derived from SIPA, of ''securities of the same class and series of an issuer?''

There are three substantive changes in new § 190.09, as compared to current regulations:

Section 190.09(a)(1)(ii)(G) and (L) are two categories of property that are defined to be included in customer property in order better to protect customers from shortfalls in customer property (*i.e.,* cases where customer property is insufficient to cover claims for customer property).

Section 190.09(a)(1)(ii)(G) is a new category of property that constitutes customer property. It includes any cash, securities, or other property which constitutes current assets of the debtor, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, in the greater of (i) the amount of the debtor's targeted residual interest amount pursuant to § 1.11 with respect to each account class, or (ii) the debtor's obligations to cover debit balances or undermargined amounts as provided in §§ 1.20, 1.22, 22.2 and, 30.7. Each of the sets of regulations referred to in proposed § 190.09(a)(1)(ii)(G) requires an FCM to put certain funds into

[143] 85 FR 36028.

[144] The trustee's employment of professionals remains subject to the requirements of section 327 of the Bankruptcy Code.

segregation on behalf of customers. To the extent the FCM has failed to comply with those regulatory requirements prior to the filing of the bankruptcy, this provision requires the bankruptcy trustee to fulfill that requirement, and allows the trustee to use the current assets of the debtor to do that.

CME stated that this new provision is a ''substantial improvement over the current rule,'' and it was also supported by ICI and Vanguard.

Section 190.09(a)(1)(ii)(L) is the analog to current § 190.08(a)(1)(ii)(J) but with updated cross-references (and a new second sentence, discussed in the next paragraph). It states that customer property includes any cash, securities, or other property in the debtor's estate, but only to the extent that the customer property under the other definitional elements is insufficient to satisfy in full all claims of the FCM's public customers.[145]

A new second sentence of § 190.09(a)(1)(ii)(L) notes explicitly that customer property for purposes of these regulations includes any ''customer property,'' as that term is defined in SIPA, that remains after satisfaction of the provisions in SIPA regarding allocation of (securities) customer property. SIPA provides that such remaining customer property would be allocated to the general estate of the debtor.[146] Any securities customer property that remains after satisfaction in full of securities claims provided for in that section of SIPA proceeding and would accordingly become property of the general estate should, to the extent otherwise provided in proposed § 190.09(a)(1)(ii)(L), and for the same reasons, become customer property in the FCM bankruptcy proceeding.

Section 190.09(d) governs the distribution of customer property, and has its analog in current § 190.08(d). Section 190.09(d)(1)(i) and (ii) and (d)(2) require customers to deposit ''substitute customer property,'' to obtain the return or transfer of specifically identifiable property. ''Substitute customer property'' is defined in § 190.01 to mean (in relevant part) ''cash or cash equivalents.'' ''Cash equivalents,'' in turn, are defined as ''assets, other than United States dollar cash, that are highly liquid such that they may be converted into United States dollar cash within one business day without material discount in value.''

The purpose of requiring customers to, in essence, ''buy back'' specifically identifiable property is to implement the *pro rata* distribution principle set forth in section 766(h) of the Bankruptcy Code, and discussed in § 190.00(d)(5). Permitting customers to redeem specifically identifiable property with either cash or cash equivalents, rather than requiring cash, may mitigate the difficulty (and costs) such customers face in obtaining redemption, but will in any event fully implement the *pro rata* distribution principle.

As a technical point, the ABA Subcommittee recommended (consistent with their recommendation in the definitions section, § 190.01, to more precisely use the term ''allowed net equity'') that the reference in proposed § 190.09(d)(3) to the amount distributable on a customer's claim be amended to add ''[the] funded balance of'' before the phrase ''such customers allowed net equity claim.'' The Commission agrees, and is making the change.

The remaining provisions of revised § 190.09 include only technical changes to the current regulations.

Accordingly, after consideration of the comments, and for the reasons stated above, § 190.09 will be adopted as proposed, with the modification to § 190.09(d)(3) referred to above.

8. Regulation § 190.10: Provisions Applicable to Futures Commission Merchants During Business as Usual

The Commission proposed § 190.10 to contain new and relocated provisions that set forth an FCM's obligations during business as usual. The Commission requested comment with respect to all aspects of proposed § 190.10, and specifically with respect to (1) the impact of proposed § 190.10(b) regarding the designation of hedging accounts, (2) the impact of proposed § 190.10(c) regarding the establishment of delivery accounts during business as usual, (3) the changes in proposed § 190.10(d) to the business as usual requirements for acceptance of letters of credit, and in particular (a) whether its understanding is correct that most letters of credit currently in use by the industry follow the JAC forms, (b) the impact of additional requirements concerning letters of credit (as well as any alternative methods of achieving the goal of treating customers posting letters of credit consistent with the treatment of other customers), and (c) whether the proposed one year transition period is reasonable, and (4) the disclosure statement for non-cash margin set out in proposed § 190.10(e) (whether the statement is helpful, legally or practically, whether it should be changed, or whether it should be deleted).

Section 190.10 will be adopted as proposed with modifications. In particular, the ABA Subcommittee and CME suggested that the provisions in proposed § 190.10 be codified in part 1, along with other regulations that pertain to an FCM's business as usual. The ABA Subcommittee stated that, while they had originally suggested that these provisions belong in § 190.10, ''[u]pon further reflection, the Committee believes that such a rule more logically belongs in the Commission's Part 1 Regulations, along with other rules that apply to FCMs during business as usual. Compliance and legal personnel could inadvertently overlook obligations that are not located in the Commission rule set where they would expect to find them.''

The Commission agrees with the commenters that transparency would be fostered by putting the ''business as usual'' requirements proposed for § 190.10 into part 1 of the Commission's regulations. Accordingly, as discussed further below, most of the paragraphs of the regulation that was proposed as § 190.10 are being renumbered and will be codified in specified places in part 1. The provisions of proposed § 190.10 will otherwise be adopted as proposed.

The provision proposed as § 190.10(a) notes that an FCM is required to maintain current records relating to its customer accounts, pursuant to §§ 1.31, 1.35, 1.36, and 1.37, and in a manner that would permit them to be provided to another FCM in connection with the transfer of open customer contracts of other customer property. This provision recognizes that current and accurate records are imperative in arranging for the transfer of customer contracts and other property, both for the trustee of the estate of the defaulter and for an FCM that is accepting the transfer. Nonetheless, it does not add to an FCM's obligations under the specified regulations, but rather is useful as a reference for the trustee. Accordingly, this provision will not be moved to part 1.

No comments were received with respect to the substance of proposed § 190.10(a). As the remaining paragraphs of proposed § 190.10 will be moved to part 1, this provision will be codified as § 190.10.

The provision proposed as § 190.10(b) concerns the designation of hedging accounts. It incorporates concepts contained in current §§ 190.04(e) and 190.06(d) and the current Bankruptcy appendix form 3 instructions. As it sets

[145] ICE notes that the issues with respect to this provision may be complicated, and that it may warrant further consideration, but ultimately expresses no view on it.

[146] *See generally* SIPA section 8(c)(1), 15 U.S.C. 78fff–2(c)(1).

forth obligations for an FCM during business as usual, it will be moved to part 1. As it does not fit under any existing part 1 regulation, it will be moved under the miscellaneous heading of part 1, and codified as § 1.41.

For purposes of § 1.41, a customer will not need to provide, and an FCM will not be required to judge, evidence of hedging intent for purposes of bankruptcy treatment. Rather, § 1.41 will permit the FCM to treat the account as a hedging account for such purposes based solely upon the written record of the customer's representation. Hedging treatment for these bankruptcy purposes will not be determinative for any other purpose.

Section 1.41(a) will require an FCM to provide a customer an opportunity to designate an account as a hedging account when the customer first opens the account, rather than when the customer undertakes its first hedging contract, as specified in current § 190.06(d)(1). This provision will also require that the FCM indicate prominently in its accounting records for each customer account whether the account is designated as a hedging account.

Section 1.41(b) will set forth the requirements for an FCM to treat an account as a hedging account: If, but only if, the FCM obtains the customer's written representation that the customer's trading in the account will constitute hedging as defined under any relevant Commission regulation or rule of a DCO, DCM, SEF, or FBOT. CME supported this approach, and the clarity it adds.

In order to avoid the significant burden that would be associated with requiring FCMs to re-obtain hedging instructions for existing accounts, § 1.41(c) will provide that the requirements of § 1.41(a) and (b) do not apply to commodity contract accounts opened prior to the effective date of these revisions. Rather, the provision will recognize expressly that an FCM may continue to designate existing accounts as hedging accounts based on written hedging instructions obtained under former § 190.06(d).

Finally, § 1.41(d) will permit an FCM to designate an existing futures, foreign futures or cleared swaps account of a particular customer as a hedging account, provided that the FCM obtains the representation required under § 1.41(b).

The provision proposed as § 190.10(c) addresses the establishment of delivery accounts during business as usual.[147] As it sets forth obligations for an FCM during business as usual, it will be moved to part 1. As it does not fit under any existing part 1 regulation, it will be moved under the miscellaneous heading, and codified as § 1.42.

When a commodity contract is in the delivery phase, or when a customer has taken delivery of commodities that are physically delivered, associated property may be held in a ''delivery account'' rather than in the segregated accounts pursuant to, *e.g.,* § 1.20 or § 22.2. Section 1.42 recognizes that when an FCM facilitates delivery under a customer's physical delivery contract, and such delivery is effected outside of a futures account, foreign futures account, or cleared swaps account, it must be effected through (and the associated property held in) a delivery account. If, however, the commodity that is subject to delivery is a security, the FCM may effect delivery through (and the property may be held in) a securities account. The regulation clarifies that the property must be held in one of these types of accounts. ICE and CME generally support this provision.[148]

The provision proposed as § 190.10(d) addresses letters of credit that an FCM accepts as collateral. As it sets forth obligations for an FCM during business as usual, it will be moved to part 1. As it does not fit under any existing part 1 regulation, it will be moved under the miscellaneous heading, and codified as § 1.43.

Section 1.43 will prohibit an FCM from accepting a letter of credit as collateral unless certain conditions (1) are met at the time of acceptance and (2) remain true through its date of expiration.

First, pursuant to § 1.43(a), the trustee must be able to draw upon the letter of credit, in full or in part, in the event of a bankruptcy proceeding, the entry of a protective decree under SIPA, or the appointment of FDIC as receiver pursuant to Title II of the Dodd-Frank Act. Second, pursuant to § 1.43(b), if the letter of credit is permitted to be and is passed through to a clearing organization, the bankruptcy trustee for such clearing organization or (if applicable) FDIC must be able to draw upon the letter of credit, in full or in part, in the event of a bankruptcy proceeding, or where the FDIC is appointed as receiver pursuant to Title II.

The Commission has considered the impact that implementation of this regulation would have on FCMs and their customers, since letters of credit are currently in use by the industry.[149] The Commission proposed that, upon the effective date of the regulation, what is now codified as § 1.43 would apply only to *new* letters of credit and customer agreements. In order to mitigate the impact of implementing this regulation with respect to *existing* letters of credit and customer agreements, the Commission proposed a transition period of one year from the effective date until § 1.43 will apply to existing letters of credit and customer agreements.

CME supported this one-year transition period. By contrast, SIFMA AMG/MFA urged the Commission to shorten it in the interest of investor protection. They asked how letters of credit would be treated if an FCM were to go into bankruptcy during the transition period?

The provisions in this rulemaking regarding letters of credit are intended to codify the Commission's longstanding policy that ''customers using a letter of credit to meet original margin obligations [sh]ould be treated no differently than customers depositing other forms of non-cash margin or customers with excess cash margin deposits.'' [150] This is the policy that has been advanced by the Commission, including in litigation,[151] under the current rules. Moreover, this policy is supported by the provision in revised § 190.04(d)(3)(ii) that, for a letter of credit posted as collateral, ''the trustee shall treat any portion that is not drawn upon (less the value of any substitute customer property delivered by the customer) as having been distributed to the customer for purposes of calculating entitlements to distribution or transfer.'' That provision is not subject to the one-year transition period.

While the Commission will decline to shorten the one-year transition period for existing letters of credit, trustees will be expected to treat such letters of credit in accordance with the Commission's policy.

The provision proposed as § 190.10(e) concerns the disclosure statement for non-cash margin. No comments were received specific to this provision.

[147] *See* § 190.06 regarding the making and taking of deliveries during bankruptcy.

[148] CME again recommended that the Commission consider adopting customer protection requirements with respect to delivery accounts via a separate rulemaking.

[149] The Joint Audit Committee (''JAC'') forms for an Irrevocable Standby Letter of Credit (both Pass-Through and Non Pass-Through) appear to be consistent with the requirements of § 1.43.

[150] *See, e.g.,* 48 FR 8716, 8718 (March 1, 1983) (Adopting release for part 190); Proposal, 86 FR at 36019 & n. 103.

[151] *See, e.g.* Brief of the Commodity Futures Trading Commission In Support Of The Trustee's Motion To Confirm in *ConocoPhillips* v. *Giddens,* Case No. 1:12–cv–06014–KBF, Document 33.

As it sets forth obligations for an FCM during business as usual, it will be moved to part 1. This provision does fit under existing § 1.55 (Public disclosures by futures commission merchants), and will be added at the end, codified as § 1.55(p).

Accordingly, after consideration of the comments, and for the reasons stated above, § 190.10 will be adopted as proposed, with modifications: Proposed § 190.10(a) will be codified as § 190.10, proposed § 190.10(b) will be codified as § 1.41, proposed § 190.10(c) will be codified as § 1.42, proposed § 190.10(d) will be codified as § 1.43, and proposed § 190.10(e) will be codified as § 1.55(p).

C. Subpart C—Clearing Organization as Debtor

The Commission is adopting a new subpart C of part 190 (proposed §§ 190.11–190.19), with certain modifications discussed below, to address the currently unprecedented scenario of a clearing organization as debtor.[152]

The customers of a clearing organization are its members, considered separately in two roles: (1) Each member may have a proprietary (also known as ''house'') account at the clearing organization, on behalf of itself and its non-public customers (*i.e.,* affiliates). The property that the clearing organization holds in respect of these accounts is referred to as ''member property.'' (2) Each member may have one or more accounts (*e.g.,* futures, cleared swaps) for that members' public customers. The property that the clearing organization holds in respect of these accounts is referred to as ''customer property other than member property.'' Many clearing members will have both such types of accounts, although some may have only one or the other.

1. Regulation § 190.11: Scope and Purpose of Subpart C

The Commission is adopting § 190.11 as proposed, but designated as new paragraph (a), and adding a new paragraph (b), as set forth below. The Commission is adopting § 190.11 to establish that subpart C of part 190 will apply to proceedings under subchapter IV to chapter 7 of the Bankruptcy Code where the debtor is a clearing organization.

When originally proposing part 190 in 1981, the Commission proposed to (and ultimately did) forego providing generally applicable rules for the bankruptcy of a clearing organization.[153] The Commission explained that it had proposed no other rules with respect to the operation of clearing organization debtors—other than proposing that all open commodity contracts, even those in a deliverable position, be liquidated in the event of a clearing organization bankruptcy—because the Commission viewed it as highly unlikely that an exchange could maintain a properly functioning futures market in the event of the collapse of its clearing organization. The Commission noted that, under section 764(b)(2) of the Bankruptcy Code, it had the power to permit a distribution of the proceeds of a clearing organization liquidation free from the avoidance powers of the trustee. The Commission further explained that it was not proposing a general rule, because the bankruptcy of a clearing organization would be unique. Instead, the Commission was inclined to take a case-by-case approach with respect to clearing organizations, given the potential for market disruption and disruption of the nation's economy as a whole, in the case of a clearing organization bankruptcy, as well as the desirability of the Commission's active participation in developing a means of meeting such an emergency.[154]

Much has changed in the intervening 39 years. Markets move much more quickly, and thus the importance of quick action in respect to the bankruptcy of a clearing organization has increased. The Commodity Futures Modernization Act established DCOs as a separate registration category.[155] The bankruptcy of a clearing organization would remain unique—it remains the case that no clearing organization registered with the Commission has ever entered bankruptcy—and thus the need for significant flexibility remains, but the balance has shifted towards establishing *ex ante* the approach that would be taken.

Two clearing organizations for which the Commission has been designated the agency with primary jurisdiction have been designated as systemically important to the United States financial system pursuant to Title VIII of Dodd-Frank.[156] If any clearing organization were to approach insolvency, it is possible, though not certain, that such an entity would be resolved pursuant to Title II of Dodd-Frank.[157]

Administration of a resolution under Title II of Dodd-Frank depends, in part, on clarity as to entitlements under chapter 7 of the Bankruptcy Code. Specifically, section 210(a)(7)(B) of Dodd-Frank [158] provides with respect to claims against the covered financial agency in resolution, that ''a creditor shall, in no event, receive less than the amount that the creditor is entitled to under paragraphs (2) and (3) of subsection (d), as applicable.'' Tracing to the cross-referenced subsection, section 210(d)(2) [159] provides that the maximum liability of the FDIC to a claimant is the amount that the claimant would have received if the FDIC had not been appointed receiver, and (instead), the covered financial company had been liquidated under chapter 7 of the Bankruptcy Code.[160] Thus, it is important to have a clear ''counterfactual'' that establishes what creditors would be entitled to in the case of the liquidation of a clearing

[152] After considering comments that were received on the original Proposal, the Commission subsequently issued a Supplemental Proposal that withdrew § 190.14(b)(2) and (3), and proposed other revisions to § 190.14. Bankruptcy Regulations, 85 FR 60110 (Sept. 24, 2020).

[153] At the time, the definition of clearing organization in section 761(2) of the Bankruptcy Code was an ''organization that clears commodity contracts on, or subject to the rules of, a contract market or board of trade.'' *See* Public Law 95–598 (1978), 92 Stat 2549.

[154] 46 FR 57535, 57545 (Nov. 24, 1981).

[155] Commodity Futures Modernization Act of 2000 Public Law 106–554 section 1(a)(5); Appendix E, section 112(f).

[156] *See* Dodd-Frank section 804 (designation of systemic importance), section 803(8) (definition of ''supervisory agency''), 12 U.S.C. 5463, 5462(8). These are CME and ICE Clear Credit. A third clearing organization (Options Clearing Corporation) has also been so designated, but the SEC is the supervisory agency in that case.

[157] Resolution under Title II would require a recommendation concerning factors specified in section 203(a)(2) of Dodd-Frank, 12 U.S.C. 5383(a)(2), by a ⅔ majority of the members then serving of each of the Board of Governors of the Federal Reserve System and of the FDIC, followed by a determination concerning a related set of factors specified in section 203(b), 12 U.S.C. 5383(b), by the Secretary of the Treasury in consultation with the President. Thus, the choice of resolution versus bankruptcy for a DCO that is, in the terminology of Dodd-Frank, ''in default or in danger of default,'' *see* Dodd-Frank section 203(c)(4), 12 U.S.C. 5383(c)(4), cannot be considered certain.

It is, however, clear that Title II applies to clearing organizations. *See, e.g.,* Dodd-Frank section 210(m), 12 U.S.C. 5390(m) (applying ''the provisions of subchapter IV of chapter 7 of the bankruptcy code'' to ''member property'' of ''commodity brokers''). Pursuant to section 761(16) of the Bankruptcy Code, ''member property'' applies only to a debtor that is a ''clearing organization.'' 11 U.S.C. 761(16).

[158] 12 U.S.C. 5390(a)(7)(B).

[159] 12 U.S.C. 5390(d)(2).

[160] For the sake of completeness, it should be noted that section 210(d)(2), 12 U.S.C. 5390(d)(2), provides, as an additional comparator, ''any similar provision of State insolvency law applicable to the covered financial company.'' Given Federal regulation of DCOs, it would appear that this phrase is inapplicable. Similarly, section 210(d)(3), 12 U.S.C. 5390(d)(3), which refers to covered financial companies that are brokers or dealers resolved by SIPC, is also inapplicable here, given the inconsistency in being both a DCO and a broker-dealer.

organization under chapter 7 (subchapter IV) of the Bankruptcy Code.

Although the Commission believes that the potential—albeit unprecedented—scenario of a clearing organization as debtor would require significant flexibility, the Commission also believes it necessary and appropriate to establish an *ex ante* set of regulations for such a scenario.

The Commission requested comment regarding the proposed scope of subpart C, as set forth in proposed § 190.11. The Commission also specifically asked commenters whether they supported or opposed the establishment of an explicit, bespoke set of regulations for the bankruptcy of a clearing organization.

The Commission received two comments that raised concerns about how the proposed subpart C regulations would apply in the case of a debtor clearing organization that is organized and/or domiciled in a foreign country. SIFMA AMG/MFA commented that ''Part 190 should include a clear statement of public policy . . . that if an insolvency proceeding is commenced in respect of a DCO located outside the United States, such home country proceeding should take precedence over any case under the [U.S.] Bankruptcy Code.''

ICE commented that such a clearing organization, if insolvent, ''is likely to be subject to an insolvency proceeding in its home jurisdiction.'' ICE also commented that many such DCOs ''have significant assets (including for this purpose, the assets of clearing members and their customers.'' In particular, ICE stated that ''a foreign DCO may have, in addition to the customer account classes contemplated by the CEA and CFTC regulations (and the Part 190 regulations), one or more classes of customer accounts that are required to be segregated or separately accounted for under applicable foreign law, generally for the protection of foreign clearing members and their customers.'' ICE further commented that, ''[t]o the extent the Part 190 rules mandate a distribution scheme for property of the [DCO in bankruptcy] that would be inconsistent with foreign law applicable to the DCO, and that could disadvantage foreign members or their customers, significant conflicts may arise . . . .'' ICE suggested two alternative approaches for the Commission to consider: (1) The ''Commission could provide that the new Part 190 regulations would not apply to a foreign DCO;'' or (2) ''[a]lternatively, the Commission could provide that the new Part 190 regulations, including the distributional regime, would apply only to the separate customer account class structure provided for under U.S. law (futures, cleared swaps and foreign futures), to the extent carried through FCM clearing members.''

After considering the comments, the Commission is adopting § 190.11 with modifications. With respect to the protection of customer property in connection with foreign DCOs, the Commission has traditionally focused its efforts on the protection of the public customers of FCM members of such foreign DCOs. While protecting public customers of FCM members of foreign DCOs would not be well served by disapplying part 190 in the case of foreign DCOs, as suggested in ICE's first approach, as well as in the comment by SIFMA AMG/MFA, balancing the goal of protecting public customers of FCM members with the goal of mitigating conflict with foreign proceedings would appear to be supported by following ICE's second approach, and limiting the applicability of part 190, in the case of a foreign DCO subject to a proceeding in its home jurisdiction, to focus on the contracts and property of public customers of FCM members.

In order to balance the goal of protecting public customers of FCM members with the goal of mitigating conflict with foreign proceedings, the Commission believes it to be appropriate that, in a situation where a debtor clearing organization is organized outside the United States and is subject to a foreign bankruptcy proceeding, part 190 should apply as follows. First, the Commission believes it to be appropriate that subpart A should apply to such proceedings, given that those provisions set forth core concepts, definitions and general provisions. Second, the Commission believes it to be appropriate that § 190.12 should apply to such proceedings, given that the regulation sets forth requirements for records and reporting, which are critical in such proceedings. And third, the Commission believes it to be appropriate that three regulations should be applicable in a limited fashion, to focus on the contracts and property of public customers of FCM members:[161] (1) § 190.13, setting forth the prohibition on avoidance of transfers, but only with respect to futures and cleared swaps contracts cleared by FCM clearing members on behalf of their public customers; (2) § 190.17, setting forth the calculation of net equity; and (3) § 190.18, setting forth the treatment of property. In such a scenario, §§ 190.13, 190.17, and 190.18 would only apply with respect to: (1) Claims of FCM clearing members on behalf of their public customers; and (2) property that is or should have been segregated for the benefit of FCM clearing members' public customers, or that has been recovered for the benefit of FCM clearing members' public customers.

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is: (1) Adopting the language of § 190.11 as proposed, but designated as new paragraph (a); and (2) modifying proposed § 190.11 by adding the following as new paragraph (b): If the debtor clearing organization is organized outside the United States, and is subject to a foreign proceeding, as defined in 11 U.S.C. 101(23), in the jurisdiction in which it is organized, then only the following provisions of part 190 shall apply: (1) Subpart A; (2) § 190.12; (3) § 190.13, but only with respect to futures contracts and cleared swaps contracts cleared by FCM clearing members on behalf of their public customers and the property margining or securing such contracts; and (4) §§ 190.17 and 190.18, but only with respect to claims of FCM clearing members on behalf of their public customers, as well as property that is or should have been segregated for the benefit of FCM clearing members' public customers, or that has been recovered for the benefit of FCM clearing members' public customers.''

2. Regulation § 190.12: Required Reports and Records

The Commission is adopting § 190.12 to establish the recordkeeping and reporting obligations of a debtor clearing organization and/or trustee in a bankruptcy proceeding under subpart C.

The operations of a clearing organization are extremely time-sensitive. For example, § 39.14 requires that a clearing organization complete settlement with each clearing member at least once every business day. It is thus critical that the Commission receive notice of a DCO bankruptcy in an extraordinarily rapid manner. Similarly, the trustee that is appointed (as well as the Commission) must receive critical documents rapidly, and proper notice should be provided to the DCO's members.

Regulation § 190.12 sets forth the timing and content of notices that must be provided to the Commission and the DCO's members, as well as the timing and content of reports and records that

[161] As noted above, the Commission has traditionally focused its efforts on the protection of the public customers of FCM members of such foreign DCOs. In a DCO bankruptcy, the Commission believes that the application of these three regulations would be critical to fulfilling the agency's mission to protect customers.

must be provided to the Commission and trustee.

Section 190.12(a)(1) is analogous to § 190.03(a), as amended herein, in that it would provide instructions regarding how to give notice to the Commission and to a clearing organization's members, where such notice would be required under subpart C of part 190.[162] Section 190.12(a)(2) would require the clearing organization to notify the Commission either in advance of, or at the time of, filing a petition in bankruptcy (or within three hours of receiving notice of a filing of an involuntary petition against it).[163] Notice would need to include the filing date and the court in which the proceeding has been or will be filed. While the clearing organization would also need to provide notice of the docket number, if the docket number is not immediately assigned, that information would be provided separately as soon as available.

It is also important to permit the trustee to begin to understand the business of the clearing organization as soon as practicable, and within hours. Accordingly, § 190.12(b)(1) requires the clearing organization to provide to the trustee copies of each of the most recent reports filed with the Commission under § 39.19(c), which includes § 39.19(c)(1) (daily reports, including initial margin required and on deposit by clearing member, daily variation and end-of-day positions (by member, by house and customer origin), and other daily cash flows), § 39.19(c)(2) (quarterly reports, including of financial resources), § 39.19(c)(3) (annual reporting, including audited financial statements and a report of the chief compliance officer), § 39.14(c)(4) (event-specific reporting, which would include the most up-to-date version of any recovery and wind-down plans the debtor maintained pursuant to § 39.39(b),[164] and which may well include events that contributed to the clearing organization's bankruptcy), and § 39.19(c)(5) (reporting specially requested by the Commission or, by delegated authority, staff). In order to provide the trustee with an initial overview of the business and status of the clearing organization, with respect to quarterly, annual, or event-specific reports, the clearing organization would be required to provide any such reports filed during the preceding 12 months. These reports would need to be provided to the trustee as soon as practicable, but in any event no later than three hours following the later of the commencement of the proceeding or the appointment of the trustee. It is the Commission's expectation that in the event of an impending bankruptcy event, staff at the DCO would, as soon as practicable, be preparing these materials for transmission to the trustee.

Similarly, § 190.12(b)(2) requires the debtor clearing organization, in the same time-frame, to provide the trustee and the Commission with copies of the default management plan and default rules and procedures maintained by the debtor pursuant to § 39.16 and, as applicable, § 39.35. While some of this information may have previously been filed with the Commission pursuant to § 39.19, it is important that the Commission have readily available what the clearing organization believes are the most up-to-date versions of these documents. Moreover, given that these documents must be provided to the trustee, providing copies to the Commission should impose minimal additional burden (particularly if the documents are provided in electronic form).

Regulation § 39.20(a) requires a DCO to maintain records of all activities related to its business as such, and sets forth a non-exclusive list of the records that are included in that term. To enable the trustee and the Commission further to understand the business of the clearing organization, § 190.12(c) requires the debtor clearing organization to make copies of such records available to the trustee and to the Commission no later than the business day after the commencement of the proceeding. In order to inform the trustee and the Commission better concerning the enforceability in bankruptcy of the clearing organization's rules and procedures, the clearing organization is similarly required to make available any opinions of counsel or other legal memoranda provided to the debtor, by inside or outside counsel, in the five years preceding the commencement of the proceeding, relating to the enforceability of those arrangements in the event of an insolvency proceeding involving the debtor.[165]

The Commission requested comment with respect to all aspects of proposed § 190.12. The Commission raised specific questions as to whether the reports and records identified in proposed § 190.12 to be provided to the Commission are useful and appropriate, and whether additional reports and records should be included. The Commission also asked if the proposed time deadlines are appropriate.

The Commission received two comments on proposed § 190.12.

CME expressed support for proposed § 190.12, and agreed with the Commission that ''the reports and records identified in [the proposed regulation] would be useful for the trustee and the Commission.'' CME also agreed with the Commission that certain items, such as the DCO's default rules and recovery and wind-down plans, should be furnished as soon as possible.

OCC ''generally support[ed] a requirement for a DCO to provide a trustee and the Commission with information they need for efficient resolution of the DCO,'' recognizing that ''time would be of the essence in such a proceeding.'' OCC also noted that, because the ''information is periodically reported to, or filed with, the Commission,'' OCC did not ''foresee any challenge in identifying and providing this information without delay.'' However, OCC requested that proposed § 190.12(b) be amended to require a DCO to provide the information delineated therein ''as soon as practicable.'' OCC ''believe[d] that a specific deadline of three hours is overly prescriptive.''

After considering the comments, the Commission is adopting § 190.12 as proposed. As the commenters observed, the information specified in § 190.12 is

[162] While § 190.03(a)(2), as amended herein, applies to notice to an FCM's customers, and § 190.12(a)(1)(ii) applies to notice to a clearing organization's members, the means of giving notice are identical. For a discussion of how these notice provisions differ from the prior iteration of part 190, please refer to the discussion of § 190.03(a) above.

[163] Commodity broker bankruptcies are rare, and outside the experience of most chapter 7 trustees, who are chosen from a panel of private trustees eligible to serve as such for all chapter 7 cases. *See generally* 11 U.S.C. 701(a)(1), 28 U.S.C. 586(a)(1). Historically, Commission staff, on being notified of an impending commodity broker bankruptcy, have worked with the office of the relevant regional United States Trustee, *see generally* 28 U.S.C. 581 *et seq.,* to identify, and have then briefed, the chapter 7 trustee that would then be appointed. This would be even more important in the context of a clearing organization bankruptcy.

[164] *See* § 39.19(c)(4)(xxiv).

[165] The trustee of a corporation in bankruptcy controls the corporation's attorney-client privilege for pre-bankruptcy communications. *Commodity Futures Trading Comm'n* v. *Weintraub,* 471 U.S. 343 (1985). Production to the Commission pursuant to the proposed regulation would not waive that privilege (although voluntary production would). *See, e.g., U.S.* v. *de la Jara,* 973 F.2d 746, 749 (9th Cir. 1992) (''a party does not waive the attorney-client privilege for documents which he is *compelled* to produce'') (emphasis in original); Office of Comptroller of the Currency Interpretative Letter, 1991 WL 338409 (with respect to ''internal Bank documents'' that are ''subject to the attorney-client privilege'' and are ''requested by OCC examiners for their use during examinations of the Bank,'' OCC ''has the power to request and receive materials from national banks in carrying out its supervisory duties. It follows that national banks must comply with such requests. That being the case, it is our position that when national banks furnish documents to us at our request they are not acting voluntarily and do not waive any attorney-client privilege that may attach to such documents.'').

important for the trustee and the Commission, and time would be of the essence in a DCO bankruptcy. Moreover, the prescribed task in § 190.12 is to gather and transmit documents that already exist, rather than to generate new information. The documents to be sent to the trustee are documents that were recently sent to the Commission, and the documents to be sent to the trustee and to the Commission are documents that one would expect, as the commenter noted, to be readily accessible. In this context, the Commission believes that a deadline of ''as soon as practicable and in any event no later than three hours following the commencement of the proceeding'' (or, where appropriate, the appointment of the trustee) is reasonable and will set clear expectations for relevant parties that will facilitate DCOs' contingency planning.

Accordingly, after consideration of the comments, and for the reasons stated above, the Commission is adopting § 190.12 as proposed.

3. Regulation § 190.13: Prohibition on Avoidance of Transfers

The Commission is adopting § 190.13 as proposed, to implement section 764(b) of the U.S. Bankruptcy Code, protecting certain transfers from avoidance (sometimes referred to as ''claw-back'') with respect to a debtor clearing organization. Regulation § 190.13 is analogous to new § 190.07(e) (and current § 190.06(g)), with certain changes. Specifically, while § 190.07(e) allows FCM transfers unless they are explicitly disapproved by the Commission, § 190.13 requires explicit Commission approval for DCO transfers. The difference in approach is rooted in the inherent difference between FCM transfers and DCO transfers: Whereas an FCM is capable of transferring only a portion of its customer positions, a DCO would be expected to transfer all of its customer positions (or at least all positions in a given product set) simultaneously in order to maintain a balanced book. Given the importance of transferring all open commodity contracts—and the property margining such contracts—in the event of a DCO bankruptcy, the Commission believes that any such transfer should require explicit Commission approval, either before or after such transfer.

Thus, whereas § 190.07(e)(1) provides that a pre-relief transfer by a clearing organization cannot be avoided as long as it is *not disapproved* by the Commission, § 190.13(a) instead provides that a pre-relief transfer of open commodity contracts and the property margining or securing such contracts cannot be avoided as long as it was *approved* by the Commission, either before or after such transfer. Similarly, whereas § 190.07(e)(2)(i) provides (for all commodity brokers, including clearing organizations) that a post-relief transfer of a customer account cannot be avoided as long as it is *not disapproved* by the Commission, § 190.13(b) instead provides that a post-relief transfer of open commodity contracts and the property margining or securing such contracts made to another clearing organization cannot be avoided as long as it was *approved* by the Commission, either before or after such transfer.

The Commission requested comment with respect to all aspects of proposed § 190.13, and in particular, the Commission asked whether commenters agreed with the proposed approach of requiring explicit Commission approval of transfers by debtor DCOs.

The Commission received one comment on proposed § 190.13. CME expressed support for proposed § 190.13, particularly the allowance for Commission approval of transfers after such transfers have occurred. CME noted that porting customer positions to a DCO would be the preferred course of action in a bankruptcy, and a DCO may need to act quickly.

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting § 190.13 as proposed.

4. Regulation § 190.14: Operation of the Estate of the Debtor Subsequent to the Filing Date

The Commission is adopting § 190.14 as proposed, with certain modifications discussed below.

Section 190.14(a) provides discretion to the trustee to design the proof of claim form and to specify the information that is required. The Commission believes that broad discretion is appropriate in this context, given the bespoke nature of a clearing organization bankruptcy.

Section 190.14(b) addresses the operation of a debtor clearing organization in bankruptcy and provides that, after the order for relief, the DCO shall cease making calls for either variation or initial margin.

As originally proposed, § 190.14(b) included additional provisions that were intended to provide a brief opportunity, after the order for relief, to enable paths alternative to liquidation—that is, resolution under Title II of the Dodd-Frank Act, or transfer of clearing operations to another DCO—in cases where a short delay (*i.e.,* less than or equal to six days) might facilitate such an alternative path. Subsequent to the issuance of the Proposal, the Commission received several comments on proposed § 190.14(b), and based on its consideration of those comments, the Commission determined it to be appropriate to issue the Supplemental Proposal. The Supplemental Proposal modified proposed § 190.14(b) in several respects, including the withdrawal of proposed § 190.14(b)(2) and (3) and the new proposal of an alternative approach.[166] Further discussion of the Supplemental Proposal, including the Commission's consideration of comments received in response to the Supplemental Proposal, is set forth in section II.H below.

Section 190.14(c)(1) requires the trustee to liquidate, no later than seven calendar days after the order for relief, all open commodity contracts that had not earlier been terminated, liquidated or transferred. However, in the Proposal, paragraph (c)(1) also provided that such liquidation would not be required if the Commission (whether at the request of the trustee or *sua sponte*) determined that such liquidation would be inconsistent with the avoidance of systemic risk[167] or, in the expert judgment of the Commission, would not be in the best interests of the debtor clearing organization's estate.[168] In such a situation, the trustee would be directed to carry out such liquidation in accordance with the rules and procedures of the debtor clearing

[166] In withdrawing proposed § 190.14(b)(2) and (3), the Commission determined, after considering the comments, that those provisions would not be a practicable and effective way to foster the transfer of clearing operations—to the extent that such an opportunity presents itself—at an acceptable cost. The Commission also endeavored to propose (in the Supplemental Proposal) a more cost-effective alternative to foster the resolution of a DCO—in particular, a systemically important DCO—under Title II of the Dodd-Frank Act. Specifically, as set forth in the Supplemental Proposal, the Commission proposed ''a limited revision to the Proposal that would (1) stay the termination of SIDCO contracts for a brief time after bankruptcy in order to foster the success of a Title II Resolution, if the FDIC is appointed receiver in such a Resolution within that time, but (2) do so in a manner that does not undermine the QMNA status of SIDCO rules.''

The Commission sought comment on the Supplemental Proposal, and in particular, whether the new approach could reasonably be expected to achieve the Commission's stated goals, would be feasible, would be the best design for such a solution, and appropriately reflected consideration of benefits and costs.

[167] *See* section 3(b) of the CEA, 7 U.S.C. 5(b) (''It is the purpose of [the CEA] . . . to ensure . . . the avoidance of systemic risk . . . .'').

[168] *See* section 20(a)(3) of the CEA, 7 U.S.C. 24(a)(3) (''Notwithstanding title 11 . . . , the Commission may provide, with respect to a commodity broker that is a debtor . . . [,] the method by which the business of such commodity broker is to be conducted or liquidated after the date of the filing of the petition . . . .'').

organization, to the extent applicable and practicable.[169]

Section 190.14(c)(2) permits the trustee to make distributions to members in the form of securities that are equivalent (*i.e.,* securities of the same class and series of an issuer) to those that were originally delivered to the debtor by the clearing member or such member's customer, rather than liquidating securities and making distributions in the form of cash. Section 190.14(c)(2) is analogous to § 190.09(d)(3), discussed above in section II.B.7.

Section 190.14(d) requires the trustee to use reasonable efforts to compute the funded balance of each customer account immediately prior to the distribution of any property in the account, ''which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.'' Section 190.14(d) is analogous to § 190.05(b), discussed above in section II.B.3, but is modified for the context of a DCO bankruptcy. Similar to § 190.05(b), the Commission's objective in § 190.14(d) is to provide the bankruptcy trustee with the latitude to act reasonably, given the circumstances they are confronted with, recognizing that information may be more reliable and/or accurate in some insolvency situations than in others. However, at a minimum, the trustee is required to calculate each customer's funded balance prior to distributing property, to achieve an appropriate allocation of property between customers.

The Commission requested comment with respect to all aspects of proposed § 190.14. The Commission also raised specific questions regarding § 190.14(b)(2).[170] The comments received in response to those specific questions on § 190.14(b)(2) have already been considered by the Commission in the Supplemental Proposal, wherein the Commission ultimately withdrew § 190.14(b)(2) and (3). Although such comments on the Proposal relate to proposed paragraphs that were withdrawn in the Supplemental Proposal, the comments relating to proposed § 190.14(b)(2) and (3) nonetheless are noted below.[171]

The Commission received some comments that related to § 190.14 generally. ICI commented in favor of the requirement proposed in § 190.14 that ''any decision to continue operating a DCO in liquidation must be made with [the Commission's] input and consent.'' ICI asserted, however, that the Commission should only approve an application from a trustee to continue operating a DCO in liquidation if the Commission determines that the trustee ''has the knowledge and experience to manage such operations.'' Noting that the continued operation of a DCO has the potential to result in significant continued losses for customers and exacerbate stress, ICI further asserted that, ''[i]n considering whether to grant a request to allow a failed DCO to continue operating, the Commission should consider the potential harm to customers and should request input from both DCO members and customers.'' OCC commented that additional considerations should be considered in determining ''whether continued operation of a DCO in bankruptcy would be practical.'' Specifically, OCC stated that ''a DCO may . . . maintain contractual arrangements with various counterparties . . . that are necessary for the DCO's continued operation,'' such as contract markets and other trade sources, other DCOs, banking and liquidity providers, and information technology vendors). OCC asserted that ''a trustee would need to review the DCO's recovery and wind-down plan[s] and/or consult with a DCO to determine whether such arrangements necessary for the DCO's continued operation would—or could—be terminated [by the counterparties] upon the DCO's entry into bankruptcy and, if so, determine whether the counterparties . . . would continue to provide those necessary services for a period of time.''

The Commission also received comments on § 190.14(a). CME commented in support of paragraph (a). ICE commented that § 190.14(a) did not clearly account for ''non-CFTC-regulated clearing or other activity occurring at a DCO, including security-based swaps and other securities, cleared forward contracts or spot contracts to the extent such instruments are not carried in a CFTC regulated futures or swap account.'' ICE recommended that while ''such activity may be outside the scope of the Part 190 regulations, claims of members with respect to such activity, whether for their proprietary or customer accounts, need to be properly accounted for in a DCO's bankruptcy and should not be disadvantaged.''

Several commenters expressed concern that proposed § 190.14(b) would inadvertently create legal uncertainty with respect to the enforceability of a DCO's close-out netting rules and related issues, and requested that the Commission address these concerns in varying ways.

ICE did not object to proposed § 190.14(b), but believed that the Commission ''should clarify that the rule does not interfere with either the automatic termination of contracts upon insolvency or clearing member rights to terminate contracts upon insolvency.'' Noting ''that clearing member capital and accounting often take into account the ability of a clearing member to terminate, or the automatic termination of, its cleared positions in the event of a clearinghouse insolvency,'' ICE asserted that it would be important that the final rules ''not upset settled expectations of clearing members'' in this regard. ICE further noted that ''automatic termination is common,'' and thus, continuing the operations of a clearinghouse after insolvency would likely be infeasible, in practice.

CME requested that the Commission add a provision to § 190.14 stating that: ''if the Commission permits the trustee to continue to operate the DCO, that the action is not in derogation of, and clearing members fully retain and may exercise, their right under the DCO's rules and procedures with respect to close-out netting.'' CME stated that ''[s]ome have expressed concern that proposed Regulation 190.14 creates uncertainty around the enforceability of close-out netting rules if the trustee is allowed to continue the DCO's operations under the conditions as drafted.'' CME asserted that it would be ''critical that any decision to continue to operate the DCO not be contrary to the DCO's rules or be construed in any way to abrogate clearing members' close-out netting rights under the rules.'' CME noted that the enforceability of close-out rights is of ''paramount importance'' to clearing members as part of their contract with the DCO, and that CME and other DCOs have obtained detailed legal analyses on the enforceability of their close-out netting rules and other features of their default rules to assure clearing members of their rights. CME commented that it did not believe that

[169] As discussed below, § 190.14(c)(1) is being modified to remove language that commenters stated would raise uncertainties concerning the enforceability of close-out netting provisions in a DCO bankruptcy.

[170] In particular, the Commission asked about the framing of the concepts of usefulness and practicability in the context of permitting the trustee to continue to operate a DCO in insolvency, in accordance with proposed § 190.14(b)(2), in order to facilitate the transfer of clearing operations to another DCO or placing the debtor DCO into resolution pursuant to Title II of the Dodd-Frank Act. The Commission also asked whether there is a better way to frame either of those terms, and whether it is appropriate to provide for the possibility that the trustee may be permitted to delay liquidating contracts.

[171] For further discussion of the Supplemental Proposal and the Commission's consideration of comments received thereto, see section II.H below.

proposed § 190.14 would create an issue with respect to its own close-out netting rules or netting opinions, because its own rules ''would compel termination of open contracts upon a CME bankruptcy event and, thus the conditions of Regulation 190.14(b) would not be satisfied and the trustee could not continue CME's DCO operations.'' Nonetheless, CME speculated that other DCOs ''could potentially have rules that permit a clearing member to terminate open positions at their discretion without compelling termination.''

ISDA supported the provision in proposed § 190.14(b) that would ''prevent the trustee from continuing operation of the DCO subsequent to the order for relief if the DCO's rules contain closeout netting provisions.'' However, ISDA also recommended that the Commission modify proposed § 190.14(c)(1) to delete the second sentence and amend the first sentence to affirmatively provide that: ''notwithstanding anything else to the contrary in Subpart C, the trustee shall liquidate all open contracts in accordance with the close-out needing provisions in the DCO's rules (or bylaws) and, in any event, no later than seven calendar days after the entry of the order for relief.'' ISDA commented that it is ''critical'' that ''all aspects of [the] Part 190 regulations . . . support, and in no event be inconsistent with, . . . exposure netting.'' ISDA noted that ''[e]nforceable close-out netting rights provide the legal basis for netting of exposures between derivative counterparties, which reduces costs, increases market liquidity and reduces credit and systemic risks.'' ISDA stated that a ''firm's right to terminate outstanding transactions with a counterparty following an event of default and calculate the net amount due to one party by another is the primary means of mitigating credit risks associated with financial contracts.'' ISDA further argued that, [w]ithout enforceable close-out netting rights, firms would need to manage their credit risk on a gross basis, dramatically reducing liquidity and credit capacity.''

OCC commented that ''the Commission should continue to consult with DCOs and market participants who rely on closeout netting opinions to ensure that the proposed rules[, including proposed § 190.14(b)(2),] do not raise uncertainty related to the enforceability of DCOs' closeout netting rules or have other unintended consequences.''

FIA commented that proposed § 190.14(b)(2) and proposed § 190.14(c) are ''fundamentally flawed and should not be adopted.'' FIA raised concerns that those provisions may inadvertently create ''an unacceptable level of legal uncertainty related to the enforcement of closeout netting provisions'' set out in DCO rulebooks, which all but four DCOs maintain. FIA asserted that, if proposed § 190.14(b)(2)(ii)(A) ''could be read to provide the trustee some level of discretion to determine whether or when DCO rules may 'compel' the termination of contracts, such discretion, in turn, may call into question whether the DCO's rules constitute a 'qualifying master netting agreement' as described in the rules of the several bank regulatory authorities.'' FIA also commented that the ''continued operation of a DCO after an order for relief would be ill-advised'' and impracticable. FIA stated that a trustee with no familiarity or understanding of central clearing would be highly unlikely to be able to manage effectively the operation of a bankrupt DCO. In the case of SIDCOs, FIA noted that ''the prospect of a bankruptcy trustee operating the DCO for even a brief interim period prior to commencement of Title II [resolution] proceedings could result in a loss of market confidence and a destabilizing rush to exit by clearing members and their clients, [thereby] potentially frustrat[ing] the successful resolution of the DCO.'' In the case of other DCOs, FIA commented that ''the post-filing transfer of . . . clearing operations to another DCO would be difficult at best,'' and ''clearing members and their clients should not be expected to take the execution risk of being forced to continue clearing through a bankrupt DCO when successful completion of a transfer to a new DCO in bankruptcy is not certain.'' FIA also stated its belief that ''non-defaulting clearing members or their clients would be [unwilling] to continue to pay margin to the estate of a bankrupt DCO.''

The ABA Subcommittee requested that the Commission revise proposed § 190.14(b) ''to clarify that the DCO's close-out netting rules remain in effect and are enforceable as written, notwithstanding any decision under [proposed §] 190.14(b) by the Commission to allow the trustee to continue making calls for variation settlement and margin.'' The ABA Subcommittee raised a concern that proposed § 190.14(b) ''may create unintended ambiguity'' regarding the enforceability of such rules.

After considering the comments, the Commission is adopting § 190.14(a) as proposed. The Commission notes that § 190.14(a) provides that the trustee shall ''instruct each customer [a term that, in the context of a debtor DCO, includes members] to file a proof of claim containing such information as is deemed appropriate by the trustee.'' To the extent that the DCO is conducting non-CFTC-regulated activity that is outside the scope of the part 190 regulations, the proof of claim form should include an opportunity to claim for debts of the DCO related to activity that is not regulated by the CFTC. These would be payable from the general estate (outside of customer property) or, if secured, from the property securing the debts. Thus, such activity will be properly accounted for in the DCO bankruptcy, and members will not be disadvantaged. For those reasons, the Commission does not believe that § 190.14(a) should be modified in the manner recommended by ICE.

The Commission is adopting § 190.14(b)(1) as proposed, with two modifications that reflect the Commission's previous withdrawal of paragraphs (b)(2) and (3) in the Supplemental Proposal: (1) Proposed paragraph (b)(1) is re-designated as paragraph (b); and (2) new paragraph (b) is modified to remove the phrase: ''except as otherwise explicitly provided in this paragraph (b).'' [172]

Several commenters expressed concern that proposed § 190.14(b) inadvertently creates legal uncertainty with respect to the enforceability of a DCO's close-out netting rules and requested that the Commission address this concern in varying ways.[173] The Commission considered those comments in advance of issuing the Supplemental Proposal, and determined that § 190.14(b)(2) and (3) would not be a practicable and effective way to foster the transfer of clearing operations—to the extent that such an opportunity presents itself—at an acceptable cost. Consequently, the Commission withdrew § 190.14(b)(2) and (3) in the Supplemental Proposal and instead proposed an alternative approach. The Supplemental Proposal, including the Commission's consideration of comments thereto, is discussed below in section II.H of this adopting release.

Commenters' concerns regarding the legal uncertainty of close-out netting rules in the context of § 190.14(b) also apply to § 190.14(c), as proposed, specifically the language that states that the trustee shall liquidate all open positions no later than seven calendar days after the order for relief ''unless the

[172] *See* 85 FR at 60112 n.12 (''The Commission will make appropriate edits to the language in proposed § 190.14(b)(1) as part of the process of finalizing the [p]art 190 rule proposal.'').

[173] *See* comment letters from ICE, CME.

Commission determines that liquidation would be inconsistent with the avoidance of systemic risk or would not be in the best interests of the debtor's estate'' (the ''Unless Clause''). Some commenters—including FIA and ISDA—explicitly raised this issue in the context of § 190.14(c), to the extent that the proposed language would afford the trustee with some level of discretion to determine whether or when a DCO rule may ''compel'' the termination of contracts. Although the Commission believes that commenters' concerns were largely addressed in the Supplemental Proposal through the withdrawal of § 190.14(b)(2) and (3), the Commission agrees that the Unless Clause raises similar concerns, in that it suggests that the Commission may decide that a DCO's contracts should not be terminated in bankruptcy, and accordingly that paragraph (c)(1) should be modified by removing the Unless Clause. Thus, after considering the comments, the Commission is adopting § 190.14(c) as proposed, with a modification to paragraph (c)(1) by deleting the phrase: ''unless the Commission determines that liquidation would be inconsistent with the avoidance of systemic risk or would not be in the best interests of the debtor's estate.'' This modification—when taken in conjunction with the Commission's prior withdrawal of § 190.14(b)(2) and (3)—should remove any lingering uncertainties in § 190.14 concerning the enforceability of close-out netting provisions in a DCO bankruptcy.

The Commission received no specific comments on the proposed language of § 190.14(d) and, thus, is adopting that paragraph as proposed.

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting § 190.14 as proposed, with the deletion of paragraphs (b)(2) and (3) and modifications to paragraphs (b)(1) and (c)(1), as set forth above.[174]

5. Regulation § 190.15: Recovery and Wind-Down Plans; Default Rules and Procedures

The Commission is adopting § 190.15 substantially as proposed (with a modification, as discussed below), to favor the implementation of a debtor clearing organization's default rules and procedures maintained pursuant to § 39.16 and, as applicable, § 39.35, and any recovery and wind-down plans maintained by the debtor and filed with the Commission, pursuant to §§ 39.39 and 39.19, respectively. Section 39.16 requires each DCO to, among other things, ''adopt rules and procedures designed to allow for the efficient, fair, and safe management of events during which clearing members become insolvent or default on the obligations of such clearing members to the'' DCO. In adopting § 39.35, the Commission explained that it ''was designed to protect SIDCOs, [s]ubpart C DCOs, their clearing members, customers of clearing members, and the financial system more broadly by requiring SIDCOs and [s]ubpart C DCOs to have plans and procedures to address credit losses and liquidity shortfalls beyond their prefunded resources.'' [175] Similarly, in adopting § 39.39, the Commission explained that it was ''designed to protect the members of such DCOs and their customers, as well as the financial system more broadly, from the consequences of a disorderly failure of such a DCO.'' [176]

Section 190.15(a) states that the trustee shall not avoid or prohibit any action taken by the debtor DCO that was reasonably within the scope of, and was provided for, in any recovery and wind-down plans maintained by the debtor and filed with the Commission, subject to section 766 of the Bankruptcy Code. The Commission's intent is to provide finality and legal certainty to actions taken by a DCO to implement its recovery and wind-down plans, which are developed subject to Commission regulations.

Section 190.15(b) instructs the trustee to implement, in consultation with the Commission, the debtor DCO's default rules and procedures maintained pursuant to § 39.16, and, as applicable, § 39.35, as well as any termination, close-out and liquidation provisions included in the rules of the debtor, subject to the trustee's reasonable discretion and to the extent that implementation of such default rules and procedures is practicable.

Similarly, § 190.15(c), as proposed, instructs the trustee, in consultation with the Commission, to take actions in accordance with any recovery and wind-down plans maintained by the debtor and filed with the Commission, to the extent reasonable and practicable. The Commission's intent is to provide the trustee, who will need to take prompt action to manage the DCO (and any member default), with a roadmap to manage such action. The Commission further intends that the roadmap be based on the rules, procedures, and plans that the DCO has developed in advance, and that are subject to the requirements of the Commission's regulations.

The Commission requested comment with respect to all aspects of proposed § 190.15. The Commission also raised specific questions as to whether it is appropriate to steer the trustee towards implementation of the debtor DCO's default rules and procedures and recovery and wind-down plans, and whether the proposed language concerning discretion, reasonability, and practicability is appropriate and sufficient.

The Commission received several comments on proposed § 190.15. CME and ICE generally supported the proposal, although ICE raised concerns about the discretion afforded to the trustee. In contrast, Vanguard, FIA, ACLI, SIFMA AMG/MFA, and ICI expressed concerns with the proposed rule, in whole or in part.

ICE, while generally supporting the proposal, objected to the language in § 190.15 that a ''trustee's obligation to [follow a DCO's default rules and recovery and wind-down plans] is 'subject to the reasonable discretion' of the trustee or is limited 'to the extent reasonable and practicable.' '' While ICE acknowledged ''the need for some degree of flexibility in the conduct of a bankruptcy proceeding,'' it contended that ''the Commission should make clear that the trustee cannot override the DCO rules . . . [or] deviate from an approved recovery or wind-down plan.''

Vanguard requested that proposed § 190.15(a) be removed, arguing that it would be ''imprudent to give deference'' to a DCO's rules because such rules ''do not set forth a comprehensive roadmap to dealing with DCO insolvency.'' Vanguard noted that ''DCO rulebooks set forth a variety of powers the DCO may employ'' (*e.g.,* ''assessments, variation margin gains haircutting, and tear-ups''), and that such rules ''lack [the] necessary specificity and detail to provide certainty to FCMs and customers, or to the trustee,'' with respect to what would follow in DCO insolvency. Vanguard was concerned that such uncertainty may ''contribute to further market stresses during a critical time,'' and that expressly instructing the trustee to implement a DCO's default rules and procedures ''where practicable,'' permits a DCO to ''override the fundamental customer protections intended by Part 190.''

[174] The modifications to paragraph (b)(1) include both the addition of the language described above and the re-designation of proposed paragraph (b)(1) as new paragraph (b), in light of the withdrawal of proposed paragraphs (b)(2) and (3) in the Supplemental Proposal.

For further discussion of the Supplemental Proposal and the Commission's consideration of comments thereto, see section II.H below.

[175] 78 FR 72476, 72492 (Dec. 2, 2013).

[176] *Id.* at 72494.

FIA did not support the adoption of proposed § 190.15(b) and (c), commenting that the proposal's post-bankruptcy implementation of all DCO default rules and procedures and recovery and wind-down plans is ''inappropriate.'' FIA was concerned that the proposal's ''concept of 'default rules and procedures' could encompass a number of different tools or actions, some of which would be inappropriate and risky for a bankruptcy trustee to attempt to execute.'' In addition, ''to the extent that the Commission would select some but not other default rules and procedures for a trustee to implement,'' uncertainty with respect to possible bankruptcy scenarios would increase. FIA stated that a DCO's default rules and procedures should not be used ''for any purpose other than to ensure enforcement of a DCO's closeout netting provisions,'' and that, ''[b]y their terms, the default rules and procedures . . . represent contractual arrangements between a DCO and its members whose purpose is to provide resources and tools to the DCO to *prevent* its bankruptcy.'' FIA argued that ''a fundamental term'' of these arrangements is that ''such resources and tools are only available *prior* to bankruptcy,'' and that instructing a trustee in bankruptcy to implement, with discretion, the DCO's default rules and procedures would ''undermine the long-standing and settled expectations of DCOs and their members.'' In the alternative, FIA recommended that the Commission revise proposed § 190.15(b) ''to confirm that, in administering a proceeding under Subpart C, the trustee must implement any termination, close-out and liquidation provisions included in the rules (or bylaws) of the debtor'' (including loss allocation provisions). FIA raised further concerns about the treatment of a DCO's recovery plans in proposed § 190.15. FIA asserted that such plans are intended to address ''actions to be taken prior to the DCO's bankruptcy and [are] not relevant post-filing.'' FIA also stated that such plans ''would provide no meaningful guidance to a trustee'' because they ''do not prescribe a particular course of action.'' Rather, they ''present a menu of options that a DCO might consider.'' FIA asserted that reliance on a DCO's recovery and wind-down plans is ''particularly inappropriate'' because some of them ''have been developed with no input or opportunity for comment by clearing members and other market participants.''

ACLI also expressed concern with the deference that a trustee in bankruptcy would be required to afford a DCO's rules and procedures and recovery and wind-down plans under proposed § 190.15(a) and (c). ACLI claimed that ''DCO recovery and wind-down plans include such drastic measures as Variation Margin Gains Haircutting . . . and Partial Tear-Up . . . [that] are not subject to routine public input at the DCO level or at the Commission.'' ACLI identified several circumstances in which deference to the DCO's rules or recovery and wind-down plans should be reduced. ACLI asserted that: (a) A trustee should not be expected to defer to recovery and wind-down measures unless they were originally adopted with public input at the DCO level and made public for a reasonable period before the bankruptcy proceeding; (b) the trustee should ''have discretion to override a DCO's recovery or wind-down actions if they violate proposed [p]art 190's goal of protecting customer property on no worse than a *pro rata* basis''; and (c) consistent with proposed § 190.15(b), the trustee should be able to avoid or prohibit any DCO action that it determines, in consultation with the Commission, is not ''reasonable and practicable.''

SIFMA AMG/MFA commented that requiring a trustee to defer to a DCO's recovery and wind-down plans as set forth in proposed § 190.15(a) and (c) is ''inadvisable'' and, in some cases, ''unworkable,'' and recommended that the provisions be deleted. SIFMA AMG/MFA recommend that, if the Commission retains proposed § 190.15(a), the provision be amended to remove the words ''was reasonably in the scope of'' and replace references to the DCO's recovery and wind-down plans with references to the DCO's default rules and procedures. In support of their position, SIFMA AMG/MFA asserted that recovery and wind-down plans are insufficiently prescriptive, and that because they tend to be drafted as a menu of options, such plans are not likely to provide the trustee with clear direction, effectively causing the trustee to defer to the judgment of the debtor itself. SIFMA AMG/MFA also asserted that recovery and wind-down plans do not require Commission approval or reflect significant input from customers, and because DCOs are not required to make such plans public, the plans are not a fair reflection of the *ex ante* expectations of a DCO's stakeholders. SIFMA AMG/MFA further asserted that ''requiring the trustee . . . to defer to the debtor's resolution plans would be inconsistent with other regimes for the resolution of systemically important financial institutions.'' SIFMA AMG/MFA requested that the Commission add a new clause to proposed § 190.15 requiring the trustee and Commission, in implementing § 190.15, to ''consider whether implementation of the debtor's default rules and procedures [and recovery and wind-down plans] may undermine the core principles set forth in § 190.00 or may pose additional systemic risk.'' [177] If the trustee and Commission determine that such implementation would have that effect, SIFMA AMG/MFA suggested that the provision permit the trustee to override the rules, procedures, and plans. SIFMA AMG/MFA further commented that, in the event that deference to a DCO's default management rules and procedures and recovery and wind-down plans is mandated in subpart C of the proposal, the Commission should amend parts 39 and 40 of the Commission's regulations ''to ensure that customers have the opportunity to provide meaningful input during the development and application of such rules, procedures, and plans.''

ICI did not support the proposal's deference to a DCO's loss allocation, recovery, and wind-down rules in a DCO liquidation. ICI asserted that such rules are neither ''clear'' nor ''well-vetted.'' ICI stated that DCO rules ''do not provide the level of specificity and detail that is required to give certainty to market participants,'' but rather, they ''enumerate a wide variety of tools that a DCO may deploy to recover losses,'' some of which ''have the capacity to alter the entitlements of customers'' under part 190 (*e.g.,* ''a customer would only be entitled to such a *pro rata* share of customer property to the extent the DCO rules did not modify the distribution of the DCO's assets'' through variation margin gains haircutting or partial tear-up). ICI recommended that, ''[b]efore the Commission gives effect to any DCO loss allocation, recovery, and wind-down rules in a [p]art 190 proceeding, . . . the Commission should develop and codify minimum principles that must be reflected in [those rules,] . . . review both existing DCO rules and proposed rule changes to ensure that they are consistent with the Commission's minimum principles . . . [, and] require DCOs to change their governance process for rule changes to give stakeholders greater opportunity for input.''

As an initial matter, the Commission notes that some commenters, including ACLI, FIA, ICI, and SIFMA AMG/MFA, objected to the application of DCO recovery and wind-down plans and rules, in particular the application of

[177] Alteration in original.

variation margin gains haircutting, because they believed that changes should be made to the process by which parts 39 and 40 permit DCOs to adopt such plans and rules.

Amendments to parts 39 and 40 are beyond the scope of this rulemaking, and the Commission does not believe that these concerns with the content and operation of parts 39 and 40 should inhibit the use of such plans and rules in the context of part 190. However, the Commission continues actively to review these issues, in particular with respect to governance, as they relate to parts 39 and 40.

The Commission also notes that other commenters, including FIA, believed that default rules and procedures and recovery plans are designed to avoid bankruptcy, and should not be applied if they fail in achieving that goal. However, the DCO's rules, procedures, and plans set forth *ex ante* the manner in which losses are allocated—that is, who is exposed to them, and to what extent. In the event that losses must be borne in bankruptcy, the Commission believes, as was noted in the preamble to the proposal, that ''allocation of losses should not depend on the happenstance of when default management or recovery tools were used—*e.g.,* when assessments were called for, or when such assessments were met.'' The Commission does not believe that the comments offer a persuasive reason why the allocation of losses—who wins, who loses, and how much—should change on the basis of when a bankruptcy is filed.

The Commission further notes that a number of commenters, including ACLI and Vanguard, were concerned with the application in bankruptcy of recovery tools such as variation margin gains haircutting and partial tear-up. Variation margin gains haircutting, to the extent set forth in DCO rules, will be applied in bankruptcy, in that it represents the *ex ante* manner in which losses are allocated.[178] By contrast, partial tear-up of contracts will not be applied; rather, pursuant to § 190.14(c)(1), ''the trustee shall liquidate *all* open commodity contracts that have not been terminated, liquidated or transferred no later than seven calendar days after entry of the order for relief'' (emphasis added).

Turning to SIFMA AMG/MFA's suggestion that ''the trustee and the Commission should explicitly be required to consider the core concepts set forth in proposed § 190.00 and systemic risk in implementing a debtor DCO's rules procedures and plans'': With respect to the core concepts, § 190.00(c) states that ''the specific requirements in [part 190] should be interpreted and applied consistently with these core concepts.'' In short, that requirement is already present. Moreover, the Commission has added § 190.00(c)(3)(i)(C) to provide that where a provision in part 190 affords the trustee discretion, that discretion should be exercised in a manner that the trustee determines will best achieve the overarching goal of protecting public customers by enhancing recoveries for, and mitigating disruptions to, public customers as a class. Thus, in exercising their discretion to determine what is ''reasonable'' for purposes of § 190.15, the trustee is already directed to focus on the ''core concepts'' in § 190.00(c), and, in particular, the ''overarching goal of protecting public customers.''

However, while a DCO's default rules and procedures are required to be made public, posted on the DCO's website,[179] the same is not true for the DCO's recovery and wind-down plans. Thus, in implementing the DCO's default rules and procedures, the trustee would be implementing rules and procedures that, prior to the bankruptcy, were both subject to the supervision of the Commission and transparently available to both clearing members and their customers. By contrast, in implementing the DCO's recovery and wind-down plans, the trustee would be implementing plans that, prior to the bankruptcy, were subject to the supervision of the Commission,[180] but may not have been transparently available to clearing members or their customers. In light of this distinction, a more customer-protective approach seems appropriate in the latter context.

Accordingly, the Commission is modifying proposed § 190.15(c), which reads that in administering a proceeding under this subpart, the trustee shall, in consultation with the Commission, take actions in accordance with any recovery and wind-down plans maintained by the debtor and filed with the Commission pursuant to § 39.39, to the extent reasonable and practicable—to add at the end the qualifier that these actions should also only be taken to the extent consistent with the protection of customers.[181]

With respect to systemic risk, while the Commission, as a governmental agency, is attentive to considerations of mitigating systemic risk in all that it does,[182] it may be difficult for a trustee to make meaningful determinations as to how to do so. Moreover, the trustee is the representative of the bankruptcy estate, *see* 11 U.S.C. 323(a), with fiduciary duties to estate beneficiaries,[183] rather than to the financial system as a whole. Accordingly, the Commission does not believe it appropriate to add an explicit requirement concerning considerations of systemic risk, as suggested by SIFMA AMG/MFA.

The Commission does not agree that FIA's observation that DCO recovery and wind-down plans may ''not prescribe a particular course of action but, rather, present a menu of options that a DCO may consider'' supports FIA's conclusion that ''these plans would appear to provide no meaningful guidance to a trustee.'' To the contrary, the Commission believes that providing a ''menu of options'' among which the trustee may select (and adapt) in a manner that is ''reasonable and practicable'' would provide the trustee—who would be stepping into a complex and difficult situation with little preparation—with a helpful roadmap to determine strategy and tactics, in order to act in a prompt and cost-effective manner.

The Commission also declines to provide that the trustee cannot override the DCO's rules or deviate from an approved recovery or wind-down plan. Even if part 39 were to require that such plans be ''approved''—and it does not—they are designed in the context of operation of the DCO outside of bankruptcy. Thus, the Commission believes it to be appropriate for the trustee to apply them with flexibility to the extent reasonable and practicable.

Accordingly, after consideration of the comments and for the reasons stated above, the Commission is adopting § 190.15 as proposed, with the modification to § 190.15(c) discussed above.

[178] Moreover, as discussed in more detail in section II.C.7 below, there is a limited amount of customer property available. Any increase in some customers claims (and thus, their distributions) due to the disapplication of gains-based haircutting would come at the expense of a reduced share of that limited customer property (*i.e.,* reduced distributions) to other customers, which could total less than the amount of their claim arising from initial margin.

[179] *See* § 39.21(c)(6).

[180] Note that § 190.15(c) only applies to recovery and wind-down plans that were ''filed with the Commission pursuant to § 39.39 of this chapter.''

[181] The ''customers'' of a DCO are, as noted at the top of this section II.C, the clearing members with respect to their public customers, as well as the clearing members with respect to their proprietary or ''house'' accounts.

[182] *See* CEA section 3(b), 7 U.S.C. 5(b) (purposes of the CEA include ''the avoidance of systemic risk'').

[183] *See* U.S. Department of Justice, Executive Office for United States Trustees, Handbook for Chapter 7 Trustees Section 4.B, at 4–2.

6. Regulation § 190.16: Delivery

The Commission is adopting § 190.16 as proposed with a modification to paragraph (a), as set forth below.

Regulation § 190.16(a) instructs the trustee to use reasonable efforts to facilitate and cooperate with completion of delivery in a manner consistent with § 190.06(a) (which instructs trustees of FCMs in bankruptcy to foster delivery where a contract has entered delivery phase before the filing date or where it is not practicable for the trustee to liquidate a contract moving into delivery position after the filing date) and the *pro rata* distribution principle in § 190.00(c)(5). The Commission believes that it is important to address deliveries to avoid disruption to the cash market for the commodity and to avoid adverse consequences to parties that may be relying on delivery taking place in connection with their business operations. However, given the potential for competing demands on the trustee's resources, including time, this instruction is limited to requiring ''reasonable efforts.''

Regulation § 190.16(b) carries forward, to the context of a DCO in bankruptcy, the delineation between the physical delivery property account class and the cash delivery property account class in § 190.06(b), as discussed above. Specifically, physical delivery property that is held in delivery accounts for the purpose of making delivery shall be treated as physical delivery property, as will the proceeds from any sale of such property. By contrast, cash delivery property that is held in delivery accounts for the purpose of paying for delivery shall be treated as cash delivery property, as would any physical delivery property for which delivery is subsequently taken.

The Commission requested comment with respect to all aspects of proposed § 190.16. The Commission raised specific questions as to whether it is appropriate, in the context of a clearing organization bankruptcy, to separate the physical delivery account class from the cash delivery account class, and if so, whether the physical delivery account class should be further sub-divided. The Commission also asked whether the delivery account class should be treated as a single, undivided account class.

CME supported the requirement in proposed § 190.16 that the trustee use reasonable efforts to facilitate deliveries of commodity contracts that have moved into delivery prior to the date and time of relief on behalf of a clearing member or customer, but asked that the Commission ''expand the rule to require the trustee to facilitate deliveries'' under contracts that move into delivery position after the filing and that the trustee is unable to liquidate. CME stated that ''[i]t is equally important to protect deliveries under [such] contracts . . . to protect against disruption to commercial markets and operations,'' and that the trustee may not be able to terminate them.

The ABA Subcommittee similarly expressed concern that proposed § 190.16(a) ''does not address contracts that are unable to be liquidated and that then move into delivery position,'' noting that ''it may be impossible or impracticable for a trustee to liquidate every'' physical-delivery commodity contract that is open at the date and time of the order for relief before the contract moves into delivery position. The ABA Subcommittee recommended that the Commission ''remove the timing limitation in Proposed Rule 190.16(a),'' and add language stating that ''the trustee should use reasonable efforts to liquidate open physical delivery commodity contracts before they move into a delivery position.''

The Commission agrees with comments raised by CME and the ABA Subcommittee that deliveries should be facilitated after the order for relief for contracts that are not otherwise terminated, liquidated, or transferred. The Commission believes that modifying the proposal to address that scenario is appropriate to avoid disruption to the cash market and to avoid adverse consequences to parties that may be relying on delivery taking place in connection with their business operations.

Accordingly, after consideration of the comments, and for the reasons stated above, the Commission is adopting § 190.16 with a modification to apply paragraph (a) to any contract that ''moves into delivery after [the date and time of the order for relief], but before being terminated, liquidated, or transferred.''

7. Regulation § 190.17: Calculation of Net Equity

The Commission is adopting § 190.17 as proposed, with a modification to § 190.17(b)(2), as discussed below. Section 190.17 establishes net equity calculations to be used in determining the claims against the debtor DCO (and the allocation of losses) among members and their accounts.

Section 190.17(a) with respect to net equity is parallel to § 190.18(a) with respect to the treatment of customer property. Section 190.17(a)(1) confirms that a member of a clearing organization may have claims in separate capacities. Specifically, a member may have claims on behalf of its public customers (customer account) and claims on behalf of itself and its non-public customers (*i.e.,* affiliates) (house account), and, within those separate customer classes, the claims may be further separated by account class. The member shall be treated as part of the public customer class with respect to claims based on commodity customer accounts carried as ''customer accounts'' by the clearing organization for the benefit of the member's public customers, and as part of the non-public customer class with respect to claims based on its house account. Section 190.17(a)(2) directs that net equity shall be calculated separately with respect to each customer capacity and, within such customer capacity, by account class.

Section 190.17(b) sets forth how a debtor DCO's pre-existing rules and procedures governing the allocation of losses—including the default rules and procedures—should be applied in a DCO bankruptcy.

Section 190.17(b)(1) confirms that the calculation of members' net equity claims—and, thus, the allocation of losses among members and their accounts—shall be based on the full application of the debtors' loss allocation rules and procedures, including the default rules and procedures referred to in §§ 39.16 and 39.35. These pre-existing loss allocation rules and procedures are the contract between and among the members and the DCO, and the Commission believes that it is appropriate to give them effect regardless of the bankruptcy of the DCO or the timing of any such bankruptcy. In other words, the pre-existing loss allocation rules and procedures (such as member assessments) should be given the same effect in a bankruptcy, regardless of whether default management or recovery tools were fully applied prior to the order for relief. While certain DCOs may have discretion, consistent with governance procedures, as to precisely when they call for members to meet assessment obligations, the Commission believes that allocation of losses should not depend on the happenstance of when default management or recovery tools were used—*e.g.,* when assessments were called for, or when such assessments were met.

Section 190.17(b) also addresses DCO rules that govern how recoveries on claims against defaulting members are allocated to non-defaulting members' accounts,[184] which effectively ''reverse

[184] These recoveries might be based on prosecution of such claims in an insolvency or receivership proceeding, or, in the reasonable

the waterfall'' by allocating recovered assets to member accounts in reverse order of the allocation of the losses to those member accounts.[185] Section 190.17(b)(2) implements such DCO rules in bankruptcy, thereby adjusting members' net equity claims (and the basis for distributing any such recoveries) in light of such recoveries. The provision similarly implements DCO loss allocation rules in other contexts, for example, (i) rights to portions of mutualized default resources that are either prefunded or assessed and collected, and, in either event, not used, as well as (ii) rules that would allocate to members recoveries against third parties for non-default losses that are, under the DCO's rules, originally borne by members.

Section 190.17(c) adopts by reference the equity calculations set forth in proposed § 190.08, to the extent applicable.

Finally, § 190.17(d) implements section 766(i) of the Bankruptcy Code, which: (1) Allocates a debtor DCO's customer property (other than member property) to the DCO's customers (*i.e.,* clearing members) ratably based on the clearing members' net equity claims based on their (public) customer accounts; and (2) allocates a debtor DCO's member property to the DCO's clearing members ratably based on the clearing members' net equity claims based on their proprietary (*i.e.,* house) accounts. To implement section 766(i), § 190.17(d) defines ''funded balance'' as a clearing member's *pro rata* share of member property (for a clearing member's house accounts) or customer property other than member property (for accounts for a clearing member's public customers). The *pro rata* amount shall be calculated with respect to each account class available for distribution to customers of the same customer class. Moreover, given that the calculation of funded balance for FCMs is an analogous exercise, the Commission intends that such calculations under § 190.17(d) will be made in the manner provided in § 190.08(c), to the extent applicable.

The Commission requested comment with respect to all aspects of proposed § 190.17. The Commission raised a specific question as to whether it is appropriate to base the calculations proposed § 190.17 on the full application of the debtors' loss allocation rules and procedures, including the DCO's default rules and procedures.

Commenters addressed the proposed language of paragraph (b), or of § 190.17 generally, but did not offer specific comments on the proposed language of paragraph (a), (c), or (d).

CME commented in support of § 190.17(b)(1)'s application of ''the DCO's loss allocation rules and procedures, including the DCO's default rules and procedures, to the calculation of clearing members' net equity claims,'' but suggested a clarification to the proposed rule. Specifically, CME suggested that the Commission ''clarify that 'full application' of the DCO's loss allocation rules and procedures to the calculation of clearing members' house net equity claims means that assessments or similar loss allocation arrangements thereunder are part of the calculation only if and to the extent that the DCO's rules and procedures provide for post-filing assessments and payments.'' CME noted that a ''DCO's rules are the contract between and among the members and the DCO,'' and that, ''[i]f the calculation of net equity claims deviates from the DCO's loss allocation under its rules, including determination of amounts owned under close-out netting rules, that could adversely affect CME's netting opinion as to the enforceability of its netting rules.'' CME also commented in support of ''giving effect to provisions in the debtor DCO's loss allocation rules that entitle clearing members to return of guaranty fund deposits or other mutualized default resources that are not used, or to payments out of amounts that the DCO recovers on claims against a defaulting clearing member, through adjustments to clearing member's net equity claims against member property to reflect their entitlement to such payments.'' CME also commented in support of § 190.17(b)(2).

The ABA Subcommittee expressed concern with respect to perceived ambiguity in § 190.17(b)(1) regarding ''how assessments that were not called for, or that were called for but not paid before the filing date, would impact the calculation of a clearing member's net equity claim with respect to its house account.'' The ABA Subcommittee requested that the Commission modify the proposed regulation to clarify that ''house account net equity claims would be adjusted to reflect post-filing obligations only if and to the extent that the DCO's rules and procedures impose obligations on clearing members to continue making such payments following the DCO's bankruptcy.'' Specifically, the ABA Subcommittee suggested that the following phrase be added to the end of § 190.17(b)(1): If and to the extent that the debtor's loss allocation rules and procedures impose obligations on clearing members to make such payments on or after the filing date.

FIA did not support the adoption of § 190.17(b)(1). FIA stated that it would be ''inappropriate to require a clearing member to reduce the value of its net equity claim by the amount of an assessment that, under the rules of the relevant DCO, either may no longer be made or are not required to be paid.'' FIA asserted that a DCO's default fund is ''a multilateral indemnification arrangement between the DCO and its members pursuant to which members' contributions are used to cover the DCO's losses resulting from member default(s) and thereby prevent the DCO's bankruptcy.'' FIA stated that a ''DCO has no authority under its rules to request or to apply these funds for any other purpose, nor do we believe that a trustee would have any authority under the [Bankruptcy] Code to do so.'' FIA noted further that, ''by requiring that a clearing member's net equity claim must include the full application of the DCO's loss allocation rules and procedures, proposed Rule 190.17(b)(1) appears to have the effect of reducing a clearing member's potential recovery, even when the full application of the DCO's loss allocation rules is not necessary to meet the DCO's obligations to non-defaulting clearing members,'' thereby impermissibly benefitting the DCO's general creditors and shareholders to the detriment of clearing members.

ICE commented that the Commission should refrain from adopting § 190.17(b) or providing ''specific guidance as to what assumptions the CFTC would make and how the net equity claim is to be calculated hypothetically.'' ICE stated that, in determining a clearing member's net equity claim, it is neither appropriate nor feasible to consider a potential assessment that could have been called for before a bankruptcy filing but was not. ICE asserted that a DCO's determination of whether ''to call

commercial judgment of the DCO, the settlement or sale of such claims.

[185] For example, if the DCO rules allocate losses in excess of the defaulters' available resources first to the DCO's own contributions, second to the mutualized default fund contributions of members other than the defaulter, third to assessments, and fourth to gains-based haircutting (*pro rata*), all of which tools were in fact used in a particular case, then recoveries on claims against the defaulting members would be allocated (to the extent available) first to those member accounts for which gains were haircut, *pro rata* based on the aggregate amount of such haircuts per member account, until all such haircuts have been reversed, second to those members who paid assessments, *pro rata* based on the amount of such assessments paid, until all such assessments have been repaid, third to members whose mutualized default-fund contributions were consumed, *pro rata* based on such default-fund contributions, until all such contributions have been repaid, and fourth to the DCO to the extent of its own contribution.

for an assessment and/or implement other loss allocation arrangements'' accounts for many considerations that would not be appropriate to revisit in an insolvency. ICE also asserted that calculating the full application of loss allocation rules, or determining what would have happened in any full allocation, may not be possible. ICE noted, for example: (a) Because a DCO is not obligated to impose assessments against its clearing members, it is unclear how the CFTC or the trustee would determine how many assessments the DCO should have made; (b) in the event that ''clearing members have the right to cap their liability by terminating their membership in a DCO,'' it is unclear how the CFTC or the trustee would determine whether a clearing member should have terminated its membership; [186] and (c) it ''may not be possible to determine definitively what the [DCO's] losses . . . would have been if additional loss allocation steps, such as variation margin gains haircutting or tear-up, had been taken.''

SIFMA AMG/MFA commented that §§ 190.17 and 190.18(b)(1) should be modified to explicitly state that any gains that were haircut during gains-based haircutting will be treated as customer property and included in the net equity claims of the clearing members and customers whose gains were haircut. SIFMA AMG/MFA further commented in support of § 190.17(b) but suggested that the proposal be modified to provide that, if a debtor DCO either (i) does not have ''reverse the waterfall'' rules or (ii) has ''reverse the waterfall'' rules that do not address each level of the debtor DCO's waterfall, the net equity clams of the debtor DCO's clearing members and customers will be calculated as though the debtor DCO, in fact, ''has 'reverse the waterfall' rules that address each level of the DCO's waterfall.

Vanguard commented on § 190.17(b)(1)'s requirement that a trustee's calculation of DCO members' net equity claims include the full application of DCO loss allocation rules and procedures. Vanguard expressed concern that the requirement would result in a customer being entitled to only ''a *pro rata* share to the extent the DCO rules did not modify the distribution of the DCO's asset, whether pre- or post-petition, through measures such as variation margin gains haircutting or partial tear-up of transactions.'' Vanguard noted the possibility that, ''as the DCO begins to fail,'' the DCO's rules ''could be changed without the appropriate vetting by FCMs and customers who presently bear an inordinate share of the risk.'' Vanguard believed that ''any application of non-defaulting customer gains haircutting, or any other margin haircutting, should be prohibited as being fundamentally at odds with normal insolvency practice and highly counterproductive to incentivizing customers not to abandon a failing DCO.'' Vanguard asserted that, if haircutting is to be allowed, customers should ''receive full compensation in the form of a credit or equity claim against the DCO [that is] superior to that of other creditors.'' Vanguard also suggested that § 190.17(b)(2) be modified in the same manner as suggested by SIFMA AMG/MFA, with respect to situations in which a debtor DCO does not have ''reverse the waterfall'' rules, or has ''reverse the waterfall'' rules that do not address each level of the debtor DCO's waterfall.

ICI expressed concern that § 190.17(b)(1) would permit a DCO's loss allocation, recovery, and wind-down rules ''to override the fundamental customer protections that Part 190 and Subchapter IV [of the Bankruptcy Code] are meant to safeguard,'' because they would ''no longer guarantee to a customer a *pro rata* share of customer property based on its transactions and margin in accordance with Subchapter IV.'' In that scenario, ICI commented that ''a customer would only be entitled to such a *pro rata* share to the extent the DCO rules did not modify the distribution of the DCO's assets, whether pre- or post-petition, through measures such as variation gains haircutting or partial tear-up of transactions.''

Having received no specific comments on the proposed language of paragraphs (a), (c), and (d) of § 190.17, the Commission is adopting those paragraphs as proposed.

As described above, the Commission received several comments on paragraph (b). After considering the comments, the Commission notes that DCO default rules and procedures (also referred to as ''default waterfalls''), as a general matter, first use the resources of the defaulter (*i.e.,* the defaulter's initial margin and contribution to the default fund) to cover a shortfall. Should those resources be insufficient to cover the shortfall, such default waterfalls generally proceed to use the DCO's own capital contribution, and only after those resources are extinguished is the remaining shortfall mutualized among the clearing members: (1) First, through the prefunded default fund contributions of non-defaulting clearing members; (2) then, through limited assessment powers against those non-defaulting clearing members, which are generally set as a multiple of each clearing member's prior contributions to the default fund; and (3) finally, through gains-based haircuts that affect both clearing members and (through customer agreements) the customers of clearing members (*i.e.,* public customers).

The Commission notes two important takeaways from the general structure of default waterfalls. First, each clearing member knows, in advance of a default, the maximum amount of its exposure to contribute to mutualized loss through the guarantee fund and the DCO's assessment powers. Second, should there be any reduction in the amount of funds collected through such assessments, then any losses in excess of the waterfall (*i.e.,* up through the assessments) would instead be allocated to both clearing members and their public customers. In other words, if the losses are large enough, a reduced allocation of losses to clearing members would necessarily mean that their public customers would bear an increased allocation of losses.

The Commission remains of the view that, as discussed in the proposal, ''[w]hile certain DCOs may have discretion, consistent with governance procedures, as to precisely when they call for members to meet assessment obligations, . . . allocation of losses should not depend on the happenstance of when default management or recovery tools were used—*e.g.,* when assessments were called for, or when such assessments were met.'' [187] As discussed above, the losses in a DCO bankruptcy ultimately would be allocated between clearing members and customers, and clearing members' exposure to this allocation of losses is already capped by the *ex ante* limits on assessment powers. If the Commission were to modify the language of paragraph (b) in the manner suggested by multiple commenters, the modification would effectively decrease the allocation of losses that would be borne by clearing members—below the *ex ante* limits of which they are on

[186] *But see* ICE Clear Credit Rules 806, 807. To mitigate the risk that their members will ''rush to the exits'' after a default, DCOs generally hold departing members liable for assessments due to the defaults that occurred before they withdrew from membership, as well as during a ''cooling-off'' period that extends past the date the member gives notice of intent to withdraw. The ICE Clear Credit rules cited, which include a ''cooling-off period'' of at least 30 days, are examples of this phenomenon. Thus, the possibility that clearing members would withdraw is not likely to affect their liability for assessments in this context.

[187] 85 FR at 36038.

notice—and correspondingly increase the allocation of losses that would be borne by customers. In other words, in such a scenario, the Commission believes that the suggested language could harm customers and run counter to the Commission's policy that, with respect to customer property, public customers be favored over non-public customers. For those reasons, the Commission declines to adopt commenters' suggestions to modify the net equity calculations in § 190.17(b) by limiting (or eliminating) the allocation of assessments that were not exercised prior to a bankruptcy filing.

By contrast, gains-based haircuts are also part of the pre-bankruptcy arrangements for allocating losses. If that part of the ''waterfall'' is reached, then that *ex ante* arrangement should be followed. Moreover, there is a limited amount of customer property available. Thus, to the extent the application of gains-based haircuts was to be reversed, and some customers would realize increases in the allowed amounts of their claims (and thus a greater share of customer property), other customers would suffer a decreased share of customer property; indeed, the latter customers may, as a result, receive less than the amount of their claims for initial margin. This could have the effect of reducing those customers' recoveries below the initial margin they have posted. The Commission stands firmly against initial margin haircutting as inimical to the principles of segregation. Thus, the Commission declines to adopt the suggestion by SIFMA AMG/MFA and Vanguard to reverse the application of gains-based haircutting in a DCO bankruptcy.

FIA's comment letter raised two points that should be further addressed. First, FIA stated that a DCO, under its rules, lacks the authority to apply the DCO's default fund for any purpose other than preventing the DCO's bankruptcy, and a trustee would similarly lack the authority to do so under the Bankruptcy Code.[188] FIA further argued that, as a result of that limitation, the DCO's authority to make new assessments or otherwise require that members contribute additional funds to a DCO's default fund would not continue into bankruptcy. Consequently, FIA argued that a clearing member's net equity claim should not be reduced in bankruptcy by the amount of an assessment that would no longer be required to be paid under the DCO's rules. However, the Commission notes that § 190.17(b)(1) does not instruct the trustee to call any clearing member to pay in additional funds; rather, paragraph (b)(1) reduces the clearing member's net equity claim against the estate of the DCO, to account for uncalled or uncollected assessments. Pursuant to section 20(a)(5) of the CEA, the Commission has the power to provide, with respect to a commodity broker in bankruptcy, ''how the net equity of a customer is to be determined,''[189] and the Commission believes that by setting the net equity calculation as proposed, the rule would appropriately set such calculations in a manner that does ''not depend on the happenstance of when default management or recovery tools were used,'' as discussed more fully above.

Second, FIA noted that, ''by requiring that a clearing member's net equity claim must include the full application of the DCO's loss allocation rules and procedures, proposed [§] 190.17(b)(1) appears to have the effect of reducing a clearing member's potential recovery, even when the full application of the DCO's loss allocation rules is not necessary to meet the DCO's obligations to non-defaulting clearing members'' and that ''[s]uch a result would impermissibly benefit the DCO's general creditors and shareholders to the detriment of clearing members.'' The Commission did not intend for the potential outcome suggested by FIA; rather, in proposed § 190.17(b)(2)(i), the Commission intended to provide that, where the full amount of assessment powers is not needed to cover a default, an appropriate adjustment shall be made to the net equity claims of clearing members. The Commission believes that the rule text should be modified in order to communicate its intent more clearly, and avoid the possibility of the unintended outcome raised by FIA. Accordingly, the Commission is modifying § 190.17(b)(1) to clarify that the DCO's ''loss allocation arrangements shall be applied to the extent necessary to address losses arising from default by clearing members.''

This modification separates paragraph (b)(1) into two separate parts. First, paragraph (b)(1)(i) will provide that the calculation of a clearing member's net equity claim shall include the full application of the debtor's loss allocation rules and procedures, including the default rules and procedures referred to in § 39.16 and, if applicable, § 39.35. Second, paragraph (b)(1)(ii) will provide that the calculation in paragraph (b)(1)(i) will include, with respect to the clearing member's house account, any assessments or similar loss allocation arrangements provided for under those rules and procedures that were not called for before the filing date, or, if called for, have not been paid. Such loss allocation arrangements shall be applied to the extent necessary to address losses arising from default by clearing members.

The ABA Subcommittee, in its comment letter, was concerned that the proposed rule is ambiguous on whether assessments or similar loss allocation arrangements would be included in the calculation where the clearing organization's rules do not impose obligations on clearing members to make such payments on or after the filing date. The modified structure of paragraph (b)(1), as described above, should remove that ambiguity, albeit not in the direction that the ABA Subcommittee would prefer: The calculation ''*will include,* with respect to the clearing member's house account, *any* assessments or similar loss allocation arrangements that were not called for before the filing date . . . to the extent necessary to address losses arising from default . . .'' (emphasis added).

CME's comment letter also raises a concern that should be addressed. In particular, CME is concerned that deviating from the DCO's rules with respect to loss allocation in this context could adversely affect the DCO's netting opinion as to the enforceability of its netting rules. The Commission notes that this argument conflates bank capital charge calculations for cleared transactions with capital charge calculations for default fund contributions. Pursuant to, *e.g.,* 12 CFR 217.133(a)(2), a clearing member that is (or is part of) a bank holding company regulated by the Federal Reserve Board and that uses the internal ratings and advanced measurement approaches to bank capital requirements is required to use the methodologies described in the applicable paragraph of 12 CFR 217.133 to calculate its risk-weighted assets *for a cleared transaction* (that is, paragraph (c) of that section) and the methodologies described in a different paragraph to calculate its risk-weighted assets *for its default fund contribution to a CCP* (that is, paragraph (d) of that section).[190] Netting opinions are necessary to treat cleared transactions

[188] FIA at 9.

[189] In the bankruptcy of a clearing organization, clearing members are a species of customer.

[190] There are analogous provisions for bank holding companies regulated by the Federal Reserve Board that use the standardized approach for calculating bank capital requirements (12 CFR 217.35) as well as banks regulated by the FDIC and the Office of the Comptroller of the Currency.

on a net basis,[191] while assessments are related to default fund contributions. Thus, the treatment of *assessment obligations* is irrelevant to netting opinions for *cleared transactions.*

The Commission also received comments on proposed § 190.17(b)(2) concerning the treatment of ''reverse the waterfall'' rules in the context of a DCO bankruptcy. After considering the comments, the Commission continues to believe that it is useful and appropriate to use ''reverse the waterfall'' rules for recoveries made by a clearing organization (including a debtor clearing organization). Some commenters suggested that proposed § 190.17(b)(2) be modified to address situations where the debtor DCO lacks ''reverse the waterfall'' rules, or where such rules do not address each level of the debtor clearing organization's waterfall. Although the commenters did not provide specific language that could be used to apply to such situations, the Commission believes that such a complicated modification is beyond the bounds of what was proposed, and thus, the Commission declines to make the modification here. Nonetheless, the commenters' suggestion is well taken, and the Commission may consider further work on that issue in the future.

Accordingly, after consideration of the comments, and for the reasons stated above, the Commission is: (1) Adopting § 190.17(a), (b)(1), (c), and (d) as proposed; and (2) adopting § 190.17(b)(2) with the modification discussed above.

8. Regulation § 190.18: Treatment of Property

The Commission is adopting § 190.18 to establish the allocation of the debtor DCO's estate in order to satisfy claims of clearing members, as customers of the debtor. The Commission is adopting § 190.18 as proposed, with the following modifications: (1) Adding new paragraph (b)(1)(iv), as described below; and (2) removing paragraph (c)(1) and renumbering the remaining paragraphs of paragraph (c).

Section 190.18(a) with respect to customer property is parallel to § 190.17(a) with respect to net equity. Paragraph (a) provides that property of the debtor clearing organization's estate is allocated between member property, and customer property other than member property, in order to satisfy claims of clearing members as customers of the debtor. Such property would constitute a separate estate of the customer class (*i.e.,* member property, and customer property other than member property) and the account class to which it is allocated, and would be designated by reference to such customer class and account class.

Section 190.18(b) sets out the scope of customer property for a clearing organization,[192] and is based in large part on § 190.09(a). Specifically, in § 190.18, paragraphs (b)(1)(i)(A) through (G) are based on § 190.09(a)(1)(i)(A) through (G). Section 190.18(b)(1)(i) does not include a provision that is parallel to § 190.09(a)(1)(i)(H), because loans of margin are not applicable to DCOs. In § 190.18, paragraphs (b)(1)(ii)(A) through (D) are based on § 190.09(a)(1)(ii)(A), (D), (E), and (F), while § 190.18(b)(1)(ii)(E) adopts by reference § 190.09(a)(1)(ii)(H) through (K) as if the term debtor used therein refers to a clearing organization as debtor. Section 190.18(b)(1)(ii) does not include provisions that are parallel to § 190.09(a)(1)(ii)(B), (C), (G), and (L), because they would not be applicable due to the differences in business models, structures, and activities of DCOs and FCMs, respectively. Section 190.18(b)(1)(iii) is unique to clearing organizations, and includes as customer property any guarantee fund deposit, assessment, or similar payment or deposit made by a member, to the extent any remains following administration of the debtor's default rules and procedures. Section 190.18(b)(1)(iii) also includes any other property of a member that, pursuant to the debtor's rules and procedures, is available to satisfy claims made by or on behalf of public customers of a member. Finally, § 190.18(b)(2), which identifies property that is not included in customer property, adopts by reference § 190.09(a)(2) as if the term debtor used therein refers to a clearing organization as debtor and to the extent relevant to a clearing organization.

Section 190.18(c) allocates customer property between customer classes, favoring allocation to customer property other than member property over allocation to member property, so long as the funded balance in any account class for members' public customers is less than one hundred percent of net equity claims. Once all account classes for customer property other than member property are fully funded (*i.e.,* at one hundred percent of net equity claims), any excess could be allocated to member property. Section 190.18(c)(1), as proposed (but not adopted herein, as discussed below), would allocate any property referred to in § 190.18(b)(1)(iii) (guarantee deposits, assessments, etc.) first to customer property other than member property, to the extent that any account class therein is not fully funded, and then to member property. In proposing this provision, the Commission intended such treatment of property to favor public customers over non-public customers. Section 190.18(c)(2) allocates any excess funds in any account class for members' house accounts first to customer property other than member property to the extent that any account class therein is not fully funded, and then any remaining excess to house accounts to the extent that any account class therein is not fully funded. Finally, § 190.18(c)(3) allocates any excess funds in any account for members' customer accounts first to customer property other than member property to the extent that any account class therein is not fully funded, and then any remaining excess to house accounts, to the extent that any account class therein is not fully funded.

Section 190.18(d) allocates customer property among account classes within customer classes. Section 190.18(d)(1) confirms that, where customer property is tied to a specific account class—that is, where it is segregated on behalf of, readily traceable on the filing date to, or recovered by the trustee on behalf of or for the benefit of an account class within a customer class—the property must be allocated to the customer estate of that account class (that is, the account class for which it is segregated, to which it is readily traceable, or for which it is recovered). Section 190.18(d)(2) provides that customer property that cannot be allocated in accordance with paragraph (d)(1) shall be allocated in a manner that promotes equality of percentage distribution among account classes within a customer class. Thus, in such a scenario, such property would be allocated first to the account class for which funded balance—that is, the percentage that each member's net equity claim is funded—is the lowest. This would continue until the funded balance percentage of that account class equals the funded balance percentage of the account class with the next lowest percentage of funded claims. The remaining customer property would be allocated to those two account classes so that the funded balance for each such account class remains equal. This would continue until the funded balance percentage of those two account classes is equal to the funded balance of the account class with the next lowest percentage of funded claims, and so

[191] *See* 12 CFR 217.3(d).

[192] This is another provision prescribed pursuant to the Commission's authority under section 20(a)(1) of the CEA, 7 U.S.C. 24(a)(1).

forth, until all account classes within the customer class are fully funded.

Section 190.18(e) confirms, however, that where the debtor DCO has, prior to the order for relief, kept initial margin for house accounts in accounts without separation by account class, then member property will be considered to be in a single account class.

Section 190.18(f) reserves the right of the trustee to assert claims against any person to recover the shortfall of property enumerated in § 190.18(b)(1)(i)(E) and (b)(1)(ii) and (iii). Paragraph (f) is analogous in the DCO context to § 190.09(a)(3) in the context of FCMs. The purpose of paragraph (f), as with § 190.09(a)(3), is to clarify that any claims that the trustee may have against a person to recover customer property will not be undermined or reduced by the fact that the trustee may have been able to satisfy customer claims by other means.

The Commission requested comment with respect to all aspects of proposed § 190.18. The Commission raised a specific question about the comprehensiveness of the scope of customer property for a clearing organization in proposed § 190.18(b). The Commission also asked specifically about the appropriateness of the proposed allocation of customer property between customer classes in proposed § 190.18(c) and within customer classes in proposed § 190.18(d).

The Commission received several comments on the proposal. Whereas some commenters supported the proposal, in whole or in part, others raised concerns particularly with respect to the scope of customer property in proposed § 190.18(b) and the treatment of guarantee fund deposits and other payments in proposed § 190.18(c)(1), among other issues.

ICI commented in support of the proposal and agreed with the Commission that the proposal is necessary to further the policy in section 766(h) of the Bankruptcy Code of prioritizing the claims of public customers over the claims of non-public customers. ICI stated that public customers need the proposed protections because they ''typically have no direct participation in the DCO's risk management and no insight into the transactions other customers have with the DCO.'' ICI also stated that public customers may have less access to information concerning the DCO's financial health, and may have fewer tools available to protect themselves against losses, when compared to DCO members.

The ABA Subcommittee commented that the treatment of clearing members' guaranty fund deposits and similar payments in proposed § 190.18(c)(1) represents a ''significant policy change'' with ''significant competing policy considerations and complex issues'' that warrant consideration outside of the Proposal. The ABA Subcommittee contended, for example, that such payments ''may be exposed to risk in asset classes in which [the clearing member] does not trade, and which the clearing member does not expect to assume based on the DCO's rules.'' Without taking a formal position on the proposal, the ABA Subcommittee identified issues that it believed warrant further attention by the Commission and market participants, including whether the language in paragraph (c)(1): (a) Should be implemented ''through a Part 190 rule that would have the effect of overruling inconsistent DCO rules,'' or through an amendment to part 39 to require DCOs ''to have loss allocation rules that align with [the] policy change''; (b) would place U.S. DCOs ''at a competitive disadvantage to non-U.S. DCOs''; (c) would ''discourage firms from becoming or remaining direct clearing members of a DCO for the purpose of clearing trades solely for their own account or for non-public customers''; and/or (d) would ''create a risk that U.S. banking regulators will want to revisit the methodology for determining the amount of regulatory capital that bank and bank-affiliated clearing members must hold with respect to cleared derivatives.'' The ABA Subcommittee therefore recommended that the Commission maintain the status quo by revising proposed § 190.18(c)(1) ''to confirm that customer property described in Rule 190.09(b)(1) will be allocated to member property after such property is applied to cover losses in accordance with the DCO's rules . . . [until] the Commission separately considers the merits of the [proposed] policy change.''

SIFMA AMG/MFA requested that the Commission amend proposed § 190.18(b)(1) to provide explicitly ''that customer property includes property a debtor DCO contributes to its default waterfall,'' as seemingly was intended by proposed § 190.18(b)(1)(ii)(E).

Consistent with its comments on proposed § 190.17(b), FIA commented that customer property should not include guaranty fund deposits as set forth in proposed § 190.18(b)(1)(iii) and recommended that the Commission remove that provision. FIA stated that a ''default fund represents a multilateral indemnification arrangement between the DCO and its members pursuant to which members' contributions are used to cover the DCO's losses resulting from member default(s) and thereby prevent the DCO's bankruptcy.'' FIA contended that a DCO has no authority under its rules, and a trustee has no authority under the Bankruptcy Code, ''to request or to apply these funds for any other purpose.''

CME commented in support of the decision to set forth the elements that comprise customer property in proposed § 190.18(b)(1). CME specifically agreed that the scope of customer property should include any guaranty fund deposit, assessment or similar deposit made by a clearing member or recovered by the trustee, to the extent any remains following administration of the debtor's default rules and procedures, and any other property of a member available under the debtor's default rules and procedures to satisfy claims made by or on behalf of pubic customers of a member. For clarity and transparency, CME encouraged the Commission to expand the scope of customer property to explicitly include the amounts that the DCO commits to the financial resources in the waterfall under its rules, to the extent that those resources have not already been applied under the DCO's default rules. CME stated, however, that the Commission should eliminate the requirement set forth in proposed § 190.18(c)(1) that the payments described in proposed § 190.18(b)(1) be allocated to customer property other than member property for use ''to cover a shortfall in the funded balances for clearing members' customer accounts in *any* account class'' and, instead, ''reaffirm that guaranty fund deposits are to be applied to cover losses in accordance with the DCO's rules, with any remaining funds allocated to member property.'' In support of its view, CME stated that such requirement set forth in proposed § 190.18(c)(1): (1) Would materially change ''the definition of member property in current Regulation 190.10, under which any guaranty funds remaining after payments *in accordance with the DCO's rules* would be returned to clearing members as member property''; (2) ''may significantly alter how clearing members assess the risks they have assumed in joining CME,'' by undermining CME's ''rules limiting use of clearing members' guaranty fund deposits to cover losses in the relevant product class to which they have contributed to the guaranty fund and in which they participate''; and (3) would ''compromise CME's ability under Regulation 39.27 to 'operate pursuant to

a well-founded, transparent, and *enforceable* legal framework that addresses each aspect' of CME's obligations as a DCO, including netting arrangements and 'other significant aspects' of CME's 'operations, risk management procedures, and related requirements' as a DCO.'' [193] CME also asserted that: (a) Proposed § 190.18(c)(1) ''is vulnerable to legal challenge as exceeding the Commission's authority'' in section 20 of the CEA, because such authority is not being exercised consistent with the Bankruptcy Code and other provisions of the CEA; [194] (b) the Commission does not have the authority under the CEA ''to adopt rules that have the effect of directly rewriting a DCO's rules,'' and that doing so would be contrary to the reasonable discretion afforded to DCOs under section 5b of the CEA to comply with DCO core principles and Commission regulations; (c) the Commission may not alter or supplement the rules of a registered entity until it satisfies the requirement under section 8a(7) of the CEA to request that the registered entity amend its rules and provide the registered entity with notice and an opportunity for a hearing if it does not do so; (d) amending the contract between and among clearing members and the DCO through a Commission regulation ''would call into question . . . the enforceability of the DCO's rules''; and (e) ''a proposed rule impacting the manner in which bank or bank-affiliated clearing members' guaranty fund deposits and assessment obligations can be utilized may drive subsequent changes to the methodology and resulting amount of capital such members must hold for those exposures under the Cleared Transactions Framework in the Regulatory Capital Rules.''

ICE agreed with the Commission's approach not to propose ''that property in an insolvent DCO's general estate can be treated as customer property where customer property is otherwise insufficient to pay customer claims.'' ICE suggested that the Commission clarify ''that any ability to use residual assets should be only to the extent such assets are not required to be used for any other purpose under other applicable law (*e.g.*[,] for other classes of customers or for other products).'' ICE suggested that ''[t]he definition of customer property should also respect any express limitations on recourse that have been implemented under DCO rules.'' ICE did not believe that the distributional preference for public customers over clearing members and any non-public customers of clearing members, as established by proposed § 190.18, is appropriate in the context of a DCO failure, because it could ''impose losses, or greater losses, on non-defaulting clearing members in a manner that overrides the negotiated and approved frameworks in the DCO's rules.'' ICE asserted that this ''change could require fundamental restructuring of DCO operations,'' and should be ''part of a separate rulemaking that addresses the interaction [of the proposal] with the Part 39 requirements.'' ICE also noted that the liability caps that limit the overall amount of a clearing member's contributions and assessments—and the manner in which they may be used for a particular default—are important for the clearing members' risk management and are often necessary under such clearing members' capital requirements. ICE stated that requiring the use of contributions or assessments for purposes other than what is set forth in the DCO's rules ''would render such caps and limitations ineffective.'' ICE further posited that proposed § 190.18 is ''unworkable for clearing houses that have separate guaranty funds for separate products, or other limited recourse provisions in their rulebooks [that are used] to designate particular default resources for particular products, and to ring-fence the liability of clearing members from particular products that they may choose not to clear.'' ICE also raised a concern that proposed § 190.18's potential subordination of the claims of the self-clearing members of a defaulting DCO to customers of other clearing members could serve as a ''significant disincentive'' to self-clearing, sponsored clearing, or direct clearing. ICE commented that proposed § 190.18 ''should not be applied to require the use of clearing member guarantee fund, margin, or other resources in the context of a non-default loss where the rules of the DCO specifically do not contemplate (or expressly forbid) the use of such assets for such purposes.'' On that issue, ICE noted that many DCOs have sought to address separately the allocation of non-default losses through rules that ''may allocate certain losses, and not others, to clearing members and/or to the clearing organization itself, and/or provide for the sharing of certain losses in certain amounts.''

After considering the comments, the Commission is adopting § 190.18 with modifications, specifically with respect to paragraphs (b)(1) and (c)(1).

Multiple commenters suggested that the Commission modify § 190.18(b)(1) to make explicit that customer property includes the amounts of its own funds that a debtor DCO had committed as part of its loss allocation rules. Given that the DCO's commitment, in DCO rules, of a specified amount of its own funds to loss allocation sets a market-wide understanding and expectation that such an amount will be used for such a purpose, the Commission agrees that this clarification is warranted. Therefore, the Commission is modifying § 190.18(b)(1) by adding a new paragraph (b)(1)(iv), which will explicitly include in customer property: ''Amounts of its own funds that the debtor had committed as part of its loss allocation rules, to the extent that such amounts have not already been applied under such rules.''

Multiple commenters addressed proposed § 190.18(c)(1)(i), which assigned guarantee funds to customer property other than member property (*i.e.,* to the benefit of members' public customers) if and to the extent that a shortfall existed in the funded balance for such customers. The proposal was supported by ICI, but opposed by CME, FIA, and ICE, while the ABA Subcommittee also noted potential issues.

The Commission separately considered each of the arguments raised by the commenters in opposition to proposed § 190.18(c)(1). In the discussion below, the Commission reviews the arguments raised by the commenters and explains why it is modifying the proposal by not adopting proposed § 190.18(c)(1), and renumbering the remaining paragraphs of proposed § 190.18(c).

In response to concerns that the Commission lacks the authority to implement this provision, the Commission notes that it has the authority under section 20(a)(1) of the CEA to determine, ''[n]otwithstanding title 11 of the United States Code'' (*i.e.,* the Bankruptcy Code) both ''(1) that certain . . . property [including, *e.g.,* guarantee fund deposits] [is] to be included in or excluded from . . . member property'' and ''(5) how the net equity of a customer is to be determined.'' Thus, § 190.18(c)(1) is legally sound because of the ''notwithstanding title 11'' clause in section 20 of the CEA.

Moreover, proposed § 190.18(c)(1) would allocate guarantee fund deposits to customer property other than member

[193] Emphasis in original.

[194] CME commented that the proposal would be contrary to the Bankruptcy Code's definition of ''member property'' as ''customer property received, acquired, or held by or for the account of a debtor that is a clearing organization, from or for the proprietary account of a customer that is a clearing member of the debtor.''

property only where the funded balance is less than one hundred percent of net equity claims for members' public customers in an account class, *i.e.,* where the DCO had failed to maintain in segregation sufficient funds to pay members' public customer account balances in full. In other words, in that scenario, the debtor DCO would be non-compliant with Commission regulations. This is not a re-writing of the DCO's rules,[195] nor a re-writing of the contract between the DCO and its members, nor an undermining of the DCO's ''well-founded, transparent, and enforceable legal framework,'' but an allocation of shortfall in a bankruptcy case where the DCO is non-compliant with Commission regulations.

The use of guarantee funds in the manner specified in proposed § 190.18(c)(1) would not be an ''unexpected loss'' to non-defaulting clearing members, given that the *regulation* would be transparently available to all. To the extent that the consequences of the application of the regulation (re-allocation of their default fund contributions to cover a shortfall in customer property for members' public customers) would be unexpected by clearing members, and unpredicted by their risk management systems, it is equally the case that the public customers of clearing members would be surprised by a shortfall in customer property, which their risk management systems would also see as unexpected.[196] Thus, the choice is not simply whether to impose an unexpected loss to clearing members or not, but rather a choice of who should bear that unexpected loss, clearing members (as a group) or their customers (as a group). To that point, in addition to the statutory authority that is provided in the CEA, the Commission agrees with the comment from ICI that § 190.18(c)(1) would further the policy goal—stated in section 766(h) of the Bankruptcy Code, but also running throughout the Commission's approach to part 190—of prioritizing the claims of public customers over the claims of non-public customers.

However, despite the foregoing analysis supporting adoption of § 190.18(c)(1), the Commission is concerned about bank regulators' potential analysis of § 190.08(c)(1). In particular, the Commission has considered that bank regulators may conclude that, because § 190.08(c)(1) directs the use of DCO default funds for reasons other than addressing mutualized member defaults, member contributions to DCO default funds do not fit within the definition (in bank capital regulations) of ''default fund contribution,'' *see, e.g.,* 12 CFR 217.2. Specifically, such member contributions may not constitute ''funds contributed or commitments made by a clearing member to a CCP's mutualized loss sharing arrangement,'' *see, e.g., id.* If this were the case, members' default fund contributions would be subject to more onerous capital treatment than they would receive if such contributions did fit within the definition of ''default fund contributions.'' [197] That more onerous capital treatment would have a direct, negative impact on normal day-to-day activities for bank-affiliated clearing members, and not merely in the uncertain future event of a DCO bankruptcy. In other words, as discussed further below in section III.D.8, while the benefits to public customers of § 190.18(c)(1) in case of bankruptcy would be balanced by the costs to clearing members, the present-day costs to (bank-affiliated) clearing members of more onerous capital treatment would not be offset by significant benefits to public customers.

The Commission acknowledges that the decision not to adopt proposed § 190.18(c)(1) differs from the Commission's approach to § 190.17(b)(1). In § 190.17(b)(1), uncalled or unmet assessments would be applied to address default losses, with the only difference being the timing of the bankruptcy relative to the timing of the calls for, or payment of, the assessments. In short, the Commission concludes in that context that the default fund contributions would be treated as such for bank capital purposes, and thus would not be subject to more onerous capital treatment. In contrast, proposed § 190.18(c)(1) would apply guarantee funds to cases that are distinct from a member default. As discussed above, it seems entirely plausible that doing so would take such contributions outside of the definition (in bank capital regulations) of ''default fund contribution,'' and thus subject them to more onerous capital treatment. The Commission believes that this distinction is significant and forms the basis for the difference in the Commission's respective approaches to § 190.17(b)(1) and proposed § 190.18(c)(1).

Accordingly, after consideration of the comments, and for the reasons stated above, the Commission is adopting § 190.18 as proposed, with the following modifications, as set forth above: (1) Adding new paragraph (b)(1)(iv), as described above; and (2) by removing paragraph (c)(1) and renumbering the remaining paragraphs of paragraph (c).

9. Regulation § 190.19: Support of Daily Settlement

The Commission is adopting § 190.19 as proposed, with a modification to paragraph (b)(1), as discussed below.

As the Commission noted in proposing § 39.14(b), ''[t]he daily settlement of financial obligations arising from the addition of new positions and price changes with respect to all open positions is an essential element of the clearing process at a DCO.'' [198] Indeed, Congress confirmed this by requiring that each DCO complete money settlements not less frequently than once each business day.[199]

In the ordinary course of business, variation settlement payments are, at a set time or times each day,[200] sent to the DCO from the customer and proprietary accounts of each clearing member with net losses in such accounts (since the last point of computation of settlement obligations for that member), and then sent from the DCO to the customer and proprietary accounts of each clearing member with net gains in such accounts over that time period.

There is no necessary relationship between the aggregate amount of payments to the DCO from all clearing

[195] And, thus, does not require the Commission to invoke or follow the procedures of CEA section 8(a)(7).

[196] Indeed, the risk would be even more unexpected by public customers: Clearing members are entirely aware that their default fund contributions are at risk of use to cover a mutualized default. Their customers, on the other hand, expect that their customer funds are fully protected by the CEA's and the Commission's segregation requirements.

[197] That treatment could be significantly more onerous: For example, under the FDIC's regulations, the capital requirement for a clearing member's prefunded default fund contribution to a qualifying CCP can be as low as 0.16% of that default fund contribution. *See* 12 CFR 324.133(d)(4). By contrast, the capital requirement for a clearing member's prefunded default fund contribution to a non-qualifying CCP is 100% of that default fund contribution. *See* 12 CFR 324.10(a)(1)(iii), (b)(3) (requiring capital of 8% of risk-weighted asset amount, 324.133(d)(2) (setting risk-weighted asset amount for default fund contributions to non-qualifying CCP at 1,250% of the contribution). (1,250% * 8% = 100%). The Federal Reserve and Office of the Comptroller of the Currency have similar regulations.

Default fund contributions to DCOs total many billions of dollars. While not all default fund contributions to DCOs come from bank-affiliated clearing members, the majority of them do.

[198] 76 FR 3608, 3708 (Jan. 11, 2011).

[199] *See* Core Principle E(i), 7 U.S.C. 7a–1(c)(2)(E)(i).

[200] DCOs are required to effect settlement with each clearing member at least once each business day. They are additionally required to have the capability to effect a settlement with each clearing member on an intraday basis. *See* § 39.14(b).

member customer accounts with net losses and the aggregate amount of payments from the DCO to clearing members' customer accounts with net gains. On the other hand, it is the case that, for each business day, the sum of variation settlement payments to the clearinghouse from clearing members' customer and house accounts with net losses will equal the sum of variation settlement payments from the clearinghouse to clearing members' customer and house accounts with net gains.[201] Those variation settlement payments will be received into the DCO's accounts at one or more settlement banks from the accounts of the clearing members with net losses and subsequently be disbursed from the DCO's accounts at settlement banks to the accounts of the clearing members with net gains.[202] Depending on the settlement bank and operational arrangements of the particular DCO, the variation settlement funds will remain in the DCO's accounts between receipt and disbursement for a time period of between several minutes and several hours.

The Commission believes that it is crucial to the settlement process that the variation settlement payments that flow into the DCO from accounts with net losses are available promptly to flow out of the DCO as variation settlement to accounts with net gains.

The Commission is adopting § 190.19(a), pursuant to section 20(a)(1) of the CEA,[203] to provide that, upon and after an order for relief, variation settlement funds shall be included in the customer property of the DCO, and that they shall be considered traceable to—and shall promptly be distributed to—member and customer accounts entitled to payment with respect to the same daily settlement.[204] This customer property would be allocated to (i) member property and (ii) customer property other than member property, in proportion to the ratio of total gains in member accounts with net gains, and total gains in customer accounts with net gains, respectively.

The Commission is adopting § 190.19(b) to address cases where there is a shortfall in funds received pursuant to paragraph (a) (*i.e.,* settlement payments received by the DCO), such as in the case of a member default. Paragraph (b)(1) sets forth how such a shortfall shall be supplemented, to the extent necessary, and further states that such funds shall be allocated in the same proportion as referred to in paragraph (a). Paragraph (b)(1) provides that four types of property shall be included as customer property: (i) Initial margin held for the account of a member that has defaulted on a daily settlement, including initial margin segregated for the customers of such member;[205] (ii) Assets of the debtor to the extent dedicated to such use as part of the debtor's default rules and procedures, or as part of any recovery and wind-down plans described in the paragraph (a) (*i.e.,* the debtor DCO's ''skin in the game''); (iii) Prefunded guarantee or default funds maintained pursuant to the DCO debtor's default rules and procedures; and (iv) Payments made by members pursuant to assessment powers maintained pursuant to the debtor DCO's default rules and procedures. Paragraph (b)(2) provides that, to the extent that the funds that are included as customer property pursuant to paragraph (a), supplemented as described in paragraph (b)(1), such funds would be allocated between (i) member property; and (ii) customer property other than member property, in proportion to the ratio of total gains in member accounts with net gains, and total gains in customer accounts with net gains, respectively.

The Commission requested comment with respect to all aspects of proposed § 190.19.

CME expressed support for proposed § 190.19, commenting that the provisions in the proposal ''are appropriate to support the daily settlement cycle when the trustee obtains the Commission's approval to continue operating the DCO.'' FIA commented that it did not support proposed § 190.19(b), stating that the provision's reliance on a debtor DCO's recovery and wind-down plans post-bankruptcy would be inappropriate.[206] SIFMA AMG/MFA requested that the Commission modify proposed § 190.19(b)(1) to clarify the Commission's presumed intent that ''the debtor's recovery and wind-down plans shall only apply with respect to proposed § 190.19(b)(1)(ii)—the debtor's ''skin in the game'' [(*i.e.,* its own capital contributions)]—and not with respect to the other'' categories of customer property that are enumerated in § 190.19(b)(1). The Commission agrees that its intent should be clarified to reflect the comment from SIFMA AMG/MFA,[207] and is modifying the language of § 190.19 to reflect that clarification.

Accordingly, after consideration of the comments, and for the reasons stated above, the Commission is adopting § 190.19 as proposed, with a modification to clarify that the reference to the debtor's recovery and wind-down plans in paragraph (b)(1) applies only to paragraph (b)(1)(ii), as set forth above.

D. Appendix A Forms

The Commission is deleting forms 1 through 3 contained in appendix A and is replacing form 4 with a streamlined proof of claim form. Current forms 1 through 3 contain outdated provisions that require unnecessary information to be collected. The Commission believes these changes will provide a trustee with flexibility to act based on the specific circumstances of the case, while still acting consistently with the rules.

As noted in § 190.03(f), the trustee will be permitted, but not required, to use the revised template proof of claim form included as new appendix A. That

[201] Thus, while (for each settlement cycle), customer account losses (x) plus house account losses (y) will equal customer account gains (p) plus house account gains (q) (that is, $x + y = p + q$), x would only equal p by random chance.

[202] In some cases, the DCO will use one settlement bank, and all settlement funds will flow into and out of that bank. In other cases, the DCO may use a system of settlement banks, and the DCO may, after receiving payments from members with payment obligations, move funds between and among the settlement banks (possibly through a ''concentration bank'') to match the settlement funds at each bank to the DCO's settlement obligations to members who are entitled to settlement payments.

[203] 7 U.S.C. 24(a)(1) (''Notwithstanding title 11 of the United States Code, the Commission may provide, with respect to a commodity broker that is a debtor under chapter 7 of title 11 of the United States Code, by rule or regulation . . . that certain cash, securities, other property, or commodity contracts are to be included in or excluded from customer property or member property.'').

[204] Because deposits of initial margin described in § 39.14(a)(1)(iii) are separate from the variation settlement process, they are treated separately in § 190.19(a). Such funds would be member property to the extent that they are deposited on behalf of members' house accounts, and customer property other than member property to the extent that they are deposited on behalf of members' customer accounts.

[205] This is restricted to the extent that such margin may only be used to the extent that such use is permitted pursuant to parts 1, 22, and 30 of the Commission's regulations, which include provisions restricting the use of customer margin.

[206] FIA's concerns with the language in § 190.19(b) are the same as its concerns with § 190.15(b) and (c), discussed in greater detail above. *See supra* section II.C.5. However, for the reasons noted in section II.C.5, the Commission believes that providing a ''menu of options'' among which a trustee may select (and adapt) in a manner that is ''reasonable and practicable'' would provide the trustee with a helpful roadmap to determine strategy and tactics, given that the trustee will likely face a complex and difficult situation with little preparation.

[207] As SIFMA AMG/MFA correctly suggested, the Commission intends for the debtor DCO's recovery and wind-down plans to apply to the property described in § 190.19(b)(1)(ii), and not to the property described in paragraph (b)(1)(i), (iii) or (iv), in the manner and to the extent described in paragraph (b)(1). As noted in the preamble to the proposal, and as found in the regulation itself, § 190.19(b)(1)(ii) contains an explicit reference to ''recovery and wind-down plans,'' whereas § 190.19(b)(1)(i), (iii) and (iv) do not contain such references.

template is intended to implement § 190.03(e), and includes cross-references to the detailed paragraphs of that section. Similarly, the instructions for this template form that are included in appendix A are also designed to aid customers in providing information and documentation to the trustee that will enable the trustee to decide whether, and in what amount, to allow each customer's claim consistent with part 190.

The Commission received one comment with respect to appendix A, from CME, which opined that ''the proposed template proof of claim form included as Appendix A [is a] major improvement[ ] over the current . . . proof of claim template. CME also support[ed] giving the trustee the flexibility to tailor the proof of claim form to request information of customers as appropriate under the circumstances.''

Accordingly, after consideration of this comment, and for the reasons stated above, appendix A to part 190 will be adopted as proposed.

E. Appendix B Forms

Appendix B to part 190 contains special bankruptcy distribution rules. These rules are broken into two frameworks. Framework 1 provides special rules for distributing customer funds when the debtor FCM participated in a futures-securities cross-margining program that refers to that framework. Framework 2 provides special rules for allocating as shortfall in customer funds to customers when the shortfall is incurred with respect to funds held in a depository outside the U.S. or in a foreign currency.

The Commission proposed clarifying changes to framework 1. No comments were received with respect to framework 1. Accordingly, and for the reasons stated above, the Commission is adopting appendix B, framework 1 as proposed.

The Commission proposed to retain framework 2 with some clarifying changes to the opening paragraph, but without proposing any substantive change. It proposed to retain the current instructions and examples following the first paragraph in appendix B, framework 2 entirely unchanged. It requested comment with respect to framework 2. The Commission received two comments on framework 2: From the ABA Subcommittee, and from a number of individual members of that subcommittee writing on their own behalf.

The ABA Subcommittee expressed the concern that ''[f]ramework 2 creates some ambiguity on when and how the special distribution framework it prescribes should apply.'' First, the ABA Subcommittee stated that ''framework 2 could be read to apply whenever there is a loss resulting from a sovereign action, even if there is sufficient customer property to otherwise pay all customer net equity claims in full.'' The ABA Subcommittee suggested that an additional sentence be added to the opening paragraph of framework 2 clarifying that it applies only when there is a loss due to sovereign action *and* there is insufficient customer property to pay all customer net equity claims in full. Second, the ABA Subcommittee (in conjunction with a clarifying comment from the Subcommittee Members) noted that framework 2 uses the term ''reduction in claims'' in a potentially confusing manner—framework 2 is intended to reduce distributions allocated to those customers who are allocated losses due to sovereign risk; those customers claims are not reduced. If the sovereign action is later reversed or modified, those customers whose distributions were reduced will receive increased distributions on their claims.

Third, the existing instructions to framework 2 ''establish the 'Final Net Equity Determination Date' as the date for both converting customer claims to U.S. dollars and determining the amount of the Sovereign Loss.'' However, in prior bankruptcies of FCM/commodity brokers, ''claims stated in foreign currencies were either valued on the date of transfer (where porting was available), or converted to U.S. dollars as of either as of the petition date or the date on which the foreign currency reflected in the customer's account was liquidated (and thus the customer bore the risk of interim currency fluctuations).'' Furthermore, ''a sovereign action could take place at any time after the petition date, and the trustee is required to make funded balance calculations throughout the course of the bankruptcy case for purposes of porting and/or making interim distributions.''

The Commission finds the comments on framework 2 of the ABA Subcommittee, as clarified by the comment of the Subcommittee Members, persuasive. First, framework 2 is indeed only intended to address cases where there is insufficient customer property to pay all customer net equity claims in the relevant account class in full (if there is no shortfall, then there is no need to allocate losses), and that point should be made clear. Second, it is correct that framework 2 is intended to reduce distributions, it is not intended to reduce claims, and it is indeed appropriate to change the language used in framework 2 to clarify this fact.[208] Third, the relevant date is the date of the calculation, not the ''Final Net Equity Determination Date,'' and this should be clarified as well.

Accordingly, the Commission is:

(1) Modifying the first paragraph of framework 2 to include the statement that: ''If a futures commission merchant enters into bankruptcy and maintains futures customer funds or Cleared Swaps Customer Collateral in a depository outside the U.S. or in a depository located in the U.S. in a currency other than U.S. dollars, *and a sovereign action of a foreign government or court has occurred that contributes to shortfalls in the amounts of futures customer funds or Cleared Swaps Customer Collateral,* the trustee shall use the following allocation procedures'' (emphasis added solely for illustration).

(2) Amending the instructions and examples within the whole of framework 2 to replace references to ''reduction in claims'' with references to ''reduction in distributions,'' and with conforming changes to other text.

(3) Deleting the phrase ''Final Net Equity Determination Date'' from current section II.B.2.b of framework 2, and replacing it with the phrase ''date of the calculation.''

Accordingly, after consideration of the comments, and for the reasons stated above, the Commission is adopting appendix B, framework 2 as proposed, with the modifications described above.

F. Technical Corrections to Other Parts

1. Part 1

The Commission is making as proposed several technical corrections and updates to part 1 in order to update cross-references. These are as follows:

- In § 1.25(a)(2)(ii)(B) the Commission will revise the cross-reference to specifically identifiable property, since the definition will be updated in § 190.01.
- In § 1.55(d) introductory text and (d)(1) and (2), references to current § 190.06 will be removed consistent

[208] The fact that sovereign action reduces *distributions* rather than *claims* means that, if the sovereign action is later reversed or modified (*e.g.,* by appeal in the foreign courts, or due to recovery of assets in the foreign insolvency proceeding) resulting in reduced losses due to sovereign action in a particular jurisdiction, those customers whose distributions have been reduced due to sovereign action in that jurisdiction will receive increased distributions on their claims (with those distributions adjusted to reflect the revised amount of losses due to sovereign action). Thus, in this case, the claims remain constant, while the distributions increase.

with the revisions to new § 1.41 (which was proposed as § 190.10(b) and renumbered).

- In §§ 1.55(f) and 1.65(a)(3) introductory text and (a)(3)(iii) the Commission will update references to the customer acknowledgment in § 1.55(p) (which was proposed as § 190.10(e) and renumbered).

2. Part 4

In part 4, the Commission is making as proposed minor technical corrections: In §§ 4.5(c)(2)(iii)(A), 4.12(b)(1)(i)(C), and 4.13(a)(3)(ii)(A), the Commission will change the cross-references to the defined term for ''in-the-money-amount.''

3. Part 41

In part 41, the Commission is making as proposed one technical correction. In § 41.41(d), the Commission will delete the cross-reference to the recordkeeping obligations in current § 190.06, pursuant to the revisions to § 1.41 (which was proposed as § 190.10(b) and renumbered).

No comments were received with any of these technical corrections and accordingly, for the reasons stated above, they are being adopted as proposed.

G. Additional Comments

In addition to the comments discussed above, the Commission received several general comments that addressed matters outside the scope of the Proposal. The Commission appreciates the additional feedback. Because these comments do not address proposed changes and are therefore outside the scope of this rulemaking, the Commission may take the comments under advisement for future rulemakings.

ISDA encouraged the Commission to continue working on DCO recovery and resolution issues alongside the Federal Deposit Insurance Corporation (FDIC) in the United States, and with global standard setters such as CPMI–IOSCO and the Financial Stability Board and other CCP supervisors and resolution authorities internationally. The Commission notes that staff are actively doing each of those things.

ISDA also noted that it would be advisable to engage in workshops with both market participants (including DCOs, FCMs and other clearing members and customers) and the FDIC prior to finalizing the Proposal to develop examples that illustrate both how net equity claims would be calculated in a hypothetical DCO insolvency under various loss scenarios and how the claims of creditors and equity would be treated in a resolution of the DCO under Title II of the Dodd-Frank Act. ISDA observed that the Proposal's treatment of a DCO's insolvency contains significant subtleties and nuances that could have implications for the counterfactual in a DCO resolution. ISDA suggested that further engagement could help ensure that these subtleties and nuances would not result in any unintended consequences, and that they are broadly understood by all entities that could be impacted by a DCO's insolvency or resolution.

While the Commission is finalizing the Proposal, it agrees that workshops and similar interactions between staff and other agencies, as well as with industry participants, are an excellent way to expose subtleties and nuances, build common understanding, and enhance planning.

CME and CMC commented on various issues relating to delivery, and requested that ''the Commission consider, in a separate rulemaking, the merits of imposing custody requirements or other customer protection requirements with respect to delivery accounts, along with the possibility of further subdividing delivery accounts and delivery account classes by underlying asset class or delivery mechanism, *e.g.,* electronic transfer versus physical load-out.'' [209] CME recommended that the separate rulemaking consider requirements such as whether FCMs should hold such property in custody accounts or limitations on how long cash or cash equivalents should be held in delivery accounts that are not subject to custody requirements.[210] CME believed that any such rules would fit best in the Commission's part 1 regulations and not in part 190 as parties with delivery obligations may not necessarily be aware of requirements in the bankruptcy regulations. CME recommended that the part 190 provisions relating to the delivery account class should be consistent with any such rules the Commission may ultimately adopt. Thus, CME believed that the Commission may have to revisit the delivery account class definition, and any appropriate subdivisions within the account class, along with the definitions of cash delivery property and physical delivery property definitions, based on the outcome of such a rulemaking.

As noted above, the Commission recognizes the importance of addressing deliveries and delivery accounts, in order to protect customer funds in delivery accounts, to avoid disruptions to cash markets for delivered commodities, and to avoid adverse consequences to parties that may be relying on delivery taking place in connection with their business operations. The Commission notes that there potentially would be benefits to requiring segregation for delivery accounts, but there would be corresponding costs as well. The Commission expects to continue its consideration of such delivery and delivery account issues in the future.

SIMFA AMG/MFA understood the Commission's decision, due to limited resources, not to amend certain key definitions and concepts outside part 190, as proposed by the ABA Subcommittee in its model set of part 190 rules, within this rulemaking. These amendments include, *e.g.,* the definitions of foreign option and variation margin, as well as regulations concerning non-swap and non-futures over-the-counter transactions cleared by a DCO and concerning leverage transaction merchants. However, SIFMA AMG/MFA recommended that the Commission make these amendments as soon as possible, given the beneficial impact such changes will have on the administration of an FCM or DCO insolvency. The Commission may consider these proposed changes in the future.

ICI and Vanguard encouraged the Commission to work with other regulators to minimize existing barriers to porting, particularly for FCMs dually registered as broker-dealers, FCMs within consolidated groups that are subject to certain due diligence requirements, and FCMs that are subject to the FDIC's Orderly Liquidation Authority proceedings. The commenters encouraged the Commission to work with regulators to permit similar six-month grace periods and remove the requirement to port ''all or none'' of the positions instead of allowing partial transfers of customer positions, including those of separately managed accounts.

ICI also recommended that the Commission engage with SIPC or the relevant bankruptcy court to ensure that any selected trustee has the experience and knowledge to act in accordance with the duties contained in part 190 and Subchapter IV of the Bankruptcy Code.

Commission staff have and will continue to work with staff of other regulators to minimize barriers to

[209] See CMC, CME.

[210] *See* CME. CME believed that the Commission has authority to adopt such a rule pursuant to its anti-fraud authority under CEA section 4b and its plenary authority to regulate commodity options under CEA section 4c(b).

porting, and have worked and will, if and when necessary in future, work with SIPC and the office of the U.S. Trustee, to promote the appointment of the most knowledgeable trustees available in the context of SIPA or Chapter 7 proceedings, respectively, involving a commodity broker.

ICI recommended that the Commission continue its portfolio margining harmonization efforts with the SEC to further facilitate portfolio margining, including with respect to security-based swaps and swaps. The Commission notes that the two Commissions are actively engaging in such efforts, and, on October 22, 2020, held a joint meeting during which they jointly approved a ''Request for Comment: Portfolio Margining of Uncleared Swaps and Non-Cleared Security-Based Swaps.'' [211]

ICI and Vanguard recommended that the Commission extend the ''legally segregated operationally commingled'' (''LSOC'') model applied to cleared swaps contracts (and associated collateral) within part 22 to also apply to futures, foreign futures, and options thereon (and associated collateral) to limit non-defaulting customer exposure to defaulting customers.

ICI also requested that the Commission or Commission staff provide guidance, such as an interpretive letter, that interprets part 22 to require that OTC transactions cleared by DCOs and carried in a cleared swaps account be treated as cleared swaps subject to part 22.[212]

ICI and Vanguard recommended that the Commission prohibit non-defaulting customer gains haircutting, or any other margin haircutting, and if such gains haircutting is allowed at all, it should be limited in scope and duration, overseen by the DCO's resolution authority and/or the systemic risk authority, and the customer must receive full compensation in the form of a credit or equity claim against the DCO, superior to that of other creditors.

ICI and Vanguard also requested that the Commission require DCOs to increase their ''skin-in-the-game'' as a foundational incentive for the DCO to set appropriate margin levels and avoid clearing illiquid or highly volatile products. Vanguard also recommended that a DCO's capital should be required to backstop clearing risk, should the assets available for DCO recovery prove inadequate.

FIA requested that the Commission confirm that amendments to part 190, including to appendix B, framework 2, would not prohibit the Commission from amending § 1.49 at a later date to expand the definition of ''money center currency.''

The Commission confirms that the amendments to part 190 that are being made herein will not prohibit the Commission from amending any other regulation, including § 1.49, in the future. If future amendments to other parts of the Commission's regulations lead to a situation where it would be advisable to make conforming changes to part 190, the Commission will consider such conforming changes along with those amendments.

H. Supplemental Proposal

In the Supplemental Proposal, the Commission noted a problem to be solved: There is a possibility that a SIDCO could file for bankruptcy before the process for placing that SIDCO into Title II resolution is complete. Due to closeout netting rules adopted by many DCOs, including the SIDCOs, that filing could have the consequence of terminating all of the SIDCO's cleared contracts. Terminating those contracts could undermine the success of any subsequent Title II resolution.

The Supplemental Proposal suggested one approach to solve the problem, and requested comment, *inter alia,* on better ways to do so. In light of concerns raised in the comments received in response to the Supplemental Proposal, and for reasons discussed below, the Commission has determined not to finalize the alternative that was proposed in the Supplemental Proposal.

The process for placing a financial company into Title II Resolution is deliberate and intricate.[213] By contrast, a voluntary petition in bankruptcy commences the case, which in turn constitutes an order for relief. Accordingly, there exists a possibility that, in the highly unlikely event that a SIDCO would consider bankruptcy, the SIDCO could file for bankruptcy before a process to place that SIDCO into a Title II Resolution would have completed. While the appointment of the FDIC as receiver under Title II would automatically result in the dismissal of the prior bankruptcy, if the bankruptcy filing were to necessarily result in the termination of the SIDCO's derivatives contracts with its members, that would undermine the potential success of any subsequent Title II Resolution.

To address the problem, the Commission proposed, in the Supplemental Proposal, to adopt a provision that would stay the termination of SIDCO contracts for a brief time after bankruptcy in order to provide advance notice to the Commission (and, thus, to enable the Commission to notify the key turners) of the point at which the SIDCO's contracts could be terminated, in order to foster the success of a Title II resolution by avoiding that termination, if the FDIC is appointed receiver in such a Resolution within that time. During this stay, variation margin would neither be collected nor paid. Due to concerns raised by commenters to the original Proposal regarding the effect of any restriction on termination of DCO contracts on treatment, under the capital regulations of Prudential Regulators of the banks that many clearing members are affiliated with, of SIDCO rules, the proposal provided that this provision would become effective only if the Commission were to find that the Prudential Regulators (*i.e.,* the Federal Reserve, the FDIC, and the Office of the Comptroller of the Currency) have taken steps to make such a stay consistent with SIDCO rules retaining status as QMNAs.[214]

[211] 85 FR 70536 (November 5, 2020).

[212] Such an interpretation may be superfluous. Previously, the Commission issued an ''Interpretative Statement Regarding Funds Related to Cleared-Only Contracts Determined To Be Included in a Customer's Net Equity.'' 73 FR 57235 (October 2, 2008). At the time, prior to Dodd-Frank, there were questions as to whether cleared-only transactions were commodity contracts. The Commission noted that, in cases where such contracts are held in a futures account at an FCM and margined as a portfolio with exchange-traded futures, assets margining that portfolio are likely to be includable within ''net equity'' even if such contracts were found not to be commodity contracts: Where the assets in an entity's account collateralize a portfolio containing both commodity contracts and other contracts, the entirety of those serves as performance bond for each type of contracts. *See id.* at 57236. *See also* 17 CFR 22.1 (defining ''Cleared Swaps Customer Collateral,'' in relevant part, as all property that ''[i]s intended to or does margin, guarantee, or secure a Cleared Swap . . . .'').

[213] In the case of a SIDCO, this would include a written recommendation by each of the FDIC and the Federal Reserve covering eight statutory factors. Following that recommendation, the Secretary of the Treasury would then need to make a determination, in consultation with the President, that each of seven statutory factors is met. (The FDIC, Federal Reserve, and Secretary of the Treasury are often referred to as the ''key turners'' for Title II resolution). Following such a determination, the board of directors of the financial company may acquiesce or consent to the appointment of the FDIC as receiver, or there may be a period of judicial review which may extend to 24 hours.

[214] Any stay (in bankruptcy) on the termination of the SIDCO's derivatives contracts would—under the regulations of the Prudential Regulators of the banks and bank holding companies that SIDCO clearing members may be affiliated with or part of—be inconsistent with the status of a DCO's rules as a qualifying master netting agreement (''QMNA''). Qualification of DCO rules as a QMNA is necessary in order for the banks and bank holding companies that clearing members are affiliated with or part of

Continued

The Commission requested comment on all aspects of the Supplemental Proposal, including as to whether the approach proposed ''is the best design for such a solution.''

The Commission received five comments on the Supplemental Proposal, each of which was from an entity that commented on the Proposal.[215]

Many of the commenters argued that the proposed stay is unnecessary, because the Commission would inevitably have received notice of the impending bankruptcy. For instance, ICI (2) commented that:

> Although it may indeed take some time for the relevant agencies to ''turn the three keys,'' a DCO's recovery tools should give the agencies more than enough time. DCOs have clearing fund provisions, operational default provisions, and a variety of other risk management tools at their disposal. In practice, these tools may not be completely effective to preclude an insolvency. However, it seems extraordinarily unlikely that they would be so ineffective as to fail to give the FDIC, Federal Reserve Board, and Secretary of the Treasury enough time to decide whether to trigger OLA proceedings.

Similarly, SIFMA AMG/MFA (2) stated that ''the possibility of a surprise bankruptcy filing [is] implausible given the regulatory oversight framework.''

FIA (2) agreed, stating that:

> A determination with regard to invoking Title II will almost certainly be made before a SIDCO is subject to an order for relief. . . . [W]e fully anticipate that the Commission, the FRB, the FDIC, and the Department of the Treasury will be making an assessment regarding the necessity and feasibility of recommending that the President invoke Title II and taking appropriate action before the SIDCO concludes that it must file a petition for bankruptcy.

CME (2) argued that:

> under the CEA oversight framework, including a SIDCO's reporting obligations, surely it is reasonable to expect that the Commission, FDIC, FRB and Treasury will be well aware of any circumstances that could portend a SIDCO's failure, whatever the cause, and will be closely monitoring the situation. If the relevant parties are contemplating placing the SIDCO into a Title II resolution proceeding, and doing so is feasible, it is hard to imagine that a SIDCO could file a voluntary petition for relief under subchapter IV of Chapter 7 of the Bankruptcy Code without their prior knowledge.
>
> * * *
>
> In the highly unlike event a SIDCO were to face a decision whether to file for bankruptcy, it would be one of last resort, taken only after careful deliberation. The decision to file a voluntary petition for relief is certainly not one that CME, or any DCO, would take lightly.

The Commission agrees that, pursuant to the DCO oversight framework, including a SIDCO's reporting obligations under § 39.19, the Commission would promptly be notified of a DCO's financial distress. Upon learning of such distress—whether through notification by the DCO or by risk surveillance by Commission staff—the Commission and staff would monitor the situation closely, and, in appropriate cases, promptly contact and act in coordination with fellow regulators, including the Federal Reserve and FDIC (and, as appropriate, the Department of the Treasury). Moreover, DCOs have strong and effective ''clearing fund provisions, operational default provisions, and other risk management tools at their disposal,'' as noted in the comment letter from ICI (2). The Commission believes it to be ''extraordinarily unlikely'' that these tools would fail, let alone fail before the ''key turners'' have time to act.

It is also true that, given prior experience with discussions with DCOs concerning defaults of clearing members (none of which resulted in financial distress to the DCOs), the Commission fully expects that any DCO that *is* in financial distress would be in close contact with Commission staff. The Commission also appreciates the sentiment expressed by CME and quoted above, implying that ''it is hard to imagine'' that a SIDCO would not provide the Commission with prior knowledge of a voluntary bankruptcy filing. Finally, the Commission is confident that the decision to file a voluntary petition for relief in bankruptcy is ''not one that . . . any DCO would take lightly.''

Nevertheless, given the destructive impact that termination of the derivatives contracts of a SIDCO would cause, the Commission remains concerned about the effects that a bankruptcy filing would have on the ability to resolve the SIDCO pursuant to Title II successfully. In this context, it is not enough that such an event is ''implausible,'' ''hard to imagine,'' or ''extraordinarily unlikely.'' Knowledge of the SIDCO's financial distress is distinct from knowledge of the timing of a potential bankruptcy filing. While the Commission would most likely be aware of the SIDCO's distress, it is at this point not certain that there would be clear communication of the SIDCO's intention to file for bankruptcy sufficiently in advance that the key turners would have time to act.

As noted in the Supplemental Proposal, the destructive impact of a full tear-up of a SIDCO's contracts would be significant. The FSOC has found that a significant disruption or failure of either SIDCO could have a major adverse impact on the U.S. financial markets, the impact of which would be exacerbated by the limited number of clearing alternatives currently available for the products cleared by each SIDCO. A failure or disruption of either SIDCO would likely have a significant detrimental effect on the liquidity of the futures and options markets (for CME) or swaps markets (for ICC), and on clearing members, which include large financial institutions, and other market participants. These significant effects would, in turn, likely threaten the stability of the broader U.S. financial system.[216] For those reasons, *inter alia,* the Commission continues to be concerned about avoiding a circumstance where the derivatives contracts of a SIDCO are irrevocably terminated because the SIDCO files for bankruptcy before a process to place that SIDCO into a Title II Resolution.

However, the comments expressed strong concerns about achieving those goals through the use of a bankruptcy stay, especially in light of the fact that variation margin would neither be collected nor paid during that period.

The Supplemental Proposal acknowledged that risk levels would increase during the stay period. Commenters argued that such increase in risk exposures during the stay period would pose unacceptable risks. For example, CME (2) stated that ''permitting the accumulation of uncovered risk for 48 hours during an extremely volatile time would pose a risk to financial stability.'' Similarly, SIFMA AMG/MFA (2) warned that the proposed part 190 stay, in conjunction with the Title II stay, ''would result in extraordinary market exposures to market participants during highly volatile market conditions. The non-payment of margin could also result in a multiple day liquidity problem for

---

to net the exposures of their contracts cleared with the DCO in calculating bank capital requirements. If they cannot net such exposures, there would be significantly increased bank capital requirements associated with such contracts. Such an increase in bank capital requirements would disrupt both proprietary and customer clearing. *See generally* Supplemental Proposal, 85 FR 60110, 60112 (Sept. 24, 2020).

[215] Comments on the Supplemental Proposal were submitted by: CME Group Inc. (''CME (2)''); Futures Industry Association (''FIA (2)''); Intercontinental Exchange Inc. (''ICE (2)''); Investment Company Institute (''ICI (2)''), and Securities Industry and Financial Markets Asset Management Group and Managed Funds Association (''SIFMA AMG/MFA (2)'').

[216] *See* 2012 FSOC Annual Report, Appendix A, at 163, 178.

market participants clearing at the SIDCO.''

The Supplemental Proposal also acknowledged that there is a significant cost to the proposed stay, in that ''[f]or the duration of the stay period, clearing members and clients will be uncertain whether their contracts will continue (as part of a Resolution) or be terminated (and thus would need to be replaced). That uncertainty would mean that clearing members and clients would be disadvantaged in determining how best to protect their positions.'' Again, commenters agreed that this cost would ensue, and argued that it would be unacceptable. For example, ICI (2) observed that during the stay:

> the price of the relevant underlying assets could (and if a SIDCO is insolvent, likely would) move dramatically. However, customers would be precluded from entering into risk-reducing or replacement transactions to stem potential losses, since they will not know whether their contracts will be terminated or reinstated. Such a freeze not only threatens to cause public customers significant losses that they cannot mitigate; it would also create a liquidity event because customers will need to preserve as much liquidity as possible during the pendency of the stay in order to meet potential margin calls.

Commenters also raised issues relating to legal uncertainty. For instance, FIA (2) acknowledged that section 20 ''authorizes the Commission to adopt rules '[n]otwithstanding title 11 of the United States Code' '' (*i.e.,* the Bankruptcy Code). However, FIA observed that ''[w]hether a stay contemplated under the Supplemental Proposal would conflict with section 404(a) of FDICIA . . . is unclear.''

In light of the persuasive arguments of the commenters, the Commission concludes that a bankruptcy stay is not an appropriate means of achieving the goal of fostering the success of a Title II Resolution by avoiding the possibility that the SIDCO could file for bankruptcy before a process to place that SIDCO into a Title II Resolution would have completed with the result that all of the SIDCO's contracts were terminated. This would be true even if action was taken by the Prudential Regulators to avoid having such a stay undermine the QMNA status of SIDCO rules. Thus, while the goal remains important, the Commission will not adopt such a stay.

A number of the comments answered the Commission's call for a better way of achieving that goal. SIFMA AMG/MFA(II) stated that ''[a]s an alternative to the proposed stay, the Commission could require, as part of its Part 39 or Part 190 rules, that a SIDCO provide a 1 or 2 day notice to the Commission of any bankruptcy petition by a SIDCO. We believe this notice requirement would achieve the same goal in a materially less detrimental manner.''

CME (2) suggested the same alternative approach to achieve the same regulatory goal, in somewhat more detail. CME (2) urged that the Commission should address the problem:

> in a more direct manner, consistent with its rulemaking authority. For example, the Commission could require a DCO to notify the CFTC in advance of its plan to file a voluntary petition for relief under subchapter IV of Chapter 7 of the Code, to allow Treasury time to determine whether to appoint the FDIC as receiver before the SIDCO files its petition. We note that before a commodity broker may file a voluntary petition for relief under subchapter IV, its board of directors must approve a resolution authorizing the debtor to take that step.

The Commission agrees that the alternative suggested by the commenters in response to the Commission's request—providing the advance notice sought by the Commission, but before a bankruptcy filing rather than thereafter—is one that, as FIA (2) observed, ''deserves the Commission's strong consideration.'' It appears that it may achieve the regulatory goals specified in the Supplemental Proposal while avoiding the concerns raised by the commenters: By providing advance notice to the Commission, it appears that it may allow the Commission, which will be coordinating with the ''key-turners,'' to advise those agencies of the imminence of a bankruptcy filing, and to provide them with warning at a time that may be sufficient to enable them to act with dispatch to complete the process.

Because the alternative approach would not involve a post-bankruptcy stay, it would appear to avoid affecting the QMNA status of SIDCO rules (and, thus, would appear not to require any action by the Prudential Regulators).[217] Moreover, because this notice would occur in advance of a bankruptcy filing, the suspension of payments and collections of variation margin would not occur, and there would appear to be no ambiguity concerning the status of the cleared contracts of market participants. By avoiding the mechanism of a bankruptcy stay, the Commission would also appear to avoid the legal uncertainty issues raised by the commenters with respect to that mechanism. Instead, this notice approach would appear to be, as noted by CME, well within the Commission's rulemaking authority.[218]

However, in light of the concerns raised with the previous approaches to addressing this problem, both the one advanced in the Supplemental Proposal as well as one advanced in the Proposal, the Commission concludes that, at this point, it should engage in further analysis and development before proposing this, or any other, alternative approach. Such further analysis and development might better enable the Commission to propose, in detail, a solution that is effective, and that mitigates any attendant costs. Thus, the Commission will, at present, keep this issue under advisement.

III. Cost-Benefit Considerations

A. Introduction

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.[219] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors (collectively referred to herein as ''Section 15(a) Factors'') below.

In the Proposal, the Commission endeavored to assess the expected costs and benefits of the proposed rulemaking in quantitative terms, including costs related to matters addressed in the Paperwork Reduction Act[220] (''PRA-related costs''), where possible. In situations where the Commission was unable to quantify the costs and benefits, the Commission identified and considered the costs and benefits of the applicable proposed rules in qualitative terms. The lack of data and information to estimate those costs was attributable in part to the nature of the proposed

[217] This also avoids the issue, raised by ICE (2), that action by the Prudential Regulators with respect to QMNA status may not be sufficient to address netting issues for non-U.S. clearing members.

[218] *See, e.g.,* CEA section 5b(c)(2)(J), 7 U.S.C. 7a–1(c)(2)(J) (reporting core principle); CEA section 3(b), 7 U.S.C. 5(b) (purpose of the CEA is to ensure the financial integrity of transactions subject to the CEA and the avoidance of systemic risk); CEA section 8a(5), 7 U.S.C. 12a(5) (general rule-making authority).

[219] CEA section 15(a), 7 U.S.C. 19(a).

[220] 44 U.S.C. 3501 *et seq.*

rules. None of the comments identified quantifiable costs or benefits.

In a number of cases, commenters suggested alternative approaches or modifications to the proposed provisions. The Commission has carefully considered these alternatives and modifications and in a number of instances, for reasons discussed in detail above, has adopted such alternative approaches or modifications where, in the Commission's judgment, the alternative or modified approach is more appropriate to accomplish the regulatory objectives. The rationale in these cases was discussed in detail above.

1. Baseline

The baselines for the Commission's consideration of the costs and benefits of this rulemaking are: (1) The Commission's current regulations in part 190, which establish bankruptcy rules in the event of an FCM bankruptcy; (2) current appendix A to part 190, which contains four bankruptcy forms (form 1—Operation of the Debtor's Estate—Schedule of Trustee's Duties; form 2—Request for Instructions Concerning Non-Cash property Deposited with (Commodity Broker); form 3—Request for Instructions Concerning Transfer of Your Hedging Contracts Held by (Commodity Broker); and form 4—Proof of Claim); and (3) current appendix B to part 190, which contains two frameworks setting forth rules concerning distribution of customer funds or allocation of shortfall to customer claims in specific circumstances.

2. Overarching Concepts

a. Changes to Structure of Industry

The Commission is making several revisions to part 190 in order to reflect the changes to the structure of the industry since part 190 was originally published in 1983. In particular, FCMs and DCOs now operate in a different world, where matters such as market moves, transactions, and movements of funds tend to happen much more quickly, in part due to the advances in technology and the global nature of underlying markets.

These changes include major structural changes in the financial markets, including regulatory reforms following the 2008 financial crisis and consequent changes to the structure of the derivatives markets, changes in the governance of the market utilities, such as DCOs, from non-profit organizations to public companies, and major reforms in the banking sector, followed by the creation of large, publicly held financial holding companies with different attitudes towards risk.

As a result, several of the changes to part 190 will address these changed circumstances. The Commission believes that the revisions in proposed part 190 that address the computerized and fast-paced nature of the industry will benefit all parties involved in a bankruptcy proceeding, since the rules would reflect how the industry actually works today and will avoid unnecessary delay to the administration of a bankruptcy proceeding.

b. Trustee Discretion

In several places in revised part 190, the Commission provides additional flexibility and discretion to the bankruptcy trustee in taking certain actions.[221] This principles-based approach is in contrast to the customer notice procedures in current part 190, which are more prescribed and depend on the type of notice being given.

The Commission has concluded that, in general, affording more discretion to the bankruptcy trustee in appropriate circumstances is beneficial, and indeed necessary, where matters are unique and fast-paced, as they often are in commodity broker bankruptcy proceedings. In many areas, it is unlikely that a prescriptive approach can be designed that will reliably be ''fit for purpose'' in all plausible future circumstances.

Granting the trustee discretion is expected to decrease, though it certainly does not eliminate, the number and extent of cases in which the trustee will petition the bankruptcy court for formal approval of an action. Each formal approval the trustee is required to obtain—*i.e.,* each time the trustee moves for an order from the bankruptcy court authorizing the trustee to take a particular action in a particular way—takes significant time and involves significant administrative costs—in particular, the time of professionals such as attorneys and financial experts to draft legal pleadings and analyses. These professionals charge significant hourly fees, and thus their time leads to significant administrative costs. As discussed further below, administrative costs can be charged against customer property, leading to reduced recoveries by public customers.

Therefore, increased discretion of the trustee will benefit the estate by allowing the trustee to make principles-based decisions that are uniquely tailored to the facts and circumstances of the particular case, rather than compelling the trustee to follow a procrustean framework, or *requiring* the trustee to request formal approval from the bankruptcy court or the Commission before implementing those decisions. This approach leads to approaches that are better tailored to the specifics of the circumstances, reductions in administrative costs (leaving more funds available for distribution to public customers and/or other creditors) and faster distributions of customer property (to the benefit of public customers). It is also intended to mitigate the negative externalities arising from the distressed circumstances that tend to result in further reduction in the value of customer assets.[222]

The Commission recognizes, however, that with increased discretion comes a risk of trustee mistake or misfeasance; in other words, a trustee making decisions that turn out not to be in the best interests of public customers as a class, or other creditors.[223] While this is certainly a potential cost in situations where the trustee is given increased discretion or flexibility, the Commission believes that this potential cost will be mitigated by (1) the high degree of informal (and, where necessary, formal) involvement of Commission staff in FCM and DCO bankruptcy matters,[224] and (2) the fact that such discretion would not be unbounded and would apply only in particular circumstances, as discussed below.

Moreover, in response to a comment by ICI, and as discussed further below, the Commission is adding a clarification in § 190.00 that where a provision in part 190 affords the trustee discretion, that discretion should be exercised in a manner that the trustee determines will best achieve the overarching goal of protecting public customers as a class by enhancing recoveries for, and mitigating disruptions to, public customers as a class. The Commission is of the view that adding this principles-based provision will further clarify the duty of trustees in commodity broker bankruptcy proceedings to act in a

[221] The alternative, to forego providing such flexibility or discretion, would invert the benefits and costs discussed below.

[222] As discussed above, *see* section II.B.2, while the trustee has discretion as to how they administer the affairs of the bankruptcy estate, a DCO of which that FCM is a member retains its rights to act under its rules.

[223] Certain discretionary decisions a trustee may take, for example, the frequency with which the trustee provides information.

[224] As a formal matter, the Commission has the right to appear and be heard on any issue in any such case. *See* 11 U.S.C. 762(b). As a practical matter, trustees and their counsel have, in previous commodity broker bankruptcies, consulted with Commission staff frequently and on an ongoing basis, particularly in making and implementing important decisions.

manner that adds benefits, and reduces costs, to public customers as a class by, respectively, enhancing their recoveries and mitigating disruptions to them.

However, channeling the trustee's discretion towards protecting public customers as a class may well work to the detriment of (and thus impose costs upon) individual public customers, or classes of public customers, whose interests differ from that of the class in general. For example, certain customers may have a particular need for current and precise information about their account balances and positions.[225] It is possible (though unlikely) that the trustee might determine that it is inordinately costly to do so for a particular time, looking at the interests of public customers as a class. Such a decision would not be a mistake or malfeasance, though one would expect the trustee to endeavor to avoid the necessity for doing so.

An additional risk related to increased discretion is the possibility that parties that are dissatisfied with the trustee's exercise of discretion may challenge it in court, potentially leading to increased litigation costs. The Commission believes that this risk is mitigated by (1) the fact that certain of these decisions would be made in contexts where the trustee would be seeking an order of the bankruptcy court approving the trustee's approach (and thus the trustee's discretion would be subject to judicial review within a proceeding in which interested parties already have an opportunity to object) and (2) the likelihood that bankruptcy courts would respect the Commission's rules granting the trustee discretion, rendering such litigation less likely to succeed, and quicker to resolve. Litigation that is less likely to succeed is less likely to be brought, and litigation that is quicker to resolve is likely to cost less. Thus, by granting the trustee discretion, the Commission mitigates the cost of such litigation.

Instances where the revisions to proposed part 190 will afford more flexibility or discretion to the bankruptcy trustee are discussed in further detail where they appear in each provision below.

c. Cost Effectiveness and Promptness Versus Precision

In revising part 190, the Commission has endeavored to effect a proper balance between cost effectiveness and promptness, on the one hand, and precision, on the other hand. Current part 190 favors cost effectiveness and promptness over precision in certain respects, particularly with respect to the concept of *pro rata* treatment. As a result of the policy choice made by Congress in section 766(h) of the Bankruptcy Code, part 190 proceeds from the principle that it is more important to be cost effective and prompt in the distribution of customer property (*i.e.,* in terms of being able to treat public customers as part of a class) than it is to value each customer's entitlements on an individual basis. The revisions to part 190 take this concept further, recognizing that there are additional circumstances where cost effectiveness and promptness in the administration of a bankruptcy proceeding should have higher priority than precision. However, in response to ICI's comment, the Commission has clarified that where the trustee is directed to exercise ''reasonable efforts'' to meet a standard, those efforts should only be less than ''best efforts'' to the extent that the trustee determines that such an approach would support the goal of protecting public customers by enhancing recoveries for, and mitigating disruptions to, public customers as a class.[226] Thus, the Commission recognizes that there are limits to the extent to which cost effectiveness and promptness will be favored over precision as discretion must be exercised in furtherance of the overarching goal of protecting the interests of public customers as a class.

The Commission believes that these revisions favoring cost effectiveness and promptness over precision further the policy embodied in section 766(h) of the Bankruptcy Code and benefit parties involved in a bankruptcy proceeding overall, in that they will in general lead to: (1) A faster administration of the proceeding; (2) public customers receiving their share of the debtor's customer property more quickly; and (3) a decrease in administrative costs.

There could, however, be corresponding costs to this approach for some public customers in that they may lose out on being treated precisely in terms of their individual circumstances (and, for example, may receive a smaller distribution of customer property than otherwise).

d. Unique Nature of Bankruptcy Events

The Commission recognizes in revised part 190 that there is no one-size-fits-all approach to the administration of the bankruptcy of an FCM or a DCO, and that it is important that the rules allow the trustee, in conducting that administration, to take into account the unique nature of each of these events. The revisions to proposed part 190, therefore, address the uniqueness of these bankruptcy events and allow for the bankruptcy trustee to tailor their approach in the way that most makes sense given the individual circumstances of the case at hand.[227] History has shown that FCM bankruptcies play out in very different ways, and several of the Commission's revisions to part 190 address that reality. These new provisions reflect the fact that each FCM and DCO bankruptcy presents individual circumstances, and that the proof of claim form will likely have to be modified to fit the unique facts and circumstances of each case. The Commission believes that the revisions of this type will benefit all parties involved in a bankruptcy proceeding by better tailoring such a proceeding to the unique needs of the particular case.

However, by providing for a bespoke tailoring of the approach to commodity broker bankruptcy, the Commission inherently provides less transparency, and thus less certainty, of the particulars of the approach that will be followed.

e. Administrative Costs are Costs to the Estate, and Often to the Customers

In many instances in this adopting release, the Commission is noting that a certain provision will impose or reduce administrative costs, that is, the actual and necessary costs of preserving the bankruptcy estate and administering the case. In each of these cases, administrative costs will be a cost to the estate of the debtor, since administrative expenses that the bankruptcy trustee incurs in administering the estate (including for the time of the trustee, accountants, counsel, consultants, etc.)[228] will be passed onto the estate

[225] *See* ICI at 22 (failure of trustee to provide account statements or information about funded balances could ''hinder the ability of a regulated fund to confirm the existence and value of its transactions and associated margin.'')

[226] *See* comparison of best efforts to reasonable efforts in section II.A.1 above.

[227] Circumstances that may vary include: The accuracy of the commodity broker's records at the time of bankruptcy; whether the bulk of an FCM's customer accounts were transferred in the days after the filing date (or otherwise migrated in the days before); the number of customer accounts; the existence and extent of a shortfall in customer funds; and the complexity of the positions carried by the commodity broker.

[228] Pursuant to section 503(b)(1) of the Code, administrative costs include the actual, necessary costs and expenses of preserving the estate; and pursuant to section 330(a)(1)(A) of the Code, the Court may award ''reasonable compensation for actual, necessary services rendered by the trustee . . . professional person, or attorney . . . .'' Factors that are considered in determining ''reasonable compensation'' include the time spent on the services, the rates charged, the customary compensation charged by comparably skilled

Continued

itself. This means that, in the event of a shortfall, such costs will ultimately be borne by the public customers of the debtor, who will receive smaller dividends on their claims as the value of the debtor's estate decreases.[229] By a parity of reasoning, reducing such administrative costs will reduce the shortfall, and increase recoveries by public customers.

To be sure, the actions taken to achieve these cost efficiencies that enhance the value of the estate for public customers as a whole may impose costs on individual public customers.

f. Preference for Public Customers Over Non-Public Customers and for Both Over General Creditors

As noted repeatedly above, and consistent with the requirements of section 766(h) of the Bankruptcy Code and longstanding Commission policy, many provisions in part 190 favor public customers over non-public customers, and both over general creditors, whenever there is a shortfall in customer property in any account class for public customers (or, with reference to general creditors, for non-public customers).

The preference for public customers benefits them, and provides them with incentives to participate in transactions protected by part 190, and to post collateral willingly. However, this preference correspondingly disfavors non-public customers. Accordingly, it arguably provides them with incentives to participate less in transactions protected by part 190—or, perhaps, to clear through unaffiliated FCMs (and thus, to do so as public customers of those FCMs).

Similarly, the preference for both public and non-public customers over general creditors may incentivize general creditors to be less willing to extend credit to commodity brokers. However, in light of the fact that commodity brokers are highly regulated entities subject to stringent capital or resource requirements, this incentive effect with respect to general creditors is not likely to be strong.

practitioners, and whether the services were necessary to the administration of the case. *See generally* 11 U.S.C. 330(a)(3).

[229] While such costs may in certain cases be borne instead by general creditors, section 766(h) permits customer property to be used to meet ''claims of a kind specified in section 507(a)(2)'' of the Bankruptcy Code (which in turn include claims for the expenses of administering the estate) ''that are attributable to the administration of customer property.''

B. Subpart A—General Provisions

1. Regulation § 190.00: Statutory Authority, Organization, Core Concepts, Scope, and Construction: Consideration of Costs and Benefits

Section 190.00 contains general provisions applicable to all of part 190. These provisions set forth the concepts that guide the Commission's bankruptcy regulations. All of § 190.00 is new, in that current part 190 does not contain an analogous regulation. However, only certain provisions within § 190.00 have cost-benefit implications, since the bulk of § 190.00 is designed to explain concepts that are either (1) not different from those contained in current part 190, but are simply stated more explicitly in the revised rules, or (2) new, in that they are not contained in current part 190, but are concepts that are meant to clarify how revised substantive provisions operate. In the latter case, cost and benefit considerations are addressed with respect to the substantive provisions.

The Commission requested comment on all aspects of its cost and benefit considerations with respect to proposed § 190.00.

There are potential costs associated with § 190.00(c)(4) which promotes the transfer or porting of the open commodity contract positions of a bankrupt FCM's public customers rather than the liquidation of these positions. For example, OCC commented that while liquidating customer positions may introduce market risk associated with closing out and reopening positions for certain customers, those risks should be weighed against the potential drawbacks of porting, especially if an FCM to accept the transfer is not immediately identified. Specifically, OCC identified three potential drawbacks with the proposed § 190.00(c)(4). First, that it could be difficult for a trustee (or DCO) to identify a transferee to accept the open positions and collateral, which depending on the market conditions could be a difficult and time-consuming process. Second, a customer could face uncertainty as to how its position and associated collateral will be resolved until a transfer is complete and also may be unable to exit a position in a timely and efficient manner. Third, a customer might need to post additional collateral at a new FCM prior to or immediately after a transfer.

In considering the costs and benefits of the preference for transfer versus liquidation, the Commission notes first that, as OCC forthrightly acknowledged, liquidating customer positions may introduce market risk associated with closing out and reopening positions for certain customers. Additionally, liquidating a mass of customer positions may roil the markets, if any, where those positions are concentrated.

Furthermore, § 190.00(c)(4) establishes a *preference* for transfer rather than a *mandate.* Thus, if after exerting their best efforts, the trustee finds that the process of transfer is indeed too ''difficult and time-consuming,'' the trustee is not obligated to implement a transfer. Moreover, as a practical matter, there are narrow limits to how long a trustee will have to endeavor to transfer before being compelled to liquidate positions by the DCO at which they are held, or, if applicable, an FCM through which they are held. (Either the DCO or the FCM, whichever is applicable, will have the discretion to liquidate positions that are being cleared/carried for an FCM that is in bankruptcy).[230] Pursuant to § 190.04(d), if the trustee is not successful in transferring an open contract by the seventh calendar day after the order for relief consistent with § 190.04(a), the trustee is directed to liquidate such contract promptly and in an orderly manner. Thus, while a customer could face uncertainty as to how its position and associated collateral will be resolved until a transfer is complete (or until the customer's positions are otherwise liquidated), the time of that uncertainty is both practically and legally limited. Finally, a customer who does not wish to post additional collateral at a new FCM would be entitled to have the new FCM liquidate their positions, and promptly receive any remaining transferred collateral. In this light, the Commission believes that the benefits of continuing the preference for transfer remain significant, while the costs of this preference are mitigated.

There are potential benefits arising from reduced uncertainty as a result of clarifications provided in several provisions. For example, § 190.00(d)(1)(ii), clearly expresses that part 190 applies to a proceeding commenced under SIPA with respect to a debtor that is registered as a broker or dealer under the CEA when the debtor also is an FCM. Similarly, § 190.00(e) clarifies how transactions and collateral that are portfolio margined are treated as an important prerequisite to an effective portfolio margining program. Cboe's comment letter expressed the view that the clarity provided in § 190.00(d)(1)(ii) will be beneficial to the entire

[230] For example, as noted above in section II.A.1, OCC's own rules would appear to permit it to liquidate such positions.

ecosystem, including customers of FCMs and broker-dealers, as it furthers the ability of market participants to utilize portfolio margining and the associated efficiencies. CME also saw benefits to ''remov[ing] any doubt'' that part 190 applies to a SIPA proceeding involving an FCM that is also registered with the SEC as a broker-dealer.

Similarly, ICI's comment letter considered that the ''home field'' rule in § 190.00(e) is highly beneficial.

With respect to the remaining provisions within proposed § 190.00, the Commission has not received comment letters that identify costs or benefits explicitly attributed to these provisions, and does not believe that there are material cost-benefit implications with respect to them:

- Proposed § 190.00(a), which sets forth the statutory authority pursuant to which the Commission is proposing to adopt proposed part 190.
- Proposed § 190.00(b), which describes how the proposed rules are organized into three subparts. While the addition of DCO-specific rules in this proposal is new, the cost-benefit implications of the DCO-specific provisions (§§ 190.11 through 190.18) are discussed separately below.
- Section 190.00(c)(2), which provides that part 190 establishes four separate account classes, each of which is treated differently under the regulations. In the Commission's view, this provision is a mere clarification, as current part 190 also establishes different account classes for different types of cleared commodity contracts, and treats each account class differently.
- Section 190.00(c)(5), which explains that part 190 applies the concept of *pro rata* distribution when it comes to shortfalls of property in a particular account class. This provision is merely explanatory.
- Section 190.00(d)(1)(i)(A), which provides that the definition of ''commodity broker'' in proposed part 190 covers both ''futures commission merchants'' and ''foreign futures commission merchants'' because both are required to register as FCMs under the CEA and Commission regulations.
- Section 190.00(d)(2)(i), which states that the bankruptcy trustee may not recognize any account class that is not one of the account classes enumerated in proposed § 190.01.
- Section 190.00(d)(3), which sets forth the transactions that are excluded from the definition of ''commodity contract.'' This provision explains and carries over concepts that are already embedded in current part 190.

While the Commission has not received comment letters that identify costs or benefits explicitly attributed to the following provisions in § 190.00, it believes that there will be cost-benefit implications to these provisions:

- Section 190.00(c)(1) states that part 190 is limited to a commodity broker that is (1) an FCM as defined by the CEA and Commission regulations, or (2) a DCO under the CEA and Commission regulations. Current part 190 applies to a broader set of ''commodity brokers,'' including FCMs, clearing organizations, commodity options dealers, and leverage transaction merchants. This narrowing of the application of part 190 (by excluding the empty categories of commodity options dealers and leverage transaction merchants) benefits the bankruptcy estate, and the customers, by allowing the Commission to promulgate regulations that are less complex and better tailored to the narrower, set of commodity brokers that are covered by the revised regulations.[231]
- Section 190.00(c)(3) explains the distinction between ''public customers'' and ''non-public customers,'' and the priority that public customers (and, after them, non-public customers) enjoy over all other claimants with respect to distributions of customer property. Both of these concepts exist in current part 190 and are clarified and explained further in § 190.00(c)(3). In its comment, ICI urged the Commission to take steps ''to help ensure that the trustee prioritizes the protection of [public] customers.'' In response, Commission has added a provision, § 190.00(c)(3)(i)(C), directing the trustee to exercise its discretion (where it has such discretion) in a manner that will best achieve the overarching goal of protecting public customers by enhancing recoveries for, and mitigating disruptions to, public customers as a class.[232] This approach has the benefit of guiding the trustee's discretion in a manner consistent with the Commission's regulatory and statutory goals. However, it has the limitation of still leaving the trustee with discretion. As noted above in section III.A.2 above, with discretion comes a risk of trustee mistake or misfeasance.
- Section 190.00(c)(6) addresses the treatment of commodity contracts that require delivery performance. The revised regulations, in allowing the trustee more flexibility in how a customer could effect delivery outside of the debtor's estate, will benefit customers by allowing for a more bespoke approach to effecting delivery when customers incur delivery obligations under their open commodity contracts. There will, however, be costs in acting in such a bespoke fashion in contrast to following standards established during business as usual.
- Section 190.00(d)(1)(i)(B) notes that while there are currently no registered leverage transaction merchants or commodity options dealers, the Commission intends to adopt rules with respect to leverage transaction merchants or commodity options dealers at such time as an entity registers as one of those categories of commodity brokers. This forward-looking flexibility will generate benefits by fostering bankruptcy rules specifically tailored to leverage transaction merchants or commodity options dealers when and if an entity registers as such.
- Section 190.00(d)(1)(iii), provides that part 190 shall serve as guidance as to the distribution of customer property and member property in a proceeding in which the FDIC is acting as receiver pursuant to Title II of Dodd-Frank.[233] This provision has the benefits associated with transparently providing to FDIC during business-as-usual the expertise and guidance of the agency with regulatory and supervisory responsibility for commodity brokers (*i.e.,* FCMs and DCOs).[234]
- Section 190.00(d)(2)(ii) provides that no property that would otherwise be included in customer property shall be excluded from customer property because it is considered to be held in a constructive, resulting, or other trust that is implied in equity. It prevents public customers from evading *pro rata* exposure to shortfalls in customer property by keeping their collateral in a trust structure. This provision has the

[231] Moreover, prescribing regulations that are intended to be applicable to entities that, at some unknown point in the future, enter these empty categories risks poor tailoring due to lack of data concerning the characteristics of those unknown future entrants.

[232] As noted above in section III.A.2.vi, the preference for public customers over non-public customers creates incentives for both groups.

[233] Section 210(m)(1)(B) of title II,12 U.S.C. 5390(m)(1)(B), requires the FDIC, where the covered financial company or bridge financial company is a commodity broker, to apply the provisions of subchapter IV as if the financial company were a debtor for purposes of such subchapter.

[234] DCOs operate nearly 24-hours a day, between Sunday afternoon and Friday evening. Moreover, the risks that a DCO is required to manage are based on market movements and events (including in OTC markets) that may occur whether or not the DCO is able to operate. Accordingly, Commission staff (in cooperation with FDIC staff) have engaged, and will continue to engage, in significant efforts to plan for the unlikely event that resolution under Title II would be necessary for a DCO.

Thus, there is a public benefit to facilitating FDIC's efforts in resolution planning for DCOs by setting forth clear guidance as to the distribution of customer property and member property in a DCO resolution proceeding.

benefit of supporting the statutory policy of *pro rata* distribution for the pool of customers, by ensuring that all property that properly belongs in the category of ''customer property'' would be considered such customer property. It should mitigate costs in cases where particular customers might structure their relationships with their FCMs in order to establish such a trust for the purpose of thwarting their exposure to *pro rata* distribution, rather than structuring those relationships in ways that otherwise make sense for their business. It would also reduce those customers' incentives to do so, and would mitigate the costs of litigation within the bankruptcy proceeding over the effectiveness of such structures in achieving that goal. It also benefits the remaining customers, since if such litigation were successful, it would spread the *pro rata* shortfall over a smaller volume of customer claims.

• However, this approach will impose costs on those customers, if any there be, who would otherwise endeavor to rely on the trust concept to shield certain of their property from entering the pool of customer property. Such customers might (despite opposition from the Commission and the trustee) otherwise be successful in litigation over the effectiveness of such arrangements, or may obtain settlements that would benefit their individual claims (albeit to the detriment of other customers, and to the policy of *pro rata* distribution). Such customers may view the inability to protect their collateral under a trust concept as an incentive to reduce their use of transactions subject to part 190.

2. Regulation § 190.01: Definitions: Consideration of Costs and Benefits

Section 190.01 sets forth definitions as they are used for purposes of part 190. In the Commission's view, only certain of the definitions in proposed § 190.01 will have cost-benefit implications, and these are discussed in more detail below, as are any definitions concerning which there were comments. The remainder of the definitions set forth in revised § 190.01 do not, in the Commission's view, impose any costs or benefits, as the changes to the definitions are minor (in the vein of, for example, updating cross-references or updating language to reflect the changes in the rest of revised part 190) or merely clarify the current definition.

Where, in the Commission's view, a definition in revised § 190.01 has cost-benefit implications, and/or where comments have identified costs or benefits concerning such a definition, those implications are discussed in more detail below:

• ''Account class,'' ''cash delivery property,'' and ''physical delivery property'': The definition of the term ''account class'' is expanded to include definitions of each type of account class set forth in proposed part 190: Futures account, foreign futures account, cleared swaps account, and delivery account. The ABA Subcommittee recommended that the Commission clarify that these types of account classes apply to non-public customers in addition to public customers. The Commission agrees that it is appropriate to clarify this point, and to include a specific definition for each type of account class. Doing so will benefit all parties involved in a bankruptcy proceeding by ensuring that all have a common understanding of how these various types of accounts are defined for purposes of part 190. Accordingly, the Commission is adopting the ABA Subcommittee's recommendation.

• The definition of ''account class'' also removes the category in current part 190 of ''leverage account'' because, as noted above, there are currently no registered leverage transaction merchants. Rather, the Commission intends to adopt rules with respect to leverage transaction merchants (and, accordingly, with respect to leverage accounts) at such time as an entity registers as such. Removal of the category of ''leverage account'' from the ''account class'' definition benefits market participants by allowing the Commission to promulgate bankruptcy rules specifically tailored to leverage transaction merchants (and, accordingly, to leverage accounts) in the event an entity registers as such.

• The definition of ''account class'' also splits ''delivery accounts'' into separate physical and cash delivery account classes. Because cash delivery property is, in some cases, more difficult to trace to specific customers and more vulnerable to loss,[235] this separate treatment of physical delivery property and cash delivery property should benefit customers with physical delivery property by allowing for more prompt distribution of such physical delivery property. This separation should also benefit the estate, because the trustee will not have to wait to distribute physical delivery property to customers while attempting to trace cash delivery property, which could result in a more prompt resolution of the bankruptcy as a whole. However, there may be costs as a result of complications, since the trustee will have to deal with two delivery account subclasses rather than one delivery account class. Moreover, in the event of a shortfall, some customers could ultimately obtain larger recoveries than they would have if the delivery account had not been split into two subclasses, while others could obtain smaller recoveries.

The ABA Subcommittee and CME suggested changes to the definition of ''cash delivery property.'' Under the current definition, cash falls within the delivery class if, *inter alia,* it is received on or after three calendar days before the first notice date or exercise date. The definition of cash delivery property in the Proposal continued that limitation. CME suggested that the three-day limitation should be removed to address cases where

> ''a customer will legitimately post cash to its delivery account sooner than the definition would allow, for example, out of caution to assure that the necessary funds are available to pay for a delivery when the first notice date or exercise date immediately follows a weekend or holiday, or to meet payment deadlines imposed by the FCM, or based on market convention.''

The comments acknowledged that the Commission's policy objective is to ''encourage FCMs and their delivery customers to hold cash intended to pay for delivery in a segregated account until bilateral delivery obligations are near at hand'' (the segregation obligations that apply to futures, foreign futures, and cleared swaps accounts do *not* apply to delivery accounts), but express some doubt that the limitation is effective in encouraging the desired behavior, because parties with delivery obligations may not be aware of it.

Thus, the benefit of retaining the three-calendar day limitation is mitigating the time during which cash delivery property is held in an account that is not subject to the protection of segregation requirements, and in encouraging business models that take that approach. The cost of doing so is the risk that funds may nonetheless be transferred earlier into a delivery account, and would then be denied protection as delivery property in an FCM bankruptcy.[236]

As discussed above,[237] the Commission has determined to take a middle-ground approach by expanding the three-calendar day limitation to a

[235] These reasons for this difficulty and vulnerability are discussed above in section II.B.4 in the explanation of the changes to proposed § 190.06(b).

[236] The Commission also notes CME's suggestion that it ''consider adopting more formal requirements with respect to delivery accounts through separate rulemaking.''

[237] *See* section II.A.2 above.

seven-calendar day limitation. This approach has the benefit of addressing fully the possibility that delivery property is transferred slightly early because of, *e.g.,* a holiday weekend (and especially cases where FCMs and their customers or contracts span across jurisdictions with different holidays). By expanding the period by four days, it should address most of the cases where there are legitimate reasons to transfer the funds in advance of when they are needed, to account for the possibility of a failure in the transfer process.[238] Significantly, it avoids the cost of encouraging the use of the delivery account (that is not subject to segregation requirements) as a long-term place to hold cash.

Commenters also suggested technical additions to the definitions of cash delivery property (to address cash provided post-petition to facilitate taking deliveries in cases where necessary) to physical delivery property (to address the possibility of a negative final settlement price), and (in the case of both cash delivery property and physical delivery property) to provide that, for contracts exchanging one fiat currency for another, both ends of the transaction would be considered cash delivery property. The Commission incorporated these suggestions in the definitions as adopted. The benefit of these approaches is to deal properly with these scenarios; there are no discernable material costs.

• Pursuant to section 4d of the CEA, certain contracts and associated collateral that would be associated with one account class may instead (pursuant to Commission regulation [239] or order) be commingled with a different account class.[240] The purpose of these arrangements, referred to as portfolio-margining, is to associate such contracts with an account class in which they are risk-reducing related to other contracts in that latter account class.

Paragraph (2) of the definition of account class confirms that these portfolio-margining arrangements will be respected in bankruptcy, that is, such contracts and associated collateral will be treated as being part of the account class into which they are commingled. The benefit of this treatment in bankruptcy is to foster and incentivize such risk-reducing (and capital-efficient) arrangements during business as usual; there should be no associated costs in bankruptcy.

Finally, paragraph (3) of the definition of account class addresses cases where a commodity broker's account for a customer is non-current, or otherwise inaccurate. These are situations over which public customers have, at best, limited control, and thus it is ineffective to endeavor to create incentives for public customers to police the behavior of their FCM. Paragraph (3) confirms that a commodity broker is considered to maintain an account for a customer where it establishes internal books and records for the customer's contracts and collateral and related activity, regardless of whether the commodity broker has kept those internal books or records current or accurate. The benefit of this treatment will be to treat customers in accordance with their entitlements, regardless of whether the commodity broker has maintained its books and records current or accurate.

• ''Customer,'' ''Customer class,'' ''public customer,'' and ''non-public customer:'' The definitions of the terms ''public customer'' and ''non-public customer'' are being revised to include separate definitions of those terms for FCMs and DCOs. This change reflects the new organization of part 190, which includes separate provisions for when the debtor is (1) an FCM (subpart B) and (2) a DCO (subpart C). The ''public customer'' definition for FCMs is also being revised to define that term with respect to each of the relevant account classes.[241]

These changes will generate benefits as they bring clarity to the question of who qualifies as a ''public'' versus a ''non-public'' customer, and transparency to the distribution of property to which each customer is entitled. Furthermore, this clarity and transparency is likely to reduce the administrative costs to the estate, and the costs to claimants, associated with the claims allowance process, as well as the likelihood of litigation by dissatisfied claimants (and associated costs). These changes could, however, impose costs on customers for whom, under current part 190, it will not be clear which category they fall into. The pool of customer property would be different for public and non-public customers under the new policy regime. Thus, a hypothetical customer who could have been considered ''public'' under current part 190 but will be categorized as ''non-public'' under revised part 190 could receive less in the distribution of customer property (with other customers receiving more).

• ''Futures, futures contract:'' The Commission is adding a definition for the terms ''futures'' and ''futures contract'' to clarify what those terms mean for purposes of part 190. This clarification will lower administrative costs by providing clarity and transparency to the types of transactions that are considered ''futures'' for purposes of proposed part 190 and therefore form part of the futures account or foreign futures account.

• ''House account:'' The definition of the term ''house account'' will be revised to include a definition of that term solely for DCOs. This change will reflect the new organization of part 190, which is revised to include separate provisions for when the debtor is (1) an FCM (subpart B) or (2) a DCO (subpart C). CME and the ABA Subcommittee urged that the term ''house account'' be deleted in the few cases where it was proposed to be used in subpart B in order to avoid the implication that the accounts of non-public customers could not be ported. This change would enhance clarity and transparency (and, thus, would reduce administrative costs) by (1) avoiding that incorrect implication, while (2) clarifying what precisely constitutes a house account for a DCO bankruptcy proceeding.

• ''Primary liquidation date:'' The definition of the term ''primary liquidation date'' is being revised to delete references to holding accounts open for later transfer. This is consistent with the policy of transferring as many open commodity contracts as possible within seven calendar days after entry of an order for relief or, if that is not possible, liquidating such commodity contracts. [242] This change in policy should benefit some customers, who will more quickly have clarity as to how their positions and associated collaterals will be resolved.[243] There may, however, be costs to customers who might have preferred having their open commodity contracts held open for transfer after the primary liquidation

[238] The commenters have not identified any legitimate reason for an FCM to impose a payment deadline of more than seven days before first notice or exercise date, or any relevant market convention that would require earlier payment, which in either case would require that the funds be held in a delivery account.

[239] *See* § 39.15(b)(2), which provides a mechanism for these arrangements to be implemented pursuant to clearing organization rules.

[240] Securities positions may also be commingled in an account class subject to section 4d of the CEA. 7 U.S.C. 6d.

[241] CME suggested that the Commission should include non-U.S. customers of foreign broker clearing members of a DCO within the public customer definition. As discussed above, the Commission has determined to consider this suggestion as part of a comprehensive review of the issues, to be conducted at such time as the model of admitting foreign brokers as clearing members for U.S. DCOs becomes empirical.

[242] *See* § 190.04(a)(1).

[243] *See* discussion of § 190.00(c)(4) in section II.B.1 above for concerns about customers lacking such clarity for an extended time.

date.[244] In the event that a larger number of contracts is liquidated rather than transferred, there will be costs resulting from additional downward pressure on prices.

• ''Specifically identifiable property:'' The Commission is revising the definition of the term ''specifically identifiable property'' to clarify and streamline the current definition of that term. The use of definitions that are clearer should reduce administrative costs. Of course, increasing clarity may be to the detriment of those customers for whom such clarity results in assignment to a category that they view as less favorable.

• ''Substitute customer property:'' The definition of the term ''substitute customer property'' is being added to refer to cash or cash equivalents delivered to the trustee by or on behalf of a customer in order to redeem specifically identifiable property or a letter of credit. This provision will benefit customers who, in a bankruptcy event, seek to redeem their specifically identifiable property or letters of credit.[245] Introducing the concept of substitute customer property may impose administrative costs, however, because the trustee may have to expend time and resources on tracking the substitute customer property and ensuring that such property ends up in the proper pool of customer property once received.

• ''Swap:'' The Commission is amending the definition of ''cleared swap'' that appears in the current rules in order to clarify what this term means for purposes of proposed part 190. This clarification should serve the goals of clarity and transparency (and, consequently, reducing administrative costs).

3. Regulation § 190.02: General: Consideration of Costs and Benefits

Section 190.02(a)(1) is revised to provide that the bankruptcy trustee may, for good cause shown, request from the Commission an exemption from the requirements of any procedural provision in proposed part 190. This is in contrast to current § 190.10(b)(1), which provides only that a bankruptcy trustee may request an exemption from, or extension of, any time limit prescribed in current part 190. This expanded mechanism for a trustee to request exemptions should benefit the estate and customers by allowing the trustee to request an exemption that lowers administrative costs and increases timeliness. This change, however, may impose administrative costs if the trustee's request is ill-founded and the Commission were nonetheless to grant the request.

The Commission does not believe that there will be any cost-benefit implications to § 190.02(a)(2) and (3), (b), (c), (d), and (e), as those provisions largely align with the provisions in current part 190 from which they are derived.

Regulation § 190.02(f) is a new provision which addresses the context of a receiver for an FCM appointed due to a violation or imminent violation of the customer property protection requirements of section 4d of the CEA or of the regulations thereunder, or of the FCM's minimum capital requirements in § 1.17. In this context, the FCM has been found to be in precarious financial condition. This provision will permit the receiver to file a petition for bankruptcy of such an FCM in appropriate cases. This provision may benefit public customers, in that a bankruptcy proceeding may be necessary to protect those customers' interests in customer property from losses in value. However, this provision may have distributional effects as there may be some customers who do not receive as much in bankruptcy as they otherwise would have under the receivership. In addition, there could be additional administrative costs that result from this provision, as the bankruptcy trustee would have to spend time and resources overseeing a bankruptcy proceeding that might not be entered into absent the power granted to the receiver under this regulation. These costs could possibly be greater than the costs of continuing to administer the FCM under receivership.

Indeed, FIA suggested that the Commission should require that the receiver must receive permission from the Commission before filing a voluntary petition, given that this action ''would effectively close the FCM.'' Closing the FCM would impose significant costs on the FCM and, in a case where the Commission would have denied permission, those costs could be unnecessary.

In considering the costs (discussed above) of what could be an unnecessary voluntary filing for bankruptcy in contrast to the benefits of avoiding delay in filing a necessary filing for bankruptcy, the Commission determines that the context where this rule would be applicable—only cases where a receiver has been appointed due to violation or imminent violation of customer property protection requirements, or of the FCM's minimum capital requirements—minimizes the likelihood that a filing would turn out to be unnecessary, and counsels in favor of avoiding delay.

4. Section 15(a) Factors—Subpart A

No comments were received on the application of the section 15(a) factors to subpart A.

i. Protection of Market Participants and the Public

Subpart A of the proposed rules should increase the protection of market participants and the public by clearly setting forth how customers of FCMs and DCOs will be classified and treated, and how their accounts will be categorized and treated, in the event of an FCM or DCO insolvency. The goal of subpart A of the proposed rules is to promote an orderly and cost-effective resolution of the insolvency of an FCM or DCO, and to increase transparency to the customers of FCMs and DCOs as to how their property would be treated in the event of such an insolvency. However, as noted above, some of the provisions of subpart A provide discretion to the trustee. While enhanced discretion for the trustee has the benefit of permitting a more tailored approach, it also has the cost of increasing the possibility of trustee mistake or misfeasance.

ii. Efficiency, Competitiveness, and Financial Integrity

Subpart A of the proposed rules should promote efficiency (in the sense of both cost effectiveness and timeliness) in the administration of insolvency proceedings of FCMs and DCOs and the financial integrity of derivatives transactions carried by FCMs and/or cleared by DCOs by clearly communicating the goals and core concepts involved in such insolvencies, and by setting forth clear definitions that have been updated to account for current market practices. These effects should, in turn, enhance the competitiveness and financial integrity of U.S. FCMs and DCOs, by enhancing market confidence in the protection of public customer funds and positions entrusted to U.S. FCMs and DCOs, even if such an entity were to become insolvent.

iii. Price Discovery

Price discovery is the process of determining the price level for an asset

[244] Given that the clearing organization for such contracts may not be willing to permit such contracts to be held open for an extended period of time, the existence of such customers is quite hypothetical.

[245] Benefits and costs associated with the use of substitute customer property are addressed further below in connection with § 190.04(d)(3) in section III.C.2.

through the interaction of buyers and sellers and based on supply and demand conditions. To the extent that the revised regulations should mitigate the need for liquidations in conditions of distress, they will help avoid negative impacts on price discovery.

iv. Sound Risk Management Practices

Subpart A of the proposed rules should generally promote sound risk management practices by setting forth the core concepts to which the bankruptcy trustee must adhere in administering an FCM or DCO bankruptcy.

v. Other Public Interest Considerations

Some of the FCMs or DCOs that might enter bankruptcy are very large financial institutions, and some are (or are part of larger groups that are) considered to be systematically important. A bankruptcy process that effectively facilitates the proceedings is likely to help to attenuate the detrimental effects of the bankruptcy on the financial marketplace and thus benefit the financial system and thus the public interest.

C. Subpart B—Futures Commission Merchant as Debtor

1. Regulation § 190.03: Notices and Proofs of Claims: Consideration of Costs and Benefits

Section 190.03(a)(1) replaces the requirement in current § 190.10(a) that all mandatory or discretionary notices be sent to the Commission via overnight mail with the requirement of sending the notices by electronic mail.[246] This change is expected to result in a benefit to all parties required to provide notices to the Commission because they will be able to avoid the costs of sending such notice in hardcopy form via overnight mail. These revisions will also allow the Commission to receive such notices—and thus, to act—much more expeditiously.

Section 190.03(a)(2) is a new, principles-based provision that replaces the more specific procedures for providing notice to customers that appear in current § 190.02(b) by allowing the trustee to establish and follow procedures ''reasonably designed'' for giving adequate notice to customers. Paragraph (a)(2) also provides that the trustee's procedures for providing notice to customers should include ''the use of a prominent website as well as communication to customers' electronic addresses that are available in the debtor's books and records.'' A generalized and more modernized approach to notifying customers will benefit the debtor's estate, as the process allows the trustee to choose cost effective means of providing notice to customers within the more flexible bounds of the proposed regulation, resulting in savings of administrative costs. Similarly, it will benefit parties interested in the proceedings, by permitting the trustee flexibly to choose methods of notification that are more prompt and effective. On the other hand, affording the trustee increased discretion in how to provide notice to customers will carry the potential cost of trustee misfeasance and abuse of such discretion, as discussed above in section III.A.2.ii.

Section 190.03(b)(1) will revise the time in which a commodity broker must notify the Commission of a bankruptcy filing. These revisions codify procedures whereby (1) in a voluntary bankruptcy proceeding, the commodity broker will provide advance notice to the Commission ahead of the filing to the extent practicable, and (2) in an involuntary bankruptcy proceeding, the commodity broker will notify the Commission immediately upon the filing. These revisions will foster the ability of the Commission and its staff to perform their duties to protect customers by providing the Commission with notice of any bankruptcy proceeding as soon as possible.

Section 190.03(b)(2) removes the current deadline of three days after the order for relief by which the trustee, the relevant DSRO or a clearing organization must notify the Commission of an intent to transfer or to apply to transfer open commodity contracts in accordance with section 764(b) of the Bankruptcy Code. It instead instructs such parties to give such notice of an intent to transfer ''[a]s soon as possible.'' To the extent that the three-day deadline was limiting transfer arrangements, this revision will benefit the estate and some customers by removing time constraints that could be construed to prohibit notification after expiration of the deadline (and thus, allow the trustee to form the intent to transfer after such time).

The revision will also enhance the orderly functioning of the marketplace at a time of severe market disruption by facilitating prompt notice of intent to transfer. On the other hand, by giving the trustee, DSRO, or clearing organization more latitude for providing notice of an intent to transfer, there will be the potential cost of misfeasance in waiting an unreasonable amount of time to provide such notice (or to form such intent), which could ultimately impose additional costs on customers who would have benefited from an earlier transfer.[247]

Section 190.03(c)(1) removes the requirement that the trustee must publish notice to customers with specifically identifiable property in a newspaper of general circulation serving the location of each branch office of the debtor prior to liquidating such property and instead establishes a requirement to notify the customers with specifically identifiable property in accordance with § 190.03(a)(2). The Commission believes that this change will result in lower administrative costs, as the trustee will be relieved of the cost of identifying, and publishing notice in, such newspapers. Moreover, the trustee will no longer be required to wait seven days after the second publication date to commence liquidation of specifically identifiable property. Rather, the trustee will be free to commence liquidation of specifically identifiable property starting on the seventh day after entry of the order for relief. This will benefit the estate, and potentially the affected customers, by allowing the trustee more freedom (from the time constraints set forth in the current regulations) in liquidating the specifically identifiable property, which, in turn, is expected ultimately to result in a better price. Moreover, the provisions in § 190.03(a)(2) that describe the notification of customers with specifically identifiable property will benefit public customers by allowing them to receive notice on a ''prominent website'' and, more specifically, at their electronic addresses (to the extent such addresses are in the debtor's books and records), thereby enhancing their ability to request the return of their specifically identifiable property within the specified timeframe.

Section 190.03(c)(2) provides the bankruptcy trustee with authority to treat open commodity contracts of public customers held in hedging accounts designated as such in the debtor's records as specifically identifiable property.[248] This is a change from the current framework, under which the trustee treats customers with specifically identifiable property on a bespoke basis. Specifically, to the extent the trustee does not receive transfer instructions regarding a customer's specifically identifiable open commodity contracts, the trustee will be required to liquidate

[246] *See also* § 190.03(d), which is adopting this new method of providing notice to the Commission for any court filings filed in a bankruptcy.

[247] *See* discussion of § 190.00(c)(4) in section III.b.1 above.

[248] *See* proposed § 190.10(b)(2) for the process of designating an account as a ''hedging account.''

such contracts within a certain time period. To the extent the trustee exercises the authority derived from revised § 190.03(c)(2), they will (subject to the revision discussed in the next paragraph) be required to notify each relevant customer and request instructions whether to transfer or liquidate the open commodity contracts. To the extent the trustee would not exercise such authority, the trustee will treat these open commodity contracts the same as other customer property and effect a transfer of such contracts. This new framework should reduce administrative costs and benefit the bankruptcy estate by allowing the trustee to rely on hedging designations made during business as usual, thereby allowing the trustee to make swift and cost effective decisions regarding the treatment of open commodity contracts during a bankruptcy situation.

ACLI suggested that § 190.03(c)(2) should express a preference for transfer over liquidation with respect to specifically identifiable property in the form of positions that are identified as hedging positions, and consult (on an individual basis) each customer's expressed preferences. However, § 190.00(c)(4) sets forth a preference for porting (transfer) of *all* open commodity contract positions of public customers. Thus, while treating customers with hedging positions on a bespoke basis may benefit some of them, it may be at the cost of effectively transferring a larger group of customer positions. Some of those may be customers with hedging positions whose positions are not transferred due to limited time and resources available to be devoted to bespoke treatment. Indeed, SIFMA AMG/MFA noted that ''permitting the trustee this flexibility (subject to the additional customer protections [of consulting existing instructions, as described immediately below]) serves the interest of customers as a whole by facilitating a more rapid transfer of customer positions and property.''

SIFMA AMG/MFA suggested that it would ''further the goal of expediency'' if the regulation would require the trustee to ''first consult the instructions (regarding preferences with respect to transfer or liquidation of open commodity contracts) provided by a public customer to the debtor at the time of opening the relevant hedging account, and only if such instructions are missing or unclear, to then require such customer to provide the trustee with written instructions as contemplated by proposed § 190.03(c)(2).'' The Commission agrees, and has made corresponding changes to the regulation. While there is a cost involved in scanning to determine if there are instructions, there is a significant benefit in avoiding duplication, and in avoiding cases where the customer, having already provided instructions, does not reply to a duplicative request in time for that reply to be acted upon.

The Commission does not believe that there are any cost-benefit implications to § 190.03(c)(3) or (4) (other than those discussed above with respect to the new notice provision referenced in each) or to § 190.03(d).

Section 190.03(e), sets forth the information required from customers regarding their claims against the debtor. As revised, § 190.03(e), reorganizes and adds certain information items to those listed in the current regulation. The Commission anticipates that, while customers are likely to have this information at their disposal, there could be costs associated with gathering it all in one place. However, this additional and more detailed information should benefit the estate, the bankruptcy court and customers alike by allowing all parties to have a fuller, more detailed and more transparent picture of the customer claims against the debtor. It should foster the reduction of administrative costs and the prompt administration of the estate. Moreover, the Commission is of the view that clarifying several of the information items listed in proposed § 190.03(e) and revising the proof of claim form to match more closely the text of the regulation should result in benefits to all parties involved in an FCM bankruptcy—the estate, the bankruptcy court, and the customers—by making the bankruptcy claims process more prompt and cost effective. CME sees § 190.03(e) and (f), and the revised proof of claim form, as ''major improvements over the current rules and proof of claim template.''

This regulation also provides that the specific items referred to are to be included ''in the discretion of the trustee.'' This discretion will permit the trustee to tailor the information requested to the specifics of the debtor's prior business, as well as the already-available records. This will permit the trustee to limit or to increase the information requested, in appropriate cases, with a corresponding increase in cost effectiveness. To be sure, there may be corresponding costs (both in administrative expense and time) if the set of information requested by the trustee in the exercise of their discretion turns out, in retrospect, to be overly narrow (or broad).

Proposed § 190.03(f) is new and provides the trustee with flexibility to modify the customer proof of claim form set forth in appendix A to part 190. Specifically, § 190.03(f) allows the trustee to modify the proof of claim form to take into account the particular facts and circumstances of the case. This provision should benefit the estate because the trustee will be able to modify the proof of claim form in a way that gathers the information necessary in a manner that is both effective and cost effective based on the specific facts of the case, and the trustee no longer will be required to get an order from the bankruptcy court to make such modifications, thereby saving time and resources. This new provision should also benefit customers, who will be able to take advantage of the more streamlined and tailored proof of claim forms developed by the trustee, and should, therefore, spend less time filling out such forms. It should also benefit the estate, which should bear less administrative cost in evaluating such forms. Again, there may be corresponding administrative costs if the set of information in a modified proof of claim form turns out, in retrospect, to be overly narrow (or broad).

2. Regulation § 190.04: Operation of the Debtor's Estate—Customer Property: Consideration of Costs and Benefits

Regulation § 190.04(a) explicitly provides a policy and a direction by which the trustee should use best efforts to transfer open commodity contracts and property held by the failed FCM for or on behalf of its public customers. This policy and direction is substantially similar to the policy and direction under current regulations.[249] The changes set forth a clear policy for trustees to follow, which should benefit customers of the failed FCM in a streamlined description of the transfer process that is consistent with the core concepts set forth in this part. The costs and benefits of the preference for transfer are discussed in section III.B.1 above, in the context of § 190.00(c)(4).

In § 190.04(a)(1), the Commission is clarifying language; these clarifications should benefit customers of the failed FCM by minimizing the likelihood of future disputes concerning qualification of property for transfer. The Commission is also changing the direction in current § 190.02(e) that the trustee ''*must immediately* use its best efforts to effect a transfer'' to a direction that the trustee ''*shall promptly* use its best efforts to effect a transfer.'' This modest change in focus will benefit public customers by recognizing that,

[249] *See* current § 190.02(e).

while effecting transfer is an extraordinarily high priority, it is possible that there may be higher priorities at the inception of the bankruptcy proceeding, *e.g.,* it may be necessary to preserve some portion of customer property from an immediate threat.[250] Once again, by enhancing the trustee's discretion as to how to manage the liquidation, there is the cost that the trustee will make a mistake.

Section 190.04(a)(2) directs the FCM (or a trustee, if one has been appointed) in a case where an involuntary petition for bankruptcy is filed against the FCM to use best efforts to effect a transfer within seven calendar days. The current regulation limits the commodity broker to trading for liquidation unless otherwise directed by the Commission, by any applicable self-regulatory organization or by the court. Revised § 190.04(a)(2) removes this limitation. Rather, revised § 190.04(e)(4) more generally covers limitations on the business of an FCM in bankruptcy. Similarly, any requirement to transfer customer positions would more properly be addressed by § 1.17(a)(4). The Commission believes that these changes will benefit the estate and the public customers by mitigating the administrative costs by removing a redundant regulation. The Commission does not anticipate any resulting increase in cost.

In § 190.04(b)(1), the Commission is clarifying and updating conditions under which the trustee may make payments of variation settlement and initial margin. In sum, the revisions clarify that payments can be made prior to pending transfers or liquidation, not just pending liquidation. The revision should benefit the customers of the FCM debtor in clarifying that the trustee has two paths in treating open commodity contracts—transfer, and if transfer is not possible, liquidation. The changes describe more accurately the types of payments that the trustee will be permitted to make and account specifically for the types of entities to which the trustee is permitted to make the types of payments referred to in this section. The revisions clarify the current regulatory text, which should benefit stakeholders. The Commission does not anticipate any increased cost from these changes.

Section 190.04(b)(1)(i) prevents the trustee from making any payments of behalf of any commodity contract account that is in deficit, to the extent within the trustee's control. The revised provision recognizes that certain accounts may be held on an omnibus basis on behalf of many customers. To the extent the trustee is making a margin payment with respect to such an omnibus account, it may be out of the trustee's control to only make payment with respect to those customer accounts that are not in deficit. The proviso similarly will clarify that this prohibition on making margin payments on behalf of accounts in deficit is not intended to prohibit ''upstream'' entities (*e.g.,* a CCP or an intermediary through which the debtor clears) from exercising legal rights to margin under applicable law. Due to the structure of omnibus accounts and the explicit requirement of lack of trustee control, any payments that are made under the revised provision would have been made pursuant to Commission authorization under the current regulation. Thus, neither provision should add any new regulatory burden and the Commission does not estimate that there will be any additional cost associated with the proposed changes.

Section 190.04(b)(1)(ii) is a new regulation that adds an explicit restriction, that the trustee cannot make a margin payment with respect to a specific customer account that would exceed the funded balance of that account. ICI agrees that this restriction supports the *pro rata* distribution principle, and should benefit the other customers of the FCM debtor—any payment of customer property in excess of a particular customer's funded balance is to the detriment of other customers.[251]

Section 190.04(b)(1)(iii) is a minor, non-substantive clarification of current § 190.02(g)(1)(ii), that should not create any changes from the status quo with regards to costs and benefits.

In § 190.04(b)(1)(iv)–(v), the Commission is clarifying that margin must only be used (*i.e.,* paid to a clearing organization or upstream intermediary) consistent with section 4d of the CEA. Section 190.04(b)(1)(vi) states explicitly the conditions under which the trustee may make payments to meet margin obligations.

Together, these changes protect customers who make payments after the order for relief by ensuring that they fully benefit from those payments (and thus incentivize customers to make such payments in appropriate circumstances). Moreover, more clearly permitting the trustee, for the purpose of curing customer margin deficiencies, to use funds in an account class that exceed the sum of all of the net equity claims for that account class, should facilitate the orderly transfer of positions and contracts following the default, lessening the potential for further roiling markets. Finally, these changes taken together also benefit the broader group of customers of the FCM debtor by clarifying the treatment of funds in segregated accounts, and thus mitigating administrative costs.

These changes are designed to clarify the statutory requirements applicable to funds in the customer account. While there may be accounting requirements associated with funds in segregated accounts, substantially all of the costs of such accounting are already incurred pursuant to the segregation rules. Thus, the Commission does not anticipate that there should be any material additional costs associated with this change.

Section 190.04(b)(2) allows the trustee discretion as to whether to issue margin calls to customers who are undermargined, deleting highly prescriptive conditions from the current rule. The revision should benefit public customers of the FCM debtor by giving the trustee the flexibility to recognize that there may be situations in which issuing a margin call is impracticable because the trustee is operating the FCM in ''crisis mode'' and may be pending wholesale transfer of liquidation of open positions.

It is, however, possible that the trustee would exercise their discretion poorly, or in a manner that, in retrospect, would be seen to be to the detriment of the estate, and that the trustee would have failed to issue a margin call in a situation in which a public customer would have paid the call (and in which the balance of administrative cost and amount recovered would mean that, in retrospect, it would have profited the estate if the call was made). Such failure could result in a cost to the estate of the FCM debtor to the extent that such funds are not available.

The balance of the revisions to § 190.04(b) should cause no change to the related costs and benefits.

Section 190.04(b)(3) retains the concept in current § 190.02(g)(3), with updated cross-references. The Commission does not anticipate that there will be any costs or benefits to the proposed minor revisions.

[250] The Commission is implementing the same change—the addition of the word ''public'' before ''customers''—to § 190.04(a)(2). The anticipated cost and benefit analysis of the change is the same as in § 190.04(a)(1).

[251] While there will be a corresponding detriment to the customers who may have benefited from such excess payments, those customers would only be losing something that runs counter to the statutory goal of *pro rata* distribution. Moreover, there are no likely incentive effects because, on this issue, customers stand behind the ''veil of ignorance''—it is difficult to identify, *ex ante,* which customers would be in the group of gaining customers (or in the group of losing customers).

Section 190.04(b)(4) addresses the trustee's obligation to liquidate accounts in deficit, or where a mark-to-market calculation would result in a deficit, or where the customer fails to meet a margin call within a reasonable time. The revision will clarify the applicability of current authority to a situation that is already implicit in the current rule. The regulation does not require the trustee to make additional calculations but, if a calculation made by the trustee reveals that the mark-to-market value of the account is a deficit, the trustee is instructed to liquidate the account as soon as practicable rather than to wait for the time that payment would be due. The benefit of this change should be to liquidate accounts in deficit more promptly (thus mitigating potential further losses); the cost will be the cost of engaging in such liquidation, as well as the possibility that, absent prompt liquidation, the deficit would have been mitigated due to favorable intervening changes in market value (or, potentially, an intervening deposit of additional collateral by the customer).[252]

Second, the Commission is adding the concept of ''exigent circumstances'' as a new exception to the general and long-established rule that a minimum of one hour is sufficient notice for a trustee to liquidate an undermargined account.

SIFMA AMG/MFA urged the Commission to curtail the trustee's discretion in § 190.04(b)(4) in a number of ways: By requiring the trustee to defer to the margin call timings present in applicable underlying agreements between the customer and the (pre-bankruptcy) debtor, and by providing customers with the opportunity to demonstrate that a margin payment was made even if the FCM's books and records do not yet reflect its receipt. By contrast, ICI noted that it is vital that the trustee be required to swiftly crystallize, and therefore cap the losses resulting from, such deficits by promptly liquidating accounts in deficit or for which a customer has failed to meet a margin call. ICI further stated that if the accounts were allowed to remain open, additional losses on the delinquent customers' transactions would be borne by the FCM's non-defaulting customers.

The Commission has determined not to make the requested changes. While making those changes would benefit those customers who are treated on a more bespoke it would be to the detriment of the FCM's other customers. Enhancing the trustee's discretion to determine how long a customer has to meet a margin call, and to rely on the FCM's books and records in doing—and refusing to curtail that discretion (by forcing the trustee to defer to margin call timings in pre-bankruptcy agreements, or to give the customer an opportunity to demonstrate that the a margin payment was made) as requested by the comment—will benefit other customers of the debtor FCM by giving the trustee flexibility to respond to market conditions following an FCM default. It is important to recognize that in stressed markets or in situations where communication protocols cannot practicably be followed, permitting a customer time to post margin in accordance with a pre-bankruptcy agreement—or, in some cases, even notice of one hour—may be insufficiently prompt to mitigate appropriately (1) the risk that such customers would default, (2) the risk that delaying liquidation of such a customer's positions increases the potential for and likelihood that they would do so with a debit balance, and (3) the risk that the size of that debit balance would increase as a result of that delay, thereby reducing the funded balances of those other customers. However, customers who are required to make payments more promptly would bear associated costs, from making such payments in a reduced time frame, from having to make duplicate payments (while these would ultimately be returned in full, this would be without interest) or from having contracts liquidated that would otherwise not have been liquidated if the customer had more time to make payment.[253]

The Commission is adding § 190.04(b)(5) to guide the trustee in assigning liquidating positions to the FCM debtor's customers when only a portion of the open contracts are liquidated. The benefit of this new provision is that it presents a clear and transparent mechanism by which the trustee is to allocate the positions. This mechanism will protect the customer account as a whole, by establishing a preference for assigning liquidating transactions to individual customer accounts in a risk-reducing manner. The allocation mechanism will, however, be subject to the trustee's exercise of reasonable business judgement. It is possible that such judgment could be exercised in a poor manner (or in a manner that, in retrospect, turns out to be regrettable), with resultant cost to the FCM debtor estate.

Section 190.04(c) requires the trustee to use its best efforts to liquidate open commodity contracts that are not settled in cash (*i.e.,* those that settle via physical delivery of a commodity) where the contract would move into delivery position. These clarifications are likely to reduce administrative costs, to the benefit of the estate (and, ultimately, customers). CME believed that this provision would have the benefit of avoiding unnecessary disruptions to the delivery process by customers that did not intend to participate in making or taking delivery. There should be no cost associated with the revision because, while there may be some customers who would prefer to hold their contracts through delivery, the current regulations, just as the revised regulations, direct the trustee to liquidate contracts coming into delivery position.[254]

Section 190.04(d) will clarify requirements concerning the liquidation and valuation of open positions. Section 190.04(d)(1) and (2) clarify requirements for liquidating open commodity contracts and specifically identifiable property other than commodity contracts.

Section 190.04(d)(3) codifies the Commission's longstanding policies of *pro rata* distribution and equitable treatment of customers in bankruptcy, as described in § 190.00(c)(5) above, as applied to letters of credit posted as margin. Under the new provision, the trustee may request that a customer deliver substitute customer property with respect to any letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract. The amount of the substitute customer property to be posted may, in the trustee's discretion, be less than the full-face amount of the letter of the credit, if such lesser amount is sufficient to ensure *pro rata* treatment consistent with §§ 190.08 and 190.09. If necessary, the trustee may require the customer to post property equal to the full-face amount of the letter of credit to ensure *pro rata* treatment. Pursuant to paragraph (d)(3)(i), if such a customer fails to provide substitute customer property within a reasonable time specified by the trustee, the trustee may draw upon the full amount of the letter of credit or any portion thereof (if the

[252] This change may also provide incentives for a customer whose account is in, or is approaching, deficit to make such payments promptly to avoid liquidation of their positions.

[253] SIFMA AMG and MFA also suggested that the regulation should be amended to give customers credit for any gains that were haircut due to gains-based haircutting by a DCO. Any such haircutting of a customer's gains is due to application of the customer's agreement with the FCM. Moreover, giving some customers credit despite such agreements would increase their recovery, but at the expense of other customers, as discussed in detail in section II.C.7 above.

[254] *See, e.g.,* current § 190.03(b)(5).

letter of credit has not expired). Under paragraph (d)(3)(ii), the trustee is instructed to treat any portion of the letter of credit that is not fully drawn upon as having been distributed to the customer. However, the amount treated as having been distributed will be reduced by the value of any substitute customer property delivered by the customer to the trustee. Any expiration of the letter of credit after the date of the order for relief would not affect this calculation. Pursuant to paragraph (d)(3)(iii), letters of credit drawn by the trustee, or substitute customer property posted by a customer, are to be considered customer property in the account class applicable to the original letter of credit.

ICI, SIFMA AMG/MFA, and Vanguard supported § 190.04(d)(3) on the grounds that it has the benefit of treating customers equitably by avoiding a more favorable treatment of customers who post letters of credit than those who post cash and securities.

These proposed new provisions could impose costs on customers who use letters of credit as collateral for their positions. Such customers could be considered to have received distributions up to the full amount of the letter of credit, or the trustee may draw upon a portion or possibly the full amount of the letter of credit.

Moreover, a number of commenters,[255] expressed the concern that requests for substitute customer property in the special context of delivery letters of credit could cause sudden liquidity needs, and substantial hardship to customers. For example, CME noted that, while they support § 190.04(d)(3) outside the context of delivery letters of credit, they see difficulties in that context, specifically in the case of deliveries for certain energy contracts, often which take place over 30 days. The delivery letters of credit for these contracts can involve hundreds of millions of dollars in face amounts, and CME is of the view that it would cause substantial liquidity hardship for buyers to have to substitute cash in such amounts.

While the discussion above represents potentially important costs, the Commission is noting factors that can alleviate these costs, and is implementing provisions that it believes substantially mitigate these costs: First, the Commission is adding a new § 190.04(d)(3)(iv), which provides that the trustee shall, in exercising their discretion with regard to addressing letters of credit, including as to the timing and amount of a request for substitute customer property, endeavor to mitigate, to the extent practicable, the adverse effects upon customers that have posted letters of credit, in a manner that achieves *pro rata* treatment among customer claims. Second, the Commission notes the likelihood that requests for substitute customer property may not apply to the particular delivery letters of credit the commenters have expressed concerns about: As requested by CME, the Commission confirms that (1) a delivery letter of credit that is posted directly with the DCO or with the delivery counterparty, rather than with or through the FCM, and for which the FCM is not a named beneficiary, is outside the delivery account class, *i.e.,* it does not constitute cash delivery property (or property of the debtor's estate), and (2) the provisions in other parts of the part 190 regulations regarding treatment of letters of credit posted with or through the debtor FCM do not apply such a letter of credit.

The Commission's priority in this context is to ensure the customers using letters of credit to meet margin obligations are treated in an economically equivalent manner to those who have posted other types of collateral, so that there is no incentive to use such letters of credit to circumvent the *pro rata* distribution of margin funds as set forth in section 766(h) of the Bankruptcy Code.[256] Moreover, if there are shortfalls in customer property in a particular account class, and public customers posting letters of credit are protected from sharing in those shortfalls, those public customers would benefit. However, the shortfalls would, inevitably, instead be allocated to other public customers, who would suffer corresponding losses. Regulation § 190.04(d)(3) supports the policy of *pro rata* treatment of public customers embodied in section 766(h) of the Bankruptcy Code by clarifying that letters of credit cannot be used to avoid *pro rata* distribution of margin funds. It therefore avoids concentrating losses on those public customers (who are likely to be smaller customers) that cannot qualify for, or cannot afford the cost of, letters of credit, or otherwise do not use letters of credit as collateral. Moreover, by directing the trustee to exercise their discretion, including with respect to amounts and timing of requests for customer property, in a manner that mitigates adverse effects on those customers that have posted letters of credit, it will mitigate the liquidity costs to such customers.

Section 190.04(e)(1) concerns liquidation of open commodity contracts in the market, while paragraph (e)(2) addresses liquidation by book entry offset. Both of these revised regulations delete the requirement in the current regulations that a clearing organization must obtain approval for its rules regarding liquidation of open commodity contracts, a requirement that is superfluous in light of the regulatory framework set forth in part 40 of the Commission's regulations, and in light of the notice-filing regime established by Congress in section 5c(c) of the CEA.[257] This has the benefit of enabling clearing organizations to avoid the cost of filing a request for rule approval, pursuant to CEA section 5c(c)(4) and Regulation § 40.5. There are potential costs, in that an ill-conceived rule could be more readily identified, and addressed, in a rule approval process. However, Commission staff, as a matter of practice, closely reviews all notice-filed clearing organization rules.

Section 190.04(e)(3) is new, and confirms that an FCM or foreign futures intermediary through which a debtor FCM carries open commodity contracts may exercise any enforceable contractual rights that the FCM or foreign futures intermediary has to liquidate such commodity contracts. It provides that the liquidating FCM or foreign futures intermediary must use ''commercially reasonable efforts'' in the liquidation and provides the trustee a damages remedy if the FCM or foreign futures intermediary fails to do so. Damages are the only remedy; under no circumstance can the liquidation be voided.

This new provision will benefit carrying FCMs by confirming explicitly that carrying FCMs are allowed to exercise enforceable contractual rights to liquidate contracts, which reduces ambiguity and thus will reduce administrative costs. At the same time, clarification of the availability of the damages remedy will help to protect creditors of the debtor FCM's estate in the event that the carrying FCM does not use commercially reasonable efforts in liquidating the open contracts (and thus will incentivize carrying FCMs to act in a commercially reasonable manner). Thus, the regulation itself provides the estate with a potential mitigant for the costs in the form of a damages remedy.

The remainder of the revisions to § 190.04(e)(4) and (f) are non-substantive language changes and

[255] CMC, CME, FIA.

[256] *See, e.g.,* 48 FR at 8718–19.

[257] 7 U.S.C. 7a–2(c).

clarifications and updated cross-references and should not have associated costs or benefits.

3. Regulation § 190.05: Operation of the Debtor's Estate—General: Consideration of Costs and Benefits

In § 190.05, the Commission is addressing general issues regarding the operation of the debtor's estate. In both § 190.05(a) and (b), the Commission is making revisions providing the trustee with more flexibility to act in a bankruptcy situation. Section 190.05(a), for example, provides that the trustee ''shall use reasonable efforts'' to comply with the CEA and the Commission's regulations. Section 190.05(b) requires the trustee to ''use reasonable efforts'' to compute a funded balance for each customer account that contains open commodity contracts or other property as of the close of business each business day until such open commodity contracts and other property in such account have been transferred or liquidated, ''which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.'' These two revisions will benefit the estate by recognizing that a bankruptcy could be an emergency event, that perfectly reliable information could be unavailable or inordinately expensive to obtain, and that therefore the trustee should be allowed some measure of flexibility to act reasonably given the particular circumstances of the case. CME noted that § 190.05(b) will have the benefit of allowing the trustee to transfer more promptly public customers' positions and property than if the trustee were held to a strict standard of precision. On the other hand, affording the trustee increased discretion in complying with the CEA and the Commission's regulations, and in computing a funded balance for each customer account, may carry the potential cost of trustee mistake, misfeasance, or abuse of such discretion, as discussed above.

Whereas current § 190.04(b) requires a trustee to compute a funded balance only for those customer accounts with open commodity contracts, revised § 190.05(b) expands the scope of customer accounts for which a trustee is required to compute a funded balance to those accounts with open commodity contracts or other property (including, but not limited to, specifically identifiable property). This expansion of the trustee's duties represents an administrative cost, as the trustee will have to expend time and resources at the close of business each business day to compute the funded balance of all customer accounts. However, this revision should also result in a benefit to those customers whose accounts hold property but no open commodity contracts, in the form of enhanced information about their financial position (including with regard to collateral, the value of which may change on a daily basis, and with regard to the percentage distribution currently available). These customers will, under the revised provision, receive daily computations of the funded balance of their accounts with the debtor.

However, revised § 190.05(b) also narrows the trustee's duty compared to current § 190.04(b): While the current provision states that the trustee ''must compute a funded balance for each customer account . . . each day,'' the revised provision only requires the trustee to ''use reasonable efforts'' to do so. Regulation § 190.00(c)(3)(i)(C) provides that ''reasonable efforts'' should only be less than ''best efforts'' to the extent that this would benefit public customers *as a class.* Exercises of discretion by a trustee that, on a net basis, benefit public customers as a class may, on a net basis, impose costs on individuals or groups within that class. For example, there theoretically may be cases where, because the administrative cost of computing a funded balance would outweigh the benefit of doing so to public customers *as a class,* the trustee, in exerting ''reasonable efforts,'' determines not to do so on a particular day or for a particular time. As ICI points out in their comment letter, that decision would harm certain customers, *i.e.,* regulated funds, who have a particular need to confirm the existence and value of their transactions and associated margin.

Section 190.05(c) requires the debtor to maintain ''records required under this chapter to be maintained by the debtor, including records of the computations required by this part'' ''until such time as the debtor's case is closed.'' This revision expands the scope of records that must be maintained, thereby imposing certain administrative costs, but should benefit the estate, because it will limit the amount of time the trustee will have to maintain the relevant records.

Section 190.05(d) requires the bankruptcy trustee to use all reasonable efforts to continue to issue account statements for customer accounts that contain open commodity contracts or other property, and to issue account statements reflecting any liquidation or transfer of open commodity contracts or other property promptly after such liquidation or transfer. This provision will likely result in administrative costs, as the trustee will have to expend time and resources issuing account statements to customers. It will benefit customers because it should help them to keep track of their commodity contracts (and the continued availability of hedges) and the property in their accounts, including in particular when such contracts and property are liquidated or transferred, even during a bankruptcy. ICI noted that this is of particular benefit to regulated funds, providing them with a basis to confirm the existence and value of their transactions and associated margin.

Section 190.05(e)(1) allows a bankruptcy trustee to effect transfers of customer property in accordance with § 190.07, but requires the trustee to obtain court approval prior to making any other disbursements to customers. This provision should benefit the estate and customers by allowing the trustee, without court approval, to port customers' positions and associated property to a solvent FCM as quickly as possible in a bankruptcy situation. In the event that too much customer property (that is, an amount in excess of the ultimate *pro rata* share) is transferred for those customers whose positions are being ported, and cannot be offset or clawed back, it could result in costs to other customers, for whom less than their *pro rata* share would be available.

Section 190.05(e)(2) allows the bankruptcy trustee to invest the proceeds from the liquidation of commodity contracts or specifically identifiable property, and any other customer property, in obligations of or guaranteed by the United States, so long as the obligations are maintained in depositories located in the United States or its territories or possessions. The revised regulation expands the scope of customer property that the trustee is permitted to invest in such a manner to include ''any other customer property.'' This change should benefit customers, in that additional customer property could be invested (in this limited manner).

Section 190.05(f) requires the trustee to apply the residual interest provisions contained in § 1.11 ''in a manner appropriate to the context of their responsibilities as a bankruptcy trustee pursuant to'' the Bankruptcy Code and ''in light of the existence of a surplus or deficit in customer property available to pay customer claims.'' This explicit requirement to continue to apply the residual interest requirements set forth in § 1.11 may result in administrative costs, since the trustee would require resources to do so. However, this provision should benefit customers by

making it more likely that they would receive what they are entitled to receive from the debtor's estate. Indeed, Vanguard noted that the residual interest requirement is a valuable buffer to protect customers.

4. Regulation § 190.06: Making and Taking Delivery Under Commodity Contracts: Consideration of Costs and Benefits

Section 190.06 addresses the making and taking of deliveries under commodity contracts.

Specifically, § 190.06(a)(2) requires the trustee to use ''reasonable efforts'' (in contrast to the current ''best efforts'') to allow a customer to deliver physical delivery property that is held directly by the customer in settlement of a commodity contract, and to allow payment in exchange for such delivery, and for both of these to occur outside the debtor's estate, where the rules of the exchange or clearing organization prescribe a process for delivery that allows this.

Management of contracts in the delivery positions involves a significant degree of tailored administration. Under the best efforts standard, the trustee may spend more time (and thus incur higher costs) focusing on the needs of a few customers, which could detract from the trustee's ability to manage the estate more broadly. Accordingly, the change from ''best efforts'' to ''reasonable efforts'' should benefit creditors of the estate (as a whole) as the trustee should not need to provide a disproportionate amount of individualized treatment to such contracts.[258] However, particular customers that would otherwise have received the trustee's focused treatment under the ''best efforts'' standard could suffer a cost from the change.

Section 190.06(a)(3) provides guidance to address situations when the trustee determines that it is not practicable to effect delivery outside the estate and therefore, delivery is made or taken within the debtor's estate. The revisions provide the trustee with the flexibility to act ''as it deems reasonable under the circumstances of the case,'' but set an outer bound to the trustee's discretion in requiring them to act ''consistent with the *pro rata* distribution of customer property by account class.'' This provision again will have the benefits and costs of enhanced discretion discussed above, but includes an outer bound to that discretion.

In § 190.06(a)(4), the Commission adds a new provision to reflect that delivery may need to be made in a securities account.[259] The new provision should benefit customers who require the delivery of securities, and the trustee, by permitting those securities to be delivered to the proper type of account. By setting limits, the provision should mitigate the risk of transferring too much value out of the commodity contract account (and creating a risk of an undermargin or deficit balance).

Section 190.06(b) is also new. It creates an account class for physical delivery property held in delivery accounts and the proceeds of such physical delivery property. This account class is further be sub-divided into separate physical delivery and cash delivery account subclasses. In general, creating the delivery account class should help protect customers with property in delivery accounts following a default, because delivery accounts are not subject to the Commission's segregation requirements. The further sub-division into sub-classes recognizes that cash is more vulnerable to loss, and more difficult to trace, as compared to physical delivery property. This will likely benefit those with physical delivery claims; customers in the cash delivery sub-class would be likely get a *pro rata* distribution that is less. The benefits and costs of creating these sub-classes were discussed more fully above in reference to the definition of account class in proposed § 190.01.

5. Regulation § 190.07: Transfers: Consideration of Costs and Benefits

Section 190.07(a) works to promote transfers of commodity contracts from a debtor FCM. It does so by prohibiting any clearing organization or self-regulatory organization from adopting, maintaining in effect, or enforcing rules that interfere with the acceptance by its members of transfers of open commodity contracts and the equity margining or securing of such contracts from FCMs with respect to which a petition in bankruptcy has been filed, if the transfers have been approved by the Commission.

The revised regulation includes the provisos that it (1) does not limit the exercise of any contractual right of a clearing organization or other registered entity to liquidate or transfer open commodity contracts, and (2) should not be interpreted to limit a DCO's ability adequately to manage risk. The revision modifies, in a balanced fashion, the standard for clearing organization and SRO rules that are adopted, maintained, in effect, and enforced and where transfers are approved by the Commission. While clearing organizations and SROs will need to comply with the revised standard, the compliance cost should not be different than under the prior standard. The clarification that the regulations do not limit contractual risk management rights should provide a benefit to clearing organizations and their members in clarifying that the regulation will not nullify the contracts in this regard, and will not have an associated cost.

In § 190.07(b)(1), the Commission clarifies that it is the transferee FCM itself who has the responsibility to determine whether it would be in violation of regulatory minimum financial requirements upon accepting a transfer. It is not the trustee's duty. The Commission does not anticipate any material cost from this revision.

Section 190.07(b)(3) permits a transferee to accept open commodity contracts and associated property prior to completing customer diligence requirements, provided that such diligence is completed as soon as practicable thereafter, and no later than six months after transfer. It is intended to incentivize potential transferees to accept transfers by making it more practicable to do so. It recognizes that customer diligence processes would have already been required to have been completed by the debtor FCM with respect to each of its customers as part of opening their accounts. CME, ICI and Vanguard agree that the proposal would provide a benefit to customers and transferee clearing members and trustees, by facilitating the transfer process.[260] If such flexibility were not provided, under the current regulations, transfer might not be accomplished, or may not be accomplished promptly. The provision recognizes the importance of the account opening diligence

[258] As discussed above in section II.A.1, the trustee in exerting best efforts to meet a standard must diligently exert efforts to meet that standard ''to the extent of its own total capabilities.'' By contrast, in exerting ''reasonable efforts'' to meet a standard, the Commission expects that the trustee will work in good faith to meet the standard, but will also take into account other considerations, including the impact of the effort necessary to meet the standard on the overarching goal of protecting public customers as a class.

[259] This is only relevant for debtor FCMs that are also broker-dealers.

[260] The customer diligence requirements in question focus on anti-money-laundering requirements and ensuring that risk disclosures have been provided to customers and acknowledgements of such disclosures have been received. The corresponding costs would arise from the possibility that the transferee's diligence would have revealed problems that had been missed by the debtor FCM's customer diligence process, or arose subsequent to the time that the original process was conducted, and that conducting the revised diligence more promptly would sooner reveal the concerns, thus permitting them to be addressed more expeditiously.

requirements and would mitigate the risk from delay by requiring the diligence to be performed as soon as practicable and setting an outer limit at six months, unless that time is extended by the Commission.

FIA has requested that the Commission provide transferee FCMs with more specific relief from applicable law relating to ''customer diligence'' and to add specific references to certain rules, in order to provide certainty, and to mitigate regulatory risk, to a transferee. FIA requested various points of specific relief under five headings: (i) Rules relating to anti-money laundering requirements; (ii) rules relating to risk and other disclosures; (iii) rules relating to capital and residual interest requirements; (iv) rules relating to account statements; and (v) rules relating to margin.

As discussed in more detail in Section II.B.5 above, the Commission has decided that, with respect to certain points of the requested relief, providing the relief is warranted, and there are no material associated costs from doing so. Thus, for example, § 190.07(b)(3) is being amended to refer explicitly to the risk disclosure requirements in § 1.65(a)(3).

With respect to the other points of requested relief, the comment requests relief that the Commission has decided carries unacceptable costs. Thus, the Commission is not providing a general exemption from undermargined account capital charges in accordance with § 1.17, nor is the Commission extending the time to comply with capital or residual interest requirements. While such relief might have the advantage of further incentivizing FCMs to accept transferred accounts, it would do so at the cost of potentially causing or accepting financial weakness at transferee FCMs.

In a third group of points of requested relief, the Commission notes that interpretations of existing regulations should adequately address the concerns. Thus, transferred accounts are (based on the terms of the regulations) excluded from the Customer Identification Program requirements of 31 CFR 1026.220, while the provisions of § 190.07(b)(3) adequately inform what constitutes ''*appropriate* risk-based procedures for conducting ongoing customer due diligence'' (emphasis supplied) in the context of 31 CFR 1026.210(b)(5)(i). While providing more specific regulatory provisions might enhance regulatory certainty (and thus redound to the benefit of transferee FCMs, and potentially incentivize FCMs to accept transferred accounts), it carries the risk of being under-inclusive or over-inclusive, and thus failing to achieve the regulatory goals.

Moreover, as to both the second and third categories, there may be a more tailored approach to achieving the goal: As the Commission explicitly notes above, any further relief that might be appropriate in a particular situation can be requested by the transferee in light of the relevant facts and circumstances. The Commission observed that its staff have traditionally responded to requests for relief in emergency situations with great dispatch, and expects, and has instructed staff, to continue to do so in this context in the future.[261] While this approach provides less certainty in advance, it has the benefit of making tailored relief available (and mitigating the possibility that relief leads to unintended consequences).

Section 190.07(b)(4) clarifies that account agreements governing a transferred account are deemed assigned to the transferee until and unless a new agreement is reached. At the request of FIA, the Commission is confirming that if there is a pre-existing account agreement between a transferred customer and the transferee FCM, that pre-existing agreement will govern the relationship rather than the agreement between the customer and the transferor (debtor) FCM. The provision also confirms that consequences for breaches pre-transfer are borne by the transferor rather than the transferee. Section 190.07(b)(4) provides important transparency regarding the agreement between a transferred customer and a transferee FCM pending the negotiation of a new agreement between them, or, if such negotiation is unsuccessful, until either party decides to terminate the relationship.

Section 190.07(b)(5) provides that in the event of transfer, customer instructions that are received by the debtor with respect to any open commodity contracts or specifically identifiable property should be transmitted to the transferee, who should comply with such instructions to the extent practicable. The slight revisions to current § 190.02(c) are merely clarifications, and there should be no costs or benefits associated with such revisions.

Section 190.07(c) provides that ''all commodity contract accounts (including accounts with no open commodity contract positions) are eligible for transfer. . . .'' This recognizes explicitly that accounts can be transferred if the accounts are intended for trading commodities, but do not include any open commodity contracts at the time of the order for relief. The revision clarifies the current language and will not change the types of accounts that can be transferred. Accordingly, the Commission does not anticipate that there will be material added cost associated with the revision.

Section 190.07(d) revises special rules for transfers under section 764(b) of the Bankruptcy Code. The revision is being made to promote transfer. Cost and benefit considerations related to transfer are as discussed above.[262] The revised regulation permits partial transfers, but (to the extent practicable) not in cases where netting sets for spreads or straddles would be broken or where customers' net equity claims would increase. The revised regulation should provide a benefit to customers by codifying this limitation. This recognizes that there may be circumstances where partial transfer is not practicable and implies that the trustee makes that decision. It is therefore possible that certain customers holding spread or straddle positions could have positions liquidated or not transferred under the revised provision, or could have spreads or straddles broken because of the trustee's exercise of discretion.

The Commission has declined to adopt ICI's suggestion to provide guidance to the effect that the trustee should not effectuate a transfer that will result in a separately managed account having a significant deficit following the porting, in order to avoid a circumstance where ''the manager of that account would likely need to liquidate the bulk of the account's portfolio and other positions in order to eliminate or reduce the deficit.'' While adopting such a suggestion might benefit the beneficial owner by enabling the account manager to manage the separate account in accord with the account manager's investment program, it may instead have the opposite effect, in that it may prevent any transfer of the customer's positions before the seventh calendar day after the order for relief, in which event the trustee will be required to liquidate the entirety of the customer's account, promptly and in an orderly manner, causing the very disruptions that the transfer provisions (and ICI's suggestion) are designed to avoid. Moreover, many FCMs carry hundreds or even thousands of separately managed accounts. It may well not be practical for a trustee, in addition to their numerous other responsibilities (and in a context where they need to learn those responsibilities

[261] *See* discussion in Section II.B.5 above.

[262] *See* section III.B.1 above.

in a compressed timeframe) to take ''due account'' of the particular circumstances of each of these separately managed accounts in the hours, or perhaps a small number of days, that the trustee may be allowed by the clearing organizations carrying the FCMs accounts to negotiate and effectuate a transfer. Endeavoring to do so might well have the cost of diverting the trustee and their assistants from carrying out more pressing tasks.

Section 190.07(d)(3) permits a letter of credit associated with a commodity contract to be transferred with an eligible commodity contract account. If the letter of credit cannot be transferred and the customer does not deliver substitute property, the provision will permit the trustee to draw upon all or a portion of the letter of credit and treat the proceeds as customer property in the applicable account class. The revised regulation ensures that letters of credit are treated in an economically similar fashion to other types of collateral and that customers using letters of credit will not receive any differential economic advantages, thus serving the goal of *pro rata* distribution. If the trustee does draw upon the letter of credit, there may be administrative costs incurred by the estate, as well as costs to the customer that posted the letter of credit as collateral. These costs may be mitigated if the customer delivers substitute property, as set forth in the proposed regulation. Moreover, consistent with § 190.04(d)(3)(iv), the trustee is directed to ''endeavor to achieve *pro rata* treatment among customer claims in a manner that mitigates, to the extent practicable, the adverse effects upon customers that have posted letters of credit.'' [263]

Section 190.07(d)(4) will require a trustee to use reasonable efforts to prevent physical delivery property from being separated from commodity contract positions under which the property is deliverable. While this provision will impose an administrative cost on the estate, it is already a best practice for trustees; keeping delivery property with the underlying contract positions is necessary for (and thus should benefit) the delivery process. Therefore, the additional administrative cost from the revised regulation should be minimal.

In § 190.07(d)(5), the Commission prohibits the trustee from making a transfer that would result in insufficient remaining customer property to make an equivalent percentage distribution to all customers in the applicable account class (taking into account all previous transfers and distributions). The Commission is further clarifying that the trustee should make determinations in this context based on customer claims reflected in the FCM's records, and, for customer claims that are not consistent with those records, should make estimates using reasonable discretion based in each case on available information as of the calendar day immediately preceding transfer. This will support achieving the statutory policy of *pro rata* distribution and give the trustee discretion to make decisions based on the overarching principle set forth above, valuing cost effectiveness over precise values of entitlement. However, this is designed to work to the detriment of any customer who, absent the provision, would otherwise benefit from a larger distribution. Moreover, in giving the trustee discretion, it carries the risk of mistake or misfeasance.

Section 190.07(e) will add language to clarify that certain transfers are approved by the Commission pursuant to the procedure set forth in the Bankruptcy Code (and thus protected from avoidance) and will prohibit the trustee from avoiding such transfers, unless the transfer is *disapproved* by the Commission. These include a transfer made by ''a receiver that has been appointed for the FCM that is now a debtor.'' The new provision is being added in order to respect the actions of a receiver that is acting to protect the property of the FCM that has become the debtor in bankruptcy. It will provide certainty to the actions of such a receiver, whose duties, among others, include protecting the customer property of the FCM. However, to the extent that the receiver takes actions that are, considered in retrospect, mistaken or ill-advised, the revised provision will prevent the correction of such actions unless the Commission acts affirmatively to disapprove them.[264]

Section 190.07(f) will clarify that the Commission may prohibit the transfer of a particular set or sets of the commodity contract accounts, or permit the transfer of a particular set or sets of commodity contract accounts that do not comply with the requirements of the section. In addition, the Commission is clarifying that the transfers of the commodity contract accounts include the associated customer property. These revisions are clarifications and should not have any associated costs.

6. Regulation § 190.08: Calculation of Funded Net Equity: Consideration of Costs and Benefits

In § 190.08, the Commission addresses calculation of funded net equity. Section 190.08(a) simply states that a customer's funded net equity claim is equal to the aggregate of such customers funded net equity claims for each account class.

Section 190.08(b) sets forth the steps for a trustee to follow when calculating each customer's net equity. SIFMA AMG/MFA requested that the Commission amend proposed § 190.08(b)(2)(xii) to treat accounts of the same principal or beneficial owner maintained by different agents or nominees as separate accounts and not all held in the individual capacity of such principal or beneficial owner, suggesting that this would have the benefit of reducing the administrative difficulties the trustee would face in consolidating all accounts of the same principal or beneficial owner, and it would have the further benefit of avoiding any confusion as to treatment of separate accounts that could arise with the overlay of the time-limited relief provided by Letter 19–17.

The Commission declined to make this change. The change would not achieve those benefits and would have associated costs: First, the FCM, to the extent it does treat such accounts separately pursuant to the relief set forth in Letter 19–17, will already be consolidating (for purposes of certain calculations) all accounts of the same principal or beneficial owner, in that the Letter conditions its relief on the FCM applying credit limits and stress testing on a combined account basis.[265] Second, given that Letter 19–17 also conditions relief on the FCM disclosing that ''under CFTC [p]art 190 rules all separate accounts of the beneficial owner will be combined in the event of an FCM bankruptcy,'' amending § 190.08(b)(2)(xii) to treat them separately would be inconsistent with that disclosure, and would cause, rather than relieve, inconsistency with the approach taken under the Letter.

While the Commission is making certain revisions in § 190.08(b)(3), (4), and (5), the Commission views such revisions as non-substantive and merely clarifying the text in the current analogous provisions. Thus, the Commission does not expect these

[263] The costs and benefits of allowing the trustee to draw upon the letter of credit have been discussed above in section III.C.2 with respect to § 190.04(d)(3).

[264] Regulation § 190.02(b)(1) explicitly excepts from the delegation to the Director of the Division of Clearing and Risk the authority to disapprove a pre-relief transfer pursuant to § 190.07(e)(1).

[265] See CFTC Letter 19–17, *https://www.cftc.gov/node/217076* at 4.

changes to result in any costs or benefits.

Section 190.08(c) sets forth instructions for calculating each customer's funded balance, while in § 190.08(d), the Commission is in general implementing changes to provide more flexibility to the trustee in valuing commodity contracts and other property held by or for a commodity broker. For instance, in § 190.08(d)(5), the Commission is deleting the requirement that the trustee seek approval of the court prior to enlisting professional assistance to value customer property. These changes should benefit the estate by providing the trustee with more flexibility to determine how to value certain customer property, including whether or not to enlist professional assistance in doing so. Likewise, these revisions should serve the goal of a *pro rata* distribution to customers, as the accurate valuation of customer property can benefit from the input of a professional. On the other hand, affording the trustee increased discretion in how to value commodity contracts and other property held by a debtor carries the potential cost of mistake, misfeasance, or abuse of discretion by the trustee, as discussed above, or possibly by the professional whose service is retained.

With respect to commodity contracts that have been transferred, § 190.08(d)(1)(i) provides that such contracts be valued at the end of the last settlement cycle on the day preceding such transfer, rather than at the end of the settlement cycle in which it is transferred. Again, this revision should benefit both the estate and customers by making it practical to calculate the value of the transferred commodity contracts prior to the transfer.

The Commission has declined to accept ICE's suggestion that it adopt a ''more flexible approach'' because ''the market may move significantly on the date of the transfer.'' While prices may move intra-day during the period between opening and the time of auction, they may also move between the time of auction and closing. Therefore, there is no *ex ante* reason to expect that the previous day's price is less reflective of the price at the time of the auction than the closing price on the auction day. Moreover, an alternative approach, using the price set in the auction as the price for individual contracts, is unlikely to be practicable. Units auctioned will frequently contain a heterogenous (though risk-related) set of products, tenors (*e.g.,* contract months), and directions (*e.g.,* long or short). Thus, it will often be impracticable to translate an auction price for a portfolio to prices for individual contracts within that portfolio.

7. Regulation § 190.09: Allocation of Property and Allowance of Claims: Consideration of Costs and Benefits

In § 190.09, the Commission is addressing allocation of property and allowance of claims. Section 190.09(a)(1) defines the scope of ''customer property'' that is available to pay the claims of a debtor FCM's customers, and § 190.09(a)(1)(i) sets forth the categories of ''cash, securities, or other property or the proceeds of such cash, securities, or other property received, acquired, or held by or for the account of the debtor, from or for the account of a customer'' that are included in customer property. In § 190.09(a)(1)(i), the Commission is making certain substantive changes to the categories listed in current § 190.08(a)(1)(i), as discussed below:

- First, § 190.09(a)(1)(i)(D) is new and provides that customer property includes any property ''received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the commodity customer account of a customer.'' Clarifying this point explicitly should benefit both the estate and customers by avoiding confusion or potential litigation.
- Second, § 190.09(a)(1)(i)(F) provides that letters of credit, including proceeds of letters of credit drawn by the trustee, or substitute customer property, constitute ''customer property.'' This section is being revised to be consistent with the other letters of credit provisions that are being added throughout part 190. The Commission does not anticipate that this provision will result in any material costs or benefits, as current § 190.08(a)(1)(i) already includes a provision regarding letters of credit.[266]

Section 190.09(a)(1)(ii) sets forth the categories of ''[a]ll cash, securities, or other property'' that would be included in customer property. In § 190.09(a)(1)(ii), the Commission is making certain substantive changes to the categories listed in current § 190.08(a)(1)(ii), as discussed below:

- First, § 190.09(a)(1)(ii)(D) provides that any cash, securities, or other property that was property received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract and that is subsequently recovered by the avoidance powers of the trustee or is otherwise recovered by the trustee on any other claim or basis constitutes customer property. The current version of this provision refers only to the trustee's avoidance powers (leaving out the possibility for recovery other than through avoidance powers). The Commission's revisions to this section will benefit the estate, by assuring that any property they recover will be included in the pool of customer property, rather than going to some other creditor (to be sure, those other creditors will receive correspondingly less).
- Second, § 190.09(a)(1)(ii)(G) is new, and provides that any current assets of the debtor in the greater of (i) the amount that the debtor is obligated to be set aside as its targeted residual interest amount, pursuant to § 1.11, or (ii) the debtor's obligations to cover debit balances or undermargined amounts, pursuant to § 1.20, § 1.22, § 22.2, or § 30.7, constitute customer property. This new provision will result in administrative costs, because the trustee will need to take the extra step of determining whether any current assets of the debtor need to be set aside as customer property and, if so, how much. This provision should benefit public customers (and serve the policy of protecting customer collateral), however, because it will mitigate the risk of a shortfall in customer funds by ensuring that the trustee fulfills the Commission's regulations that require an FCM to put certain funds into segregation on behalf of customers. ICI and Vanguard agreed that this provision will benefit customers, while CME considered it a ''substantial improvement over the current rule.'' This approach will result in such funds being included in the pool of customer property, rather than going to some other creditor. It will, to the same extent, operate to the detriment of general creditors.
- Third, § 190.09(a)(1)(ii)(K) is also new, and provides that any cash, securities, or other property that is payment from an insurer to the trustee arising from or related to a claim related to the conversion or misuse of customer property constitutes customer property. This provision should benefit customers (and, again, the policy of protecting customer collateral), since any insurance payment as described in this proposed section will enlarge the pool of customer property, rather than going

[266] The costs and benefits of the underlying policy decision to take steps to ensure that customers posting letters of credit are treated (with respect to *pro rata* allocation of losses) in a manner consistent with the manner in which customers posting other forms of collateral are treated are discussed in connection with § 190.04(d)(3) in section III.C.2 above.

to general creditors.[267] It could result in administrative costs, however, as the trustee will need to spend time and resources in order to determine whether any such insurance payments exist, and in prosecuting such insurance claims.

• Fourth, the second sentence of § 190.09(a)(1)(ii)(L) is new, and will provide that customer property for purposes of these regulations includes any ''customer property,'' as that term is defined in SIPA, that remains after satisfaction of the provisions in SIPA regarding allocation of customer property constitutes customer property. This provision should benefit commodity customers (and act to the detriment of general creditors) because any securities customer property remaining after full allocation to securities customers will enlarge the pool of commodity customer property. It could result in administrative costs, however, since the trustee could need to spend time and resources determining the extent to which such property is left over after allocation to customers in a SIPA proceeding.[268]

Section 190.09(a)(2) sets forth the categories of property that are not included in customer property. In § 190.09(a)(2), the Commission has made certain substantive changes to the categories listed in current § 190.08(a)(2), as discussed below:

• First, in § 190.09(a)(2)(iii), the Commission is adding explicit language to state that only those forward contracts that are not cleared by a clearing organization are excluded from the pool of customer property. This revision will benefit customers (and act to the detriment of general creditors), since the pool of customer property would increase by explicitly including any cleared forward contracts.

• Second, § 190.09(a)(2)(v) provides that any property deposited by a customer with a commodity broker after the entry of an order for relief that is not necessary to meet the margin requirements of such customer is not customer property. The deletion of the word ''maintenance'' before ''margin'' will eliminate any distinction between initial and variation margin; this deletion will benefit customers by ensuring that any amount deposited by a customer after the entry of an order for relief that is necessary to meet that customer's margin requirements will be included in the pool of customer property. This provision would correspondingly act to the detriment of general creditors.

• Third, § 190.09(a)(2)(viii), which is new, provides that any money, securities, or other property held in a securities account to fulfill delivery, under a commodity contract that is a security futures product, from or for the account of a customer, is excluded from customer property. This provision avoids conflict with the resolution, under SIPA, of claims for securities and related collateral.

Section 190.09(a)(3), which is new, gives the trustee the authority to assert claims against any person to recover the shortfall of customer property enumerated in certain paragraphs elsewhere in § 190.09(a). This provision could impose administrative costs, since the trustee could have to expend time and resources to assert and prosecute such claims to make up for any shortfall in customer property. The provision will, however, benefit customers, since it will ensure that the trustee is in a position to recover any such shortfalls and gives the trustee authority to act to do so. Moreover, since this provision makes explicit what is implicit in current part 190, an additional benefit of this provision may be reduced litigation costs over a trustee's authority to engage in attempts to recover shortfalls in customer property.[269]

Section 190.09(b) adds the phrase ''or attributable to'' to the language that is in current § 190.08(b), when describing how to treat property segregated on behalf of or attributable to non-public customers, namely, as part of the public customer estate; the addition of this phrase, as described above, will clarify that § 190.09(b)(1) applies both to property that is in the debtor's estate at the time of the bankruptcy filing, as well as property that is later recovered by the trustee and becomes part of the debtor's estate at the time of recovery. This additional phrase would benefit public customers and the statutory policy in favor of them (and correspondingly act to the detriment of non-public customers and general creditors), since it could increase the amount of property that is treated as part of the public customer estate. It could impose administrative costs because it could take time and resources to properly allocate any property that is recovered after the time the bankruptcy is filed.[270]

Section 190.09(c)(1)(ii) is a new provision that instructs the trustee, in the event there is property remaining allocated to a particular account class after payment in full of all allowed customer claims in that account class, to allocate the excess in accordance with proposed § 190.09(c)(2), which in turn sets forth the order of allocation for any customer property that cannot be traced to a specific customer account class. These provisions will benefit public customers who would otherwise face shortfalls (and then, non-public customers who would otherwise face shortfalls). Since these provisions make explicit what is implicit in current part 190, an additional benefit of these provisions will result from the increased clarity over what to do with any excess customer property. However, the provisions will act to the detriment of non-public customers (relative to public customers) and general creditors (relative to both) who, under the current regime, could have been more likely to receive any excess customer property in the absence of an explicit provision providing what to do with any such excess customer property.[271]

Section 190.09(d) governs the distribution of customer property. The only substantive change in § 190.09(d) from its analog in current § 190.08(d) is in § 190.09(d)(1)(i) and (ii), which import the concept of ''substitute customer property.'' Whereas current § 190.08(d)(1)(i) and (ii) require customers to deposit cash in order to obtain the return of specifically identifiable property, § 190.09(d)(1)(i) and (ii) allow the posting of ''substitute customer property.'' This term, which is defined in § 190.01, means cash or cash equivalents. This revision will benefit customers because it makes it easier for customers to redeem their specifically identifiable property by no longer limiting customers to only using cash to do so. It could, however, impose administrative costs in the form of time and resources of the trustee, who, in the event a customer chooses to post cash equivalents to redeem their specifically identifiable property, will be required to

[267] It will, again, to the same extent, act to the detriment of general creditors.

[268] The Commission further notes that the first sentence of § 190.09(a)(1)(ii)(L), which provides that customer property includes any cash, securities, or other property in the debtor's estate, but only to the extent that the customer property under the other definitional elements is insufficient to satisfy in full all claims of the debtor's public customers, will impose no new costs or benefits because such provision already appears in current § 190.08, and the only changes to the provision would be non-substantive updates to cross-references.

[269] Of course, these recoveries are derived from persons against whom such claims are successfully asserted. The transfer to customers from these individuals advances the goal of pro-rata distribution.

[270] Section 190.09(c)(1) will have a similar change in the addition of the phrase ''or recovered by the trustee on behalf of or for the benefit of an account class,'' which is meant to clarify that any property recovered by the trustee on behalf of or for the benefit of a particular account class after the bankruptcy filing must be allocated to the customer estate of that account class. This revision will present similar costs and benefits to those discussed above.

[271] The incentive effects of such preferences are discussed in section III.A.2.vi, above.

value (and potentially to liquidate) such cash equivalents. Moreover, while ''cash equivalents'' are required to be assets ''that are highly liquid such that they may be converted into United States dollar cash within one business day without material discount in value,'' it is possible that such assets could nonetheless decrease in value, potentially to the detriment of other customers.

8. Regulation § 190.10: Provisions Applicable to Futures Commission Merchants During Business as Usual: Consideration of Costs and Benefits

As proposed, § 190.10 addresses provisions applicable to FCMs during business as usual. The ABA Subcommittee and CME recommended that these ordinary course provisions should be codified in part 1 of the Commission's regulations, to be more transparent to FCM compliance personnel. As discussed further below, the Commission has accepted that suggestion and is adopting in part 1 of its regulations the provisions that were proposed as § 190.10 (b), (c), (d), and (e).

In the regulation proposed as § 190.10(a), the Commission notes that an FCM is required to maintain current records related to its customer accounts, consistent with current Commission regulations, and in a manner that will permit them to be provided to another FCM in connection with the transfer of open customer contracts and other customer property. This regulation does not impose new obligations, but rather informs the trustee regarding their duties by incorporating references to the Commission's existing regulations. Thus, this provision is remaining in part 190, and, as the sole remaining paragraph, will be codified as § 190.10.

The regulation proposed as § 190.10(b) addresses designation of accounts as intended for the purpose of hedging. It is being codified as § 1.41. An FCM will be permitted to rely upon a customer's written representation of hedging intent regarding the designation of a hedging account, without being required to look behind that representation, thus mitigating administrative costs.

Section 1.41(a) requires an FCM to provide a customer an opportunity to designate an account as a hedging account when the customer first opens the account, allowing for clear instruction to FCMs at the outset of the relationship. Clear instruction at the outset will facilitate the ability properly to account for customer property. There will be some disclosure and accounting costs associated with this provision. For those customers that do engage in hedging, it will be more cost effective to designate the account at opening than to monitor the transactions for the first qualifying transaction to provide the opportunity to make the designation, as applicable under the current regulation. Thus, the regulation should reduce the probability that the opportunity to designate the account as a hedging account will be missed.

Section 1.41(b) sets forth the conditions for treating an account as a hedging account, permitting such treatment upon the customer's written representation that their trading would constitute hedging as defined under any relevant Commission rule or the rule of a DCO, DCM, SEF, or FBOT. There will be record-keeping costs for FCMs and customers associated with the provision.

Section 1.41(c) provides that the foregoing requirements do not apply to commodity contract accounts opened prior to the effective date of this final rulemaking, and that an FCM can continue to designate such existing accounts as hedging accounts based on written hedging instructions obtained under current regulations. This provision should mitigate the impact of the changes to current requirements in § 1.41(a) and (b) by not applying those provisions to already opened hedging accounts, instead relying upon the information collected and maintained during the current regulatory framework.

Section 1.41(d) will permit an FCM to designate an existing customer account as a hedging account for purposes of bankruptcy treatment, provided that the FCM obtains the necessary customer representation. This provision will give FCMs and customers flexibility to apply the proposed regulations to existing accounts where the impact would not be overly burdensome.

The regulation proposed as § 190.10(c) addresses the establishment of delivery accounts during business as usual. It is being codified as § 1.42, and recognizes that when an FCM facilitates delivery under a customer's physical delivery contract and such delivery is effected outside of a futures account, foreign futures account, or cleared swaps account, it must be effected through (and the associated property held in) a delivery account. While there are costs associated with the opening and maintenance of delivery accounts, the Commission views that the use of such accounts is cost effective in facilitating delivery.[272] The benefit of using such accounts is twofold: To protect customer assets during the delivery process, and to foster the well-functioning of the delivery process.

The regulation proposed as § 190.10(d) addresses letters of credit, and will prohibit an FCM from accepting a letter of credit as collateral during business as usual unless certain conditions are met at the time of acceptance and remain true through the date of expiration. It is being codified as § 1.43.

The first condition is that the trustee must be able to draw upon the letter of credit in full or in part in the event of a bankruptcy proceeding, the entry of a protective decree under SIPA, or the appointment of FDIC as receiver pursuant to Title II of the Dodd-Frank Act. Second, if the letter of credit is permitted to be and in fact is passed through to a clearing organization, the trustee for such clearing organization (or the FDIC) must be able to draw upon the letter of credit in full or in part in the event of a bankruptcy proceeding for such clearing organization (or where the FDIC is appointed as receiver).

Section 1.43 will ensure that an FCM's treatment and acceptance of letters of credit during business as usual is consistent with and does not preclude the trustee's treatment of letters of credit in accordance with §§ 190.00(c)(5) and 190.04(d)(3). The Commission understands that under industry practice, most existing letter of credit arrangements are consistent with the Joint Audit Committee Forms of Irrevocable Standby Letter of Credit, both Pass-Through and Non Pass-Through,[273] and that these forms are consistent with these new requirements. Nevertheless, FCMs will need to review the existing letters of credit for consistency with the regulation, and it is plausible that some could need to be re-negotiated to be consistent therewith.

To mitigate the costs of this change, the Commission has considered the extent of the use of letters of credit in the industry and has determined that upon the effective date of the regulation, § 1.43 will apply only to *new* letters of credit and customer agreements. The Commission further is including a transition period of one year from the effective date until § 1.43 will apply to existing letters of credit and customer agreements. The transition period is intended to give FCMs an adequate opportunity to conduct the necessary review of existing letters of credit and customer agreements, and to make any

[272] The Commission further understands that it is already industry practice to use such accounts, therefore, as a practical matter, the cost associated with mandating the use of such accounts should be mitigated.

[273] *See* section II.B.8 above.

necessary changes. SIFMA AMG/MFA have urged the Commission to shorten that one-year transition period, questioning how a (non-conforming) letter of credit would be treated if an FCM that is holding such a letter of credit went into bankruptcy during that period. Nonetheless, the Commission has concluded that the one-year time period appropriately balances the goals of mitigating burden on FCMs who are required to conduct such reviews, and make such changes, with the goal of mitigating the risk that an FCM that has accepted one or more letters of credit that do not conform to the new requirements becomes a debtor during that transition period. Even if such a situation occurs, the risk that the customer who posted that letter of credit would obtain treatment that is not consistent with (*i.e.,* better than) *pro rata* treatment (at the expense of other public customers) is mitigated by the provision in § 190.04(d)(3)(ii)—which is not subject to the one-year transition period—that, for a letter of credit posted as collateral, ''the trustee shall treat any portion that is not drawn upon (less the value of any substitute customer property delivered by the customer) as having been distributed to the customer for purposes of calculating entitlements to distribution or transfer.''

It is possible that some letters of credit could become more expensive for customers to obtain, as there will be an increased likelihood that the letter of credit will be drawn upon. (As discussed above, this appears to not apply to the majority of existing arrangements). As noted in the discussion of § 190.04(d)(3), the benefit of the regulation is ensuring that letters of credit are treated in an economically consistent manner with other types of collateral, thus promoting the goal of *pro rata* distribution. However, it could create incentives for customers who had, or who would prefer to, post letters of credit that could not be drawn upon unless the customer defaulted, to reduce their participation in transactions cleared through FCMs.

The provision proposed as § 190.10(e) concerns the disclosure statement for non-cash margin, and is being codified as § 1.55(p). It largely aligns with the provisions in current part 190 from which it was derived; there will be no additional cost or benefit implications.

9. Section 15(a) Factors—Subpart B

a. Protection of Market Participants and the Public

Subpart B of the revised regulations will increase the protection of market participants and the public by clarifying certain provisions (thereby promoting transparency for customers, other claimholders, and the general public), by providing, in certain other provisions, discretion to the trustee in determining how best to achieve the goal of protecting public customers as a class, by fostering transfer (and therefore mitigating the market risk associated with closing out and reopening positions for certain customers), by enhancing the likelihood that customer net equity claims will be fully funded, and by promoting fairness to customers as a class by achieving *pro rata* distribution.

b. Efficiency, Competitiveness, and Financial Integrity

Subpart B of the revised regulations will promote efficiency (in the sense of both cost effectiveness and timeliness) in the administration of insolvency proceedings of FCMs and the financial integrity of derivatives transactions carried by FCMs by setting forth clear and well-thought-out instructions for a bankruptcy trustee to follow in the event of an FCM insolvency, and by ensuring that these instructions are and remain consistent with current market practices. Moreover, subpart B will provide the bankruptcy trustee with discretion, in certain circumstances, to react flexibly to the particulars of the insolvency proceeding, guided by the goal of protecting public customers as a class, thereby promoting cost-effective administration of the proceeding. These effects will, in turn, enhance the competitiveness of U.S. FCMs, by enhancing market confidence in the protection of customer funds and positions entrusted to U.S. FCMs, even in the case of insolvency.

c. Price Discovery

Price discovery is the process of determining the price level for an asset through the interaction of buyers and sellers and based on supply and demand conditions. The revised regulations work to promote the transfer, rather than liquidation, of customer positions. To the extent that they therefore mitigate the likelihood of the need for liquidations of customer positions, particularly in conditions of market distress, they will mitigate the negative impacts of bankruptcy proceedings on price discovery.

d. Sound Risk Management Practices

Subpart B of the revised regulations will promote sound risk management practices by facilitating the bankruptcy trustee' effective management of the risk of the debtor FCM. Subpart B will accomplish this by revising the bankruptcy regulations for an FCM insolvency to reflect current market practices and thereby make it easier for the trustee to act effectively to protect customer property in the event of such an insolvency.

e. Other Public Interest Considerations

Subpart B of the revised regulations supports the implementation of statutory policy such as promoting protection of public customers and ensuring *pro rata* distribution of customer funds. Moreover, some of the FCMs that might enter bankruptcy are very large financial institutions, and some are (or are part of larger groups that are) considered to be systematically important. A well-structured and effective bankruptcy process that efficiently facilitates the proceedings is likely to benefit the financial system (and thus the public interest), as that process will help to attenuate the detrimental effects of the bankruptcy on the financial system and reduce the likelihood that uncertainty as to the outcome of the insolvency could cause disruption to financial markets.

D. Subpart C—Clearing Organization as Debtor

Subpart C to part 190 is intended to create a tailored set of regulations to govern a proceeding under subchapter IV of chapter 7 of the Bankruptcy Code in which the debtor is a clearing organization. As discussed further below, while these regulations are fitted to the context of a commodity broker that is a clearing organization, they are principles-based rather than prescriptive, and flexible rather than rigid.

The overarching benefits of this approach include the following. First, uncertainty will be reduced during business-as-usual (thus enhancing the ability of both clearing members and their customers better to understand their exposures to the possible insolvency of a clearing organization, and to tailor their risk management practices (and use of clearing services) in light of this enhanced understanding). This better understanding may well foster greater trust in the cleared derivatives marketplace, and thus greater participation therein. To be sure, it is also possible that some market participants, upon achieving a greater understanding, may decide not to participate. There are other limitations to these benefits, noted below. Second, by developing a more detailed, yet flexible, framework and procedures for the bankruptcy of a DCO, the costs (to the estate, to clearing members, and to

public customers) of the case should be reduced.

Third, the resolution regime established under Title II of Dodd-Frank provides that the maximum liability of FDIC as receiver of a covered financial company to a claimant is the amount the claimant would have received if the FDIC had not been appointed receiver and the covered financial company had been liquidated under chapter 7 of the Bankruptcy Code. By establishing a clearer counterfactual, subpart C will: (a) Enhance the ability of FDIC to plan for and to execute its responsibilities as receiver; (b) enhance the ability of market participants to predict in advance their exposures in the unlikely event of the resolution as a DCO; and (c) mitigate the cost of litigation over the value of such claims. The Commission notes that there can, to a certain extent, be costs imposed by proposed subpart C, in that there may be a corresponding reduction in flexibility with the addition of rules specifically tailored to address a DCO bankruptcy, but the Commission has drafted these proposed rules with the intent of maintaining significant flexibility, where warranted.

It is apposite to note an important issue that affects incentives: A significant group of commenters have expressed strong concerns, both in comments to this rulemaking [274] and elsewhere,[275] that clearing members and their customers have no meaningful role in DCO risk governance, and, most relevant here, that DCOs' default rules and procedures and recovery and wind-down plans are developed without sufficient input from members and their customers. As discussed in detail in section II.C above and in this section II.D, subpart C is based, in large part, on a debtor DCO's *ex ante* default rules and procedures and recovery and wind-down plans, though applied flexibly by the trustee—that is, only to the extent they determine is ''reasonable'' and ''practicable.''

Most of those concerns transcend the topic of this rulemaking: As a general matter, risk governance is intended to mitigate the possibility of default and, where default does occur, to foster the result that it is the defaulter that pays for all of the losses; skin-in-the-game provides an additional layer of loss-absorbency that (i) comes before mutualizing costs to non-defaulters and (ii) creates incentives for DCOs to engage in successful risk management. Default rules and procedures are intended to, *inter alia,* ensure that the DCO can take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a clearing member default. Recovery plans address credit losses that exceed the DCO's available resources, as well as the manifestation of other risks, as necessary to maintain the derivatives clearing organization's viability as a going concern, while wind-down involves the actions of the DCO to effect the permanent cessation or sale or transfer of one or more services.

Commission regulations require DCOs to: Take steps to ensure their resilience, have effective rules and procedures to manage defaults, address fully any individual or combined default loss, and maintain viable plans for recovery in the event that they suffer a default loss or any other (non-default) loss.[276]

DCOs' rules and arrangements for default management and their recovery plans work to allocate losses that are not covered by the resources of the defaulter between the DCOs themselves, their clearing members, and (in some cases such as gains-based haircutting), will have the effect (along with clearing agreements between FCMs and their public customers) of allocating certain losses to public customers. These include default losses that are not covered by margin posted by the defaulter (or the defaulter's own contribution to mutualized loss arrangements) or by the DCO's ''skin-in-the-game,'' as well as certain investment or custody losses. All of this would occur outside of bankruptcy.[277]

Those rules, plans, and arrangements—and the extent to which they are considered helpful or noxious—thus influence the incentives of DCOs, their clearing members, and the customers of those clearing members. Accordingly, the concerns that these clearing members and money managers have raised with respect to their limited ability to influence these rules, plans, and arrangements that have effects outside of bankruptcy are likely to have important incentive effects on how, and the extent to which, clearing members and their public customers (including money managers) are willing to and do participate in cleared markets.

To the extent that subpart C of part 190 applies those rules, plans and arrangements, even if flexibly, then the incentive effects described above may be felt more strongly by clearing members and their public customers, albeit only marginally so.[278] The level of that enhanced incentive is difficult to measure, since it depends, in significant part, on the perception of those entities as to the effect of referring to those rules, plans, and procedures in bankruptcy under part 190, subpart C: Those rules, plans, and procedures, which they dislike, are and will be applicable in cases where the DCO engages in either default management or recovery *outside of* bankruptcy. The references to these rules, plans, and procedures in part 190 increases the likelihood that they will be used (because bankruptcy represents an additional circumstance in which they would be applicable). The incentive effects also depend on the perception of clearing members and their public customers on the effect of such use in bankruptcy.

A note on terminology: As discussed above in section II.C, the customers of a clearing organization are its members, considered separately in two roles: (1) Each member may have a proprietary (also known as ''house'') account at the clearing organization, on behalf of itself and its non-public customers (*i.e.,* affiliates). The property that the clearing organization holds in respect of these accounts is referred to as ''member property.'' (2) Each member may have an account for that members' public customers. The property that the clearing organization holds in respect of these accounts is referred to as ''customer property other than member property.'' Many clearing members will have both such accounts, although some may have only one or the other.

1. Regulation § 190.11: Scope and Purpose of Subpart C: Consideration of Costs and Benefits

Section 190.11(a) will simply state that the new subpart C of part 190 will apply to a proceeding commenced under subchapter IV of chapter 7 of the Bankruptcy Code in which the debtor is a clearing organization. Therefore, the costs and benefits of § 190.11(a) are the overarching costs and benefits stated above.

[274] *See* ACLI, FIA, ICI, SIFMA AMG/MFA, and Vanguard.

[275] *See, e.g.,* A Path Forward for CCP Resilience, Recovery, and Resolution (published by a group of prominent clearing members and money managers).

[276] *See generally* part 39 of the Commission's regulations. Only SIDCOs, or other DCOs that have elected to become subject to the provisions of subpart C of part 39, are required to address fully any default loss, or to maintain recovery and wind-down plans. However, among DCOs based in the United States, the vast majority of activity is conducted on DCOs that fall within one of those two categories.

[277] Moreover, among U.S. DCOs (and among all DCOs registered with the Commission), no loss has ever been so large that it was mutualized.

[278] The effects of those rules on incentives for DCOs is even more difficult to measure, since a chapter 7 liquidation (the only bankruptcy available to a commodity broker, *see* 11 U.S.C. 109(d)) is highly likely to reduce severely, if it does not eliminate, the DCO's value to its shareholders.

ICE and SIFMA AMG/MFA noted that, in the case of the bankruptcy of a DCO organized outside the United States, there may be conflicts with a bankruptcy proceeding in the home jurisdiction unless the applicability of part 190 is limited. For example, there may be differing—and irreconcilable—rules for distributing property. Such differing rules could incentivize, *e.g.* a customer of a non-FCM clearing member to bring litigation seeking to apply part 190's customer protection rules to what they might describe as the customer claims of their non-FCM clearing member.[279]

The Commission has determined to adopt a suggestion by ICE and, in a newly created § 190.11(b), to limit the applicability of part 190, in the case of a foreign DCO subject to a proceeding in its home jurisdiction, to provisions that (a) focus on the contracts and property of public customers of FCM members[280] or (b) general provisions, and those that provide notice and reports to the Commission and a U.S. bankruptcy trustee.[281] By limiting the applicability of part 190 in this manner, the Commission will foster the goal of mitigating such conflicts,[282] while by including those provisions (rather than disapplying part 190 entirely to the bankruptcy of a foreign-based clearing organization), the Commission will foster the goal of protecting customers of U.S. FCM members of such a foreign-based DCO.

[279] As noted immediately below, public customers of FCM clearing members will benefit from protection under part 190.

[280] *I.e.,* §§ 190.13, 190.17, and 190.18, but only with respect to: (1) Claims of FCM clearing members on behalf of their public customers; and (2) property that is or should have been segregated for the benefit of FCM clearing members' public customers, or that has been recovered for the benefit of FCM clearing members' public customers.

[281] *I.e.,* subpart A, and § 190.12.

[282] The Commission notes that conflicts involving a DCO based outside the United States with the insolvency law in that DCO's home jurisdiction as applied to claims of FCM clearing members on behalf of their public customers should be mitigated by the fact that, pursuant to § 39.27(c)(3) and Exhibit R to appendix A to part 39, the DCO is required to submit and to keep current a memorandum demonstrating, *inter alia,* the basis for the conclusion that the DCO's arrangements to ring-fence the customer funds of FCM clearing member are effective under the relevant non-U.S. law in the event of the insolvency of the DCO, and the basis for the conclusion that a local court or insolvency official in the DCO's jurisdiction of domicile would respect the choice of U.S. law in that context, and the basis for the conclusion that the DCO would be able to comply with relevant provisions of the Bankruptcy Code and Commission regulations with respect to *pro rata* distribution and relevant orders of a U.S. court regarding the distribution of customer funds.

2. Regulation § 190.12: Required Reports and Records: Consideration of Costs and Benefits

Section 190.12(a)(1) is analogous to § 190.03(a), in that it provides instructions regarding how to give notice to the Commission and to a clearing organization's members, where such notice is required under subpart C. For a discussion of the costs and benefits of this section, please refer to the discussion of the cost and benefit implications of § 190.03(a).

Section 190.12(a)(2) will revise the time in which a debtor clearing organization must notify the Commission of a bankruptcy filing. In particular: (1) In the event of a voluntary bankruptcy filing, the debtor will be required to notify the Commission at or before the time of filing, and (2) in the event of an involuntary bankruptcy filing, the debtor must notify the Commission as soon as possible, but in any event no later than three hours after the receipt of the notice of such filing. These revisions codify expectations that (1) in a voluntary bankruptcy proceeding, the debtor clearing organization will provide advance notice to the Commission ahead of the filing to the extent practicable, and (2) in an involuntary bankruptcy proceeding, the debtor clearing organization will notify the Commission immediately upon receiving notice of the filing, or within at the most three hours thereafter.

With respect to a voluntary bankruptcy filing, the Commission expects that the DCO will have reported its financial distress in the lead-up to a bankruptcy filing in accordance with the mandatory reporting requirements in § 39.19(c)(4); the revision in proposed § 190.12(a) merely codifies the expectation that the clearing organization will notify the Commission of an intent to file for bankruptcy protection as soon as practicable before, and in no event later than, the time of the filing. In addition, § 190.12(a) also will allow a debtor clearing organization to provide the relevant docket number of the bankruptcy proceeding to the Commission ''as soon as available,'' while not delaying notifying the Commission of the filing itself, to account for the potential for a time lag between the filing of a proceeding and the assignment by the relevant court of a docket number. These revisions will enhance the ability of the Commission to perform its responsibilities to support the interests of clearing members, customers of clearing members, markets, and the broader financial system, by providing the Commission with prompt notice of any DCO bankruptcy proceeding.

Section 190.12(b) and (c) involve the provision of certain reports and records to the trustee and/or the Commission by the debtor clearing organization. In particular: § 190.12(b) sets forth the reports and records that the clearing organization will be required to provide to the Commission and to the trustee within three hours following the later of the commencement of the proceeding or the appointment of the trustee, and § 190.12(c) sets forth the records to be provided to the Commission and to the trustee no later than the next business day following commencement of a bankruptcy proceeding. These provisions will impose administrative costs on the debtor clearing organization and/or the trustee, which will be obligated to spend time and resources transmitting copies of the required reports and records to the trustee and/or Commission. However, these provisions should both benefit the estate, and enhance the Commission's ability to fulfil its responsibilities, by providing them with the most current information about the clearing organization, and by allowing the trustee to begin to understand the business of the clearing organization as soon as possible following a bankruptcy filing, which is critically necessary to the administration of the debtor clearing organization's estate. This would in turn promote confidence in the clearing system in particular, and financial markets more broadly.

OCC indicated that, while they ''maintain[ ] this information in a readily accessible place and do[ ] not foresee any challenge in identifying and providing this information without delay,'' they believe that the three hour time period is ''overly prescriptive'' because of the possibility of ''unforeseen delays that could occur on the day in which a DCO enters bankruptcy.'' The Commission has declined to modify the proposal, because the Commission believes that setting this specific deadline will result in significant benefits: Providing this information to the trustee and the Commission with much-needed expediency, and facilitating DCOs' contingency planning. By comparison, the burden of providing the reports, which as the commenter notes, are already in existence and are readily accessible, appears modest.

3. Regulation § 190.13: Prohibitions on Avoidance of Transfers: Consideration of Costs and Benefits

Section 190.13 implements section 764(b) of the Bankruptcy Code with respect to DCOs, and prohibits the

avoidance of certain transfers made either before or shortly after entry of the order for relief. While the prohibition of avoidance of pre- and post-relief transfers in the context of FCM debtors in § 190.07(e) applies so long as the transfer is not *disapproved* by Commission, the same prohibition on avoidance of pre- and post-relief transfers in § 190.13(a) and (b) will require the affirmative *approval* of the Commission (though such approval can be given either before or after the transfer is made). This distinction will impose administrative costs on the clearing organization or the trustee, who will have to expend time and resources to seek affirmative approval from the Commission for such a transfer in the context of administering a DCO, respectively, either before or after bankruptcy. As noted above,[283] a clearing organization is mandated to maintain a ''balanced book.'' Thus, a transferee clearing organization may only accept transfer of all of the transferor's customer positions (or at least all positions in a given product set).[284] Any such transfer will have significant effects on the markets cleared, and on the broader financial system. There are important benefits from requiring the Commission's approval of such a significant transaction, and thus permitting the administrative agency responsible for oversight of the derivatives markets to maintain a level of discretion which will help accomplish the goal of an orderly functioning of the marketplace.

4. Regulation § 190.14: Operation of the Estate of the Debtor Subsequent to the Filing Date: Consideration of Costs and Benefits

Section 190.14(a) provides that the trustee may, in their discretion based upon the facts and circumstances of the case, instruct each customer to file a proof of claim containing such information as is deemed appropriate by the trustee. Allowing the bankruptcy trustee to use their discretion in tailoring the proof of claim form to the specific facts and circumstances of the case should benefit both the trustee and customers by limiting the information requested to only that which is necessary for purposes of administering the debtor's estate and thereby increasing cost effectiveness, particularly given the bespoke nature of a clearing organization bankruptcy. Thus, the Commission has not proposed a prescribed proof of claim form. There could, however, be corresponding administrative costs to both the estate and the customers if the set of information requested by the trustee in the exercise of their discretion turns out in retrospect to be overly narrow or broad.

ICE believed that the proposal did not clearly take into account non-CFTC-regulated clearing, and that claims of members with respect to such activity should be properly accounted for in bankruptcy and should not be disadvantaged. As the Commission noted above,[285] to the extent that the DCO is conducting non-CFTC-regulated activity, the Commission expects that the proof of claim form will include the opportunity to claim for debts of the DCO related to activity that is not regulated by the CFTC. Thus, no change is necessary to address this concern.

Section 190.14(b) provides that a debtor clearing organization will cease making calls for variation settlement or initial margin.[286] Under current regulations, it would not be possible to continue the operations of a debtor clearing organization for any amount of time after entry of the order for relief, as there is no clear and coherent mechanism to do so. Thus, § 190.14(b) affirms current legal requirements and maintains the status quo. Section 190.14(c)(1) provides that the trustee shall liquidate all open commodity contracts that have not been terminated, liquidated or transferred no later than seven calendar days after the entry of the order for relief. This provision will impose administrative costs in that the trustee will have a hard deadline for terminating, liquidating or transferring any open commodity contracts within a certain timeframe, whereas under current part 190 there was no specified timeframe for such termination, liquidation or transfer. It could, however, benefit clearing members and customers, who will have certainty that their open commodity contracts would be liquidated within a particular timeframe rather than being held open for an undetermined amount of time. A deadline for liquidation or transfer of open contracts may benefit the broader financial markets by mitigating uncertainty.

Section 190.14(c)(2), which is derived from current § 190.08(d)(3), will provide that the trustee may, at their discretion, make distributions in the form of securities that are equivalent to the securities originally delivered to the debtor by a clearing member or such clearing member's customer, rather than liquidating the securities and making distributions in cash. Unlike current § 190.08(d)(3), § 190.14(c)(2) will not allow the customer to request that the trustee purchase like-kind securities and distribute those instead of cash, but instead will leave it to the discretion of the trustee whether to do so. This change could impose costs on customers who would prefer to have a distribution of equivalent securities rather than cash, since it will remove their option to request such a distribution. However, it could benefit the estate by allowing the trustee to use their discretion as to whether to purchase and distribute equivalent securities, rather than being obligated to do so at the request of a customer.

Section 190.14(d) will require the trustee to use reasonable efforts to compute the funded balance of each customer account immediately prior to the distribution of any property in the account, ''which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.'' This requirement applies with respect to accounts of the customers of the clearing organization: That is, its members, separately in respect of each such member's (1) house account (on behalf of the member and its non-public customers and (2) customer account or accounts (on behalf of the member's public customers, one such account for each account class, to the extent relevant).

This requirement will impose administrative costs due to the time and effort involved in making such calculations. However, the regulation gives the trustee a certain amount of discretion, and this calculation will be necessary to achieve the goal of making distributions that are consistent with each customer's proportionate share.

5. Regulation § 190.15: Recovery and Wind-Down Plans; Default Rules and Procedures: Consideration of Costs and Benefits

Section 190.15 provides that (1) the trustee shall not avoid or prohibit any

[283] *See* section II.C.3 above.

[284] If the transferor clearing organization does not have a balanced book, *e.g.,* because of a member default, it could nonetheless only transfer a balanced book.

[285] *See* section II.C.4.

[286] As originally proposed, § 190.14(b) also contained provisions that were intended to provide a brief opportunity, after the order for relief, to enable paths alternative to liquidation—that is, resolution under Title II of the Dodd-Frank Act, or transfer of clearing operations to another DCO—in cases where a short delay (*i.e.,* less than or equal to six days) might facilitate such an alternative path. The Commission subsequently issued the Supplemental Proposal, which withdrew those proposed provisions—§ 190.14(b)(2) and (3)—and proposed a new alternative to facilitate the potential resolution of a SIDCO pursuant to Title II of the Dodd-Frank Act. As discussed in section II.C.4 above, the Commission is not adopting the Supplemental Proposal.

action taken by a debtor that was within the scope of and was provided for in the debtor's recovery and wind-down plans; (2) in administering a DCO bankruptcy, the trustee shall, subject to the reasonable discretion of the trustee and to the extent practicable, implement the default rules and procedures maintained by the debtor; and (3) in administering a DCO bankruptcy, the trustee shall, to the extent reasonable and practicable, and consistent with the protection of customers, take actions in accordance with the debtor's recovery and wind-down plans.

The Commission considered two alternatives to directing the trustee to implement the debtor's own default rules and procedures and recovery and wind-down plans: First, continuing to allow a bankruptcy trustee to develop, in the moment, a plan for liquidating the debtor clearing organization, and second, prescribing an across-the-board method for liquidating a debtor clearing organization.

A number of commenters appeared to support the first alternative approach. Some (*e.g.,* ACLI, FIA, ICI, SIFMA AMG/MFA, Vanguard) expressed concern that they lack transparency with regard to the DCO risk management decisions and DCOs' default rules and procedures and recovery and wind-down plans are developed without sufficient input from clearing members and their customers. For example, Vanguard argued that the existing DCO governance regime provides them with no meaningful voice in critical DCO risk management practices and new cleared product introductions; and since public customers have only a very limited ability to mitigate clearing risks contractually, they ''rely heavily on the Commission to protect the interests of [their] investors in the mandated cleared market.'' Commenters also expressed the concern that there is a risk that, as a DCO begins to fail, otherwise prudent DCO rules could be changed without the appropriate vetting by clearing members and public customers who, given mutualized allocation of losses, bear the risk of poor risk management choices undertaken by the DCO.[287]

The Commission has considered the potential interplay of the amendments to part 190 with other Commission regulations and applicable statutes. As noted above, these commenters' concerns predominantly relate to the economic interests of clearing members and their customers in contexts outside of bankruptcy.

A DCO's operations and rules outside of bankruptcy are governed by parts 39 and 40 of the Commission's regulations. The Commission, in particular through its Division of Clearing and Risk, applies these regulations and conducts a rigorous program of oversight of DCOs designed to protect the interests of market participants and of the financial system, including through careful reviews of their rules (including default rules) and their recovery and wind-down plans, through detailed daily and periodic risk surveillance, and through in-depth remote and on-site examinations addressing a wide spectrum of risk management issues.

As noted by a commenter above, they ''rely heavily on the Commission to protect the interests of our investors in the mandated cleared market.'' Over the years, the Commission has taken seriously its responsibilities in this regard, through its regulatory, surveillance, and examinations programs.

As discussed above, there are important costs to addressing, in the context of part 190, market participants' concerns regarding DCOs' rules, procedures, and plans for allocating losses that apply outside of a DCO bankruptcy: Establishing a bankruptcy regime where some market participants would be allocated a smaller amount of losses in bankruptcy than outside of bankruptcy would risk creating incentives for those participants to act in a manner that promotes the likelihood that the DCO will enter bankruptcy.

In view of these considerations, the Commission believes the commenters' concerns are effectively mitigated by the existing provisions of parts 39 and 40 of its regulations and by the Commission's supervision of DCOs.[288] Therefore, the adoption of part 190, subpart C, which is applicable to a DCO's potential bankruptcy, appropriately complements parts 39 and 40 and the Commission's ongoing supervision, which apply to a DCO's operations and rules outside of bankruptcy.

Other commenters are concerned with the inclusion in those DCO rules and plans of ''drastic measures as Variation Margin Gains Haircutting (VMGH) and Partial Tear-Up (PTU) of open positions.'' Gains haircutting, however, is part of the *ex ante* allocation of losses, and thus is an inherent part of the way in which losses will be allocated in bankruptcy. Moreover, there is a limited amount of customer property available. Thus, to the extent the application of VMGH were to be disallowed, and some customers would realize corresponding benefits through increases in the allowed amounts of their claims (and thus a greater share of customer property), other customers would suffer corresponding costs, through a decreased share of customer property—indeed, the latter customers may receive less than the amount of their claims for initial margin.[289] Accordingly, the Commission concludes that it is inadvisable to prohibit VMGH, or to mandate that its effects be reversed, in cases of DCO bankruptcy.

Partial tear-up, on the other hand, is inapplicable in a clearing organization bankruptcy: § 190.14(b) prohibits further collection of variation margin, while § 190.14(c) requires the trustee to liquidate all open commodity contracts. Together, they effectively mandate *full* tear-up of open positions. Thus, the question of whether partial tear-up should be prohibited is moot.

Other commenters were concerned that these plans do not prescribe a specific course of action, but rather ''present a menu of options.'' *See, e.g.,* FIA, Vanguard. The Commission is of the view that, given the complexity of the operations of a DCO, and the need for extremely prompt action, having the trustee develop an entire plan in the moment would be likely to turn out to be impracticable. By contrast, being presented with a ''menu of options'' among which the trustee may select (and adapt) in a manner that is ''reasonable and practicable'' provides the benefit of a helpful roadmap to determine strategy and tactics.

The commenters, and potentially other clearing members and public customers who share the concerns of the commenters, appeared to view DCO default rules and procedures and recovery and wind-down plans that they believe have been adopted with

[287] With respect to DCO rules adopted as the DCO is on the threshold of failure: DCO rules are subject to review by the Commission. In all cases, they are subject to review for consistency with the CEA and Commission regulations (*see* § 40.6). In the case of SIDCOs, they are additionally subject to review for consistency with the purposes of the Dodd-Frank Act or any applicable rules, orders, or standards prescribed under section 805(a) thereof. Moreover, to the extent commenters are concerned that such late-enacted rules will be unfair to clearing members or their customers, the Commission expects that such unfairness would affect the trustee's judgment of the extent to which it is ''reasonable'' to apply those rules.

[288] Nonetheless, the Commission is sensitive to the concerns raised by commenters with respect to the development and maintenance of DCO recovery and wind-down plans and default rules and procedures, and is actively reviewing these issues, in particular with respect to governance, as they relate to parts 39 and 40.

[289] *Cf.* ISDA: Safeguarding Clearing: The Need for a Comprehensive CCP Recovery and Resolution Framework (2017) at 2 (''Initial margin haircutting should never be permitted.'')

inadequate input from them as noxious, and thus they may already be incentivized to reduce their exposure to such DCOs. Those incentives may be (marginally) increased by the fact that the Commission is establishing in § 190.15 a model for the trustee that is based on those rules, procedures, and plans.

Other commenters (CME and ICE) supported the second alternative, specifically, a requirement that the trustee cannot override the DCO's default rules or deviate from the DCO's recovery or wind-down plans. However, given that these rules and plans are designed to operate outside of bankruptcy, a requirement to follow them in procrustean fashion would have the cost of compelling the trustee to adopt an approach that may be poorly tailored to the situation, and the Commission will accordingly not adopt such a requirement.

Finally, given the differences between DCOs (and potential bankruptcy situations), a one-size-fits-all approach prescribed by the Commission is likely to prove too rigid, and thus will not be adopted.

The Commission is accordingly of the view that, relative to these alternatives, directing a trustee to implement the DCO's own default rules and procedures, and recovery and wind-down plans, would benefit the estate by providing the trustee with a menu of purpose-built rules, procedures and plans to liquidate a DCO, which rules, procedures and plans the DCO has developed subject to the requirements of the Commission's regulations and supervision of the Commission. Adding concepts of reasonability and practicability will give the trustee the discretion to modify those rules, procedures, and plans where and to the extent appropriate. Hence, the Commission believes that an approach whereby the trustee would follow the DCO's own purpose-built default rules and procedures and recovery and wind-down plans, but have the discretion to vary them as appropriate, would be the most cost effective.

6. Regulation § 190.16: Delivery: Consideration of Costs and Benefits

Regulation § 190.16 addresses delivery in the context of a clearing organization bankruptcy. Current part 190 does not contain any regulations specific to delivery in that context.

Section 190.16(a) provides that a bankruptcy trustee is required to use ''reasonable efforts'' to facilitate and cooperate with the completion of the delivery on behalf of the clearing organization's clearing member or the clearing member's customer. This has the benefit of mitigating disruption to the cash market for the commodity and mitigating adverse consequences to parties that may be relying on delivery taking place in connection with their business operations. While the exertion of such reasonable efforts will necessarily involve administrative costs (predominantly, time of the trustee or their agents), the Commission is of the view that this approach has important benefits relative to the two alternatives. Given the importance of reliable delivery to physical markets, it would be inappropriate to relieve the trustee of the obligation to endeavor to facilitate and cooperate with the members' or members' customers' efforts to accomplish delivery. On the other hand, mandating that the trustee go beyond reasonable efforts would risk compelling the trustee to expend unwarranted amounts of resources in this endeavor.

While proposed § 190.16(a) applied this approach only to contracts that had moved into delivery position prior to the date and time of the order for relief, the ABA Subcommittee and CME suggested that this approach should be extended to contracts that move into delivery position after that date and time, with CME noting that ''it is equally important to protect deliveries under [such contracts] to avoid disruption to commercial markets and operations.'' The Commission has accepted this suggestion and notes that, if any contracts move into delivery position after the order for relief, but before being terminated, liquidated, or transferred, the benefits and costs of this approach are analogous to those of contracts that move into delivery position prior to the order for relief.

Section 190.16(b) clarifies which property will be part of the physical delivery account class and which will be part of the cash delivery account class. It is analogous to § 190.06(b) in the FCM context, and carries forward the concepts in that section, but has been modified for the context of a DCO bankruptcy. Clearly delineating between the physical delivery account class and the cash delivery account class will benefit customers because it will increase transparency in terms of which account class their property belongs in. Section 190.16(b) will likely impose administrative costs, since accounting separately for physical delivery property and cash delivery property will take the trustee's time and resources. As noted above,[290] the sub-division of the delivery account class into the physical and cash delivery account classes will recognize that cash is more vulnerable to loss, and more difficult to trace, as compared to physical delivery property. Therefore, this sub-division will likely benefit those with physical delivery claims. Since cash is more vulnerable to loss and more difficult to trace, then under this approach, clearing members and customers with claims in the cash delivery sub-class will be more likely to get a *pro rata* distribution that would be less than those with claims in the physical delivery property sub-class.[291]

7. Regulation § 190.17: Calculation of Net Equity: Consideration of Costs and Benefits

Section 190.17(a) clarifies that a member of a debtor clearing organization may have claims against the clearing organization in separate capacities: On behalf of its public customers (customer accounts) and on behalf of its non-public customers (house accounts). It further states that net equity shall be calculated separately for each customer capacity in which the clearing member has a claim against the debtor. In the Commission's view, the provisions in § 190.17(a) are clarifications that reflect customer classifications set forth in section 766(i) of the Bankruptcy Code, and account classifications that have long been used in other contexts, and will not impose any costs or benefits on any parties.

Section 190.17(b)(1) provides that the calculation of a clearing member's net equity claim in the bankruptcy of a clearing organization shall include the full application of the debtor's loss allocation rules and procedures. It also provides that, with respect to a clearing member's house account, this will include any assessments or similar loss allocation arrangements provided for under those rules and procedures that were not called for before the filing date, or, if called for, have not been paid.

A number of commenters, including the ABA Subcommittee, CME, FIA, and ICE, objected to including assessments that had not been called for before the order for relief in the calculation of net equity claims where the debtor clearing organization's rules provide that assessments cannot be called for after bankruptcy. Taking these commenters' preferred approach would benefit the clearing members in circumstances where there are both uncalled

[290] *See* discussion of § 190.06(b) in section II.B.4 above.

[291] Costs and benefits of the separation of the delivery account class into physical delivery and cash delivery subclasses were also addressed in respect to the costs and benefits section addressing the definition of ''account class'' in § 190.01, section II.A.2 above.

assessments, and remaining default losses. As FIA noted in its comment letter, the inclusion of uncalled assessments ''appears to have the effect of reducing a clearing member's potential recovery.'' However, all losses will ultimately be allocated, and if uncalled assessments are not taken into account, any remaining losses that haven't been covered by other default resources will be allocated through gains-based haircutting. Thus, the commenters' preferred approach would be at the cost of the customers of clearing members, who would bear additional losses even as the clearing members would benefit.

Relative to the alternative suggested by these commenters, the direct effect of § 190.17(b)(1) is to ensure that the uncalled assessment will make up more of the default losses, and conversely that haircutting of the gains (of both clearing members and customers) will make up less of that loss. Hence, the rule could harm clearing members, and correspondingly benefit their customers. In addition, there can be indirect effects. While the maximum amount of assessments that clearing members are exposed to will not increase, there is a marginally [292] increased likelihood that those assessments will be used.[293] Because clearing members' potential assessments are more likely to be used, they will have a marginally increased incentive to reduce their level of exposure to assessments—for example, by reducing their clearing activity for themselves or on behalf of their customers. While it is conceivable that clearing members could work to influence DCOs to reduce their own assessment powers as a result of these incentives, there are mitigants in the Commission's regulations.[294]

Section 190.17(b)(2) provides that where the debtor's loss allocation rules and procedures provide that clearing members are entitled to payments due to portions of mutualized default resources that are either prefunded, or assessed and collected, but in either case not used, or to the clearing organization's recoveries on claims against others (including recoveries on claims against defaulting clearing members), then ''appropriate adjustments shall be made to the net equity claims of clearing members that are so entitled.'' These provisions will benefit the estate by providing the trustee with tools to act promptly and efficiently, with lower administration costs. The trustee will have a clear roadmap to calculate net equity in the bankruptcy of a clearing organization and will not be obligated to come up with an ad hoc methodology for doing so. The provisions would also benefit clearing members (and, therefore, their customers) by providing transparency as to how their net equity will be calculated, as well as facilitating the efficient administration of the estate.[295]

In those cases where the debtor has excess mutualized default funds, or recovers on claims against defaulters, application of the debtor's ''reverse waterfall'' rules will benefit clearing members (and, in certain cases, their customers) by increasing the net equity claims of the entitled clearing members.

In addition to the potential for these transfers between general creditors and clearing members and their customers, this rule can create incentives for clearing members and their customers. In particular, it makes clearing members' contributions to mutualized resources (and the possibility that gains-based haircutting will affect clearing members and their customers) less onerous, because they enhance the possibility that if the clearing member's contribution to mutualized default resources (or gains-based haircutting affecting clearing members or their customers) is used to meet a default, it ultimately will come back to the clearing member or their customers as it is recovered by the DCO (or the DCO's trustee) from the (bankruptcy) estate of the defaulter.

Section 190.17(c) adopts by reference the net equity calculations set forth in proposed § 190.08, to the extent applicable.[296]

Section 190.17(d) sets forth a definition of the term ''funded balance'' that is taken directly from the relevant Bankruptcy Code provisions. Clarifying the meaning of the term ''funded balance'' in the context of a clearing organization bankruptcy will benefit clearing members, in that they will know *ex ante* what is and is not included in their funded balance and how that amount is calculated. In addition, § 190.17(d) adopts by reference the methodology for calculating funded balance that is set forth in § 190.08(c).[297]

8. Regulation § 190.18: Treatment of Property: Consideration of Costs and Benefits

Section 190.18(a) is analogous to § 190.17(a), in that it will provide that property of the debtor clearing organization's estate will be allocated between member property and customer property other than member property in order to satisfy the proprietary and customer claims, respectively, of clearing members. In the Commission's view, the provisions in § 190.18(a) are mere clarifications and do not impose any costs or benefits on any parties.

Section 190.18(b)(1)(i) and (ii) set out the scope of customer property for a clearing organization, and are largely based on § 190.09(a).[298]

Section 190.18(b)(1)(iii) provides that customer property for a clearing organization includes any guaranty fund deposit, assessment or similar payment or deposit made by a clearing member or recovered by a trustee, to the extent any remains following administration of the debtor's default rules and procedures, and any other property of a member available under the debtor's rules and procedures to satisfy claims made by or on behalf of public customers of a member. This provision supports the goal of making customers of the clearing organization whole, since it clarifies that any property described in this section will be included in the scope of customer property, rather than ultimately going to some other creditor of the debtor. It would result in corresponding costs to non-customer creditors, and could result in administrative costs, however, since the trustee could need to spend time and resources in order to determine whether any such property exists in order to properly allocate such property to customers.

[292] ''Marginal'' because this happens only if (a) there is a DCO bankruptcy, (b) there is a default loss suffered by the DCO in connection with the bankruptcy, and (c) not all of the assessments necessary to address that default loss were called before that bankruptcy.

[293] While § 190.17(b)(1) will not result in uncalled assessments being ''called''—the clearing members will not have to pay them to the estate—uncalled assessments will be ''used'' to reduce the clearing member's net equity claim.

[294] For example, § 39.39(b)(1) requires SIDCOs and Subpart C DCOs to have *viable* plans for recovery necessitated by uncovered credit losses, and the extent of a DCO's assessment power contributes to the viability of its recovery plan. Moreover, the two SIDCOs, CME and ICE Clear Credit, already have significant assessment powers, and any proposed rule change to reduce those powers would need to withstand review under § 40.10 for consistency with *inter alia,* the purposes of the CEA and the Dodd-Frank Act, which include the mitigation of systemic risk and the promotion of financial stability.

[295] *See also* 17 CFR 39.16 (requiring each DCO to, among other things, ''adopt rules and procedures designed to allow for the efficient, fair, and safe management of events during which clearing members become insolvent or default on the obligations of such clearing members to the'' DCO).

[296] For a discussion of the cost and benefit considerations for § 190.08, please see section IV.C.6 above.

[297] For a discussion of the cost and benefit considerations for § 190.08(c), please see section III.C.6 above.

[298] For a discussion of the cost and benefit considerations for § 190.09(a), please see section III.C.7 above.

A number of commenters (CME, SIFMA AMG/MFA) have suggested that the Commission make it explicit that customer property should include the amounts of its own funds a debtor DCO had committed as part of its loss allocation rules. The Commission has accepted this suggestion in the final rule, incorporating this provision in § 190.18(b)(1)(iv). This will benefit customers, who will have additional funds allocated to their claims, thereby increasing the payment that they receive on their claims and/or increasing the likelihood of full payment of their claims (due to an increase in customer property). However, this benefit would accrue at the possible expense of general creditors, as there will be an equivalent reduction in assets in the general estate. An indirect consequence of this change might be to marginally incentivize customers to retain open positions in contracts that are cleared by a potentially-failing DCO, which might marginally contribute to preserving liquidity in those markets.

Regulation § 190.18(b)(2) adopts by reference, in the context of a DCO as a debtor, the exclusions from customer property applied in the context of debtor FCMs in § 190.09(a)(2), as if the term debtor used therein would refer to a clearing organization as debtor and to the extent relevant to a clearing organization.[299]

Regulation § 190.18(c) sets forth the allocation of customer property among customer classes (*i.e.,* allocation between (1) customer property other than member property, and (2) member property). This provision, in general, applies the principle, consistent with the Commission's policy to favor public customers over non-public customers, that allocation to customer property other than member property is favored over allocation to member property, so long as the funded balance in any account class for members' public customers is less than one hundred percent of net equity claims. This provision would, in the event and at the time it applied, benefit the public customers of the debtor's clearing members, since it makes clear that allocation to such customers is preferred over allocation to the clearing members' house accounts. It imposes corresponding costs on the debtor's clearing members and affiliates to the extent that, under the current regime, there is a possibility that more customer property would be allocated to their house accounts. Overall, this provision provides the benefit of *ex ante* transparency to the estate, the debtor's clearing members, and their customers, who would know during business-as-usual how customer property would be allocated in the event of a bankruptcy.

However, the ABA Subcommittee, CME, FIA, and ICE objected to proposed § 190.18(c)(1), which would apply the debtor's mutualized (and, in general, member-funded) default fund to customer property other than member property, that is, to the customer class for members' public customers, to the extent the funded balance is less than one hundred percent for members' public customers in any account class. CME raised a particularly trenchant point: Devoting member-funded guarantee funds to purposes other than mutualizing member defaults may result in more onerous capital treatment for the contributions of bank- or bank-affiliated-members to such funds, increasing the capital charges for such exposures manifold.[300]

As noted, the costs and benefits discussed above will only accrue if there is both a clearing organization bankruptcy and a shortfall in customer funds in one or more of the account classes for members' public customers for that clearing organization in that bankruptcy. The costs and benefits at that potential future time would be balanced, in that the costs to clearing members (whose guarantee funds were devoted to claims of the clearing members' customers) would be benefits to those customers. By contrast, less favorable capital treatment would have a present-day effect, in the form of higher capital costs for clearing members. Moreover, those higher costs would not create any direct benefit (present day or otherwise) for, *e.g.,* customers. In light of these factors, the Commission has decided not to adopt proposed § 190.18(c)(1) and to renumber the remaining paragraphs of § 190.18(c).

Section 190.18(d) sets forth the allocation of customer property among account classes. This provision is similar in concept to § 190.09(c). This provision will benefit clearing members and their customers, who will have increased transparency, *ex ante,* into how customer property will be allocated. Prescribing this allocation will, however, impose administrative costs, because the trustee will lose some amount of flexibility in terms of how to allocate customer property between account classes.

Section 190.18(e) provides that, where the debtor has, prior to the order for relief, kept initial margin for house accounts in accounts without separation by account class, then member property will be considered to be in a single account class.[301] This provision will benefit the estate in those cases, because the trustee will not be put to the considerable task of separating in bankruptcy that which was treated as a single account during business-as-usual. Paragraph (e) will also benefit the debtor's clearing members, who will have increased transparency as to how their member property will be treated.

Section 190.18(f) gives the trustee the authority to assert claims against any person to recover the shortfall of customer property enumerated in certain paragraphs elsewhere in § 190.18, analogous to § 190.09(a)(3). This provision could impose administrative costs, since the trustee will need to expend time and resources to assert claims to make up for any shortfall in customer property. The provision will, however, benefit customers, since it will support the trustee's efforts to recover any such shortfalls by giving the trustee authority to act to do so. Moreover, since this provision will make explicit what is implicit in current part 190, an additional benefit of this provision is a reduction in potential litigation costs over a trustee's attempts to recover shortfalls in customer property.[302]

9. Regulation § 190.19: Support of Daily Settlement: Consideration of Costs and Benefits

Section 190.19 deals with the treatment of variation settlement in a clearing organization bankruptcy, and sets forth the approach for the trustee to follow when there is a shortfall in variation settlement owed to a debtor clearing organization's clearing members and customers. Specifically, § 190.19(a) provides that any variation settlement payments received by the clearing organization after entry of an order for relief shall be included in customer property, and shall promptly be distributed to the member and customer accounts entitled to such payments. Section 190.19(b) deals with a situation where there is a shortfall in

[299] For a discussion of the cost and benefit considerations for proposed § 190.09(a)(2), please see section III.C.7 above.

[300] As discussed in detail in a footnote in section II.C.8, those capital charges could increase by literally hundreds of times, for a total impact of billions of dollars in increased capital charges.

[301] ''Account class'' is defined in § 190.01 as meaning one or more of each of the following types of accounts, as described in greater detail in that provision: (1) Futures account; (2) foreign futures account; (3) cleared swaps account; and (4) delivery account.

[302] As discussed above in section III.C.7, while the persons against whom claims are successfully asserted may perceive a subjective cost, the Commission does not find these costs relevant to the analysis.

variation settlement received by the clearing organization, and provides that such funds shall be supplemented with four specified categories of funds (margin, to the extent permissible under parts 1, 22, and 30, assets of the debtor, to the extent dedicated to such purpose, prefunded guarantee funds, and assessments) in accordance with the clearing organization's default rules and procedures and (with respect to assets of the debtor) any recovery and wind-down plans maintained by the clearing organization.

Section 190.19 will benefit clearing members and their customers because it will ensure that any variation settlement received by the clearing organization will be sent to those member and customer accounts that would be entitled to payment of variation settlement, and that the trustee would be able to supplement any shortfall in variation settlement amounts with the property listed in proposed § 190.19(b). This approach will also benefit the financial system more broadly, by mitigating the effect of the bankruptcy of the debtor on settlement payments. There will be corresponding costs to general creditors of the clearing organization since, under current part 190, it is conceivable that, contrary to the Commission's interpretation of the current rules, variation settlement received by the clearing organization could be diverted to the pool of general creditors rather than becoming customer property (even though such diversion would be contrary to the expectations of both the Commission and the industry). In clarifying how variation settlement received by the clearing organization is to be treated by the bankruptcy trustee, § 190.19 will also benefit clearing members and their customers by providing enhanced transparency.

10. Section 15(a) Factors—Subpart C

i. Protection of Market Participants and the Public

Subpart C of the part 190 regulations will increase the protection of market participants and the public by setting forth a bespoke framework for how the bankruptcy trustee is expected to treat the property of DCO clearing members and their customers in the event of a DCO insolvency, thereby promoting *ex ante* transparency for such clearing members and customers, and by providing, in certain provisions, discretion to the trustee in determining how best to address the bankruptcy of the DCO, and to achieve the goal of protecting public customers as a class. Moreover, the addition in part 190 of bespoke bankruptcy rules for a DCO bankruptcy will provide better protections to market participants by accounting for the unique position of clearing members (and the customers of such clearing member) of a DCO that is going through an insolvency proceeding. Finally, provisions such as § 190.18(c), which preferentially allocate excess property in any account class to the customer class that benefits public customers, to the extent there is a shortfall in any account class in that customer class, will further protect public customers.

ii. Efficiency, Competitiveness, and Financial Integrity

Subpart C of the part 190 regulations will promote efficiency (in the sense of both cost effectiveness and timeliness) in the administration of insolvency proceedings of DCOs, and the financial integrity of transactions cleared by DCOs by setting forth clear instructions for a bankruptcy trustee to follow in the event of a DCO insolvency. Moreover, subpart C will provide the bankruptcy trustee with discretion, in certain circumstances, to react flexibly to the particulars of the insolvency proceeding, guided by the goal of protecting public customers as a class, thereby promoting efficiency of the administration of the proceeding. These effects will, in turn, enhance the competitiveness of U.S. DCOs and their FCM clearing members, by enhancing market confidence in the protection of customer funds and positions entrusted to U.S. DCOs through their clearing members, even in the case of insolvency.

iii. Price Discovery

Price discovery is the process of determining the price level for an asset through the interaction of buyers and sellers and based on supply and demand conditions. Because a DCO bankruptcy inevitably leads to full close-out of the positions carried at the DCO, the part 190 regulations will not contribute to avoiding the resultant negative impacts on price discovery.

iv. Sound Risk Management Practices

Subpart C of the part 190 regulations will promote sound risk management practices by facilitating the bankruptcy trustee's efforts to manage effectively the risk of the debtor DCO. Subpart C will accomplish this by adding bankruptcy regulations to part 190 for a DCO insolvency that reflect current market practices and thereby make it easier for the trustee to act effectively to protect customer property in the event of such an insolvency. Moreover, subpart C will promote sound risk management practices by instructing a bankruptcy trustee to implement the debtor DCO's default rules and procedures and to take actions in accordance with the debtor DCO's recovery and wind-down plans, which rules, procedures and plans are developed and overseen by the Commission, though subject to the trustee's discretion. Some portions of subpart C may make additional resources available to the trustee. On the other hand, some commenters expressed concern about changes (such as § 190.15) that they believe might lead to inappropriate risk management choices by DCOs.

v. Other Public Interest Considerations

By favoring the implementation of the clearing organization's default rules, recovery plans, and procedures established *ex ante* under the supervision of the Commission, and by supporting daily settlement, the part 190 regulations will support financial stability. Moreover, some of the DCOs that might enter bankruptcy are very large financial institutions, and some are considered to be systematically important. An effective bankruptcy process that efficiently facilitates the proceedings is likely to benefit the financial system (and thus the public interest), as that process will help to attenuate the detrimental effects of the bankruptcy on the financial network.

E. Changes to Appendices A and B

The Commission is deleting forms 1 through 3 contained in appendix A, which contain outdated provisions that require the collection of unnecessary information, and is replacing form 4 with a streamlined template proof of claim form, which the trustee can use in a flexible manner. CME considered the template proof of claim ''a major improvement'' over the current version. These changes have the benefit of reducing administrative costs, and there are no obvious increased costs.

Similarly, the Commission is making clarifying changes to framework 1 of appendix B, and making, consistent with the suggestions of the ABA Subcommittee and the Subcommittee Members, a significant set of clarifying changes to framework 2. These changes have the benefit of having framework 2 work in a more accurate, and less confusing manner, thus reducing administrative costs, and there are no obvious increased costs.

F. Technical Corrections to Parts 1, 4, and 41

The Commission is making technical corrections to parts 1, 4, and 41 to

update cross-references. These corrections are clarifying and do not have any impact on the substantive obligations related to these sections. Thus, there are no increased costs associated with these minor technical updates.

IV. Related Matters

A. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA in issuing any order or adopting any Commission rule or regulation.[303]

The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. The Commission has considered this rulemaking to determine whether it might have anticompetitive effects, and has not identified any effect this rulemaking, which would apply only in the rare instance of an FCM or DCO bankruptcy, would have on competition. Accordingly, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.[304] The regulations being adopted by the Commission affect clearing organizations, FCMs, bankruptcy trustees, and customers. The Commission has previously established certain definitions of ''small entities'' to be used in evaluating the impact of its regulations in accordance with the RFA.[305]

The Commission has previously determined that clearing organizations and FCMs are not small entities for purposes of the RFA.[306] In the event of a bankruptcy, a trustee is appointed as receiver to manage the estate of the insolvent FCM or clearing organization. Accordingly, since the trustee is representing the estate of either an FCM or clearing organization, the trustee is not a small entity for purposes of the RFA. The Commission recognizes that many customers of an FCM or DCO in bankruptcy could be considered to be small entities for purposes of the RFA. The Commission believes, however, that the amendments to part 190 are designed so that they can be implemented without imposing a significant economic burden on a substantial number of small entities. These regulations take into account existing trading practices and the logistical considerations of implementing the regulations.

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

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[307] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring a collection of information as defined by the PRA. The regulations adopted herein would result in such a collection, as discussed below. A person is not required to respond to a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (OMB). The regulations include a collection of information for which the Commission has previously received control numbers from OMB. The title of this collection of information is: OMB Control Number 3038–0021, ''Regulations Governing Bankruptcies of Commodity Brokers.''

Information Collection 3038–0021[308] contains the reporting, recordkeeping and third-party disclosure requirements in the Commission's bankruptcy regulations for commodity broker liquidations (17 CFR part 190). These regulations apply to liquidations under chapter 7, subchapter IV of the Bankruptcy Code.[309] The Commission promulgated part 190 pursuant to the authority of 7 U.S.C. 24. The Commission is amending Information Collection 3038–0021 as a result of these final regulations to (1) accommodate new information collection requirements for FCMs and DCOs, and (2) revise the existing information collection requirements for FCMs and DCOs. The Commission did not receive any comments regarding its PRA burden analysis in the preamble to the proposal.

1. Reporting Requirements in an FCM Bankruptcy

Regulation § 190.03(b)(1) requires FCMs that file a petition in bankruptcy to notify the Commission and the relevant DSRO, as soon as practicable before and in any event no later than the time of such filing, of the anticipated or actual filing date, the court in which the proceeding will be or has been filed and, as soon as known, the docket number assigned to that proceeding. It further requires an FCM against which an involuntary bankruptcy petition or application for a protective decree under SIPA is filed to notify the Commission and the relevant DSRO immediately upon the filing of such petition or application.

Regulation § 190.03(b)(2) requires the trustee, the relevant DSRO, or an applicable clearing organization to notify the Commission if such person intends to transfer or apply to transfer open commodity contracts or customer property on behalf of the public customers of the debtor.

Based on its experience, the Commission anticipates that an FCM bankruptcy would occur once every three years.[310] The Commission has estimated the burden hours for the reporting requirements in an FCM bankruptcy as follows:

Estimated number of respondents: 1.

Estimated annual number of responses per respondent: 1.[311]

[303] Section 15(b) of the CEA, 7 U.S.C. 19(b).

[304] 5 U.S.C. 601 *et seq.*

[305] 47 FR 18618 (Apr. 30, 1982).

[306] *See* 66 FR 45604, 45609 (Aug. 29, 2001); 67 FR 53146, 53171 (Aug. 14, 2002).

[307] 44 U.S.C. 3501 *et seq.*

[308] There are two information collections associated with OMB Control No. 3038–0021. The first includes the reporting, recordkeeping, and third-party disclosure requirements applicable to a single respondent in a commodity broker liquidation (*e.g.,* a single FCM, DCO, or trustee) within the relevant time period. This includes both (1) requirements on a single FCM or a single trustee in an FCM bankruptcy which correspond to current requirements on a single FCM or a single trustee in an FCM bankruptcy, as provided for in §§ 190.03(b)(1) and (2) and (c)(1), (2), and (4), 190.05(b) and (d), and 190.07(b)(5); and (2) new requirements on a single DCO or a single trustee in a DCO bankruptcy as provided for in §§ 190.12(a)(2), (b)(1) and (2), and (c)(1) and (2) and 190.14(a) and (d). The second information collection includes the third-party disclosure requirements that are applicable during business as usual to multiple respondents (*e.g.,* multiple FCMs). These requirements were proposed as § 190.10(b) and (e) (which are analogs to current §§ 190.06(d) and 190.10(c)), as well as a new third-party disclosure requirement provided for in § 190.10(d) (regarding letters of credit); however, the third-party disclosure requirements are being adopted as §§ 1.41, 1.43, and 1.55(p).

[309] 11 U.S.C. 761 *et seq.*

[310] These estimates express the burdens in terms of those that would be imposed on *one* respondent during the three-year period.

[311] The Commission estimates that (1) under § 190.03(b)(1), an FCM would make two notifications per bankruptcy (one to the Commission and one to its DSRO), and (2) under § 190.03(b)(2), an FCM would make one notification per bankruptcy. Dividing those numbers by three (since the Commission anticipates an FCM bankruptcy occurring once every three years) results in 0.67 notifications annually pursuant to

Estimated total annual number of responses for all respondents: 1.

Estimated annual number of burden hours per respondent: 1.[312]

Estimated total annual burden hours for all respondents: 1.

2. Recordkeeping Requirements in an FCM Bankruptcy

Regulation § 190.05(b) requires the trustee to use reasonable efforts to compute a funded balance for each customer account that contains open commodity contracts or other property as of the close of business each business day subsequent to the order for relief until the date all open commodity contracts and other property in such account has been transferred or liquidated.

Regulation § 190.05(d) requires the trustee to use reasonable efforts to continue to issue account statements with respect to any customer for whose account open commodity contracts or other property is held that has not been liquidated or transferred.

Based on its experience, the Commission anticipates that an FCM bankruptcy would occur once every three years.[313] The Commission has estimated the burden hours for the recordkeeping requirements in an FCM bankruptcy as follows:

Estimated number of respondents: 1.

Estimated annual number of responses per respondent: 26,666.67.[314]

Estimated total annual number of responses for all respondents: 26,666.67.

Estimated annual number of burden hours per respondent: 266.67.[315]

Estimated total annual burden hours for all respondents: 266.67.

3. Third-Party Disclosure Requirements Applicable to a Single Respondent in an FCM Bankruptcy

Regulation § 190.03(c)(1) requires the trustee to use all reasonable efforts to promptly notify any customer whose futures account, foreign futures account, or cleared swaps account includes specifically identifiable property, and that such specifically identifiable property may be liquidated on and after the seventh day after the order for relief if the customer has not instructed the trustee in writing before the deadline specified in the notice to return such property pursuant to the terms for distribution of customer property contained in part 190.

Regulation § 190.03(c)(2) allows the trustee to treat open commodity contracts of public customers identified on the books and records of the debtor has held in an account designated as a hedging account as specifically identifiable property of such customer.[316]

Regulation § 190.03(c)(4) requires the trustee to promptly notify each customer that an order for relief has been entered and instruct each customer to file a proof of customer claim containing the information specified in § 190.03(e).

Regulation § 190.07(b)(5) requires the trustee, in the event that specifically identifiable property has been or will be transferred, to transmit any customer instructions previously received by the trustee with respect to such specifically identifiable property to the transferee of such property.

Based on its experience, the Commission anticipates that an FCM bankruptcy would occur once every three years.[317] The Commission has estimated the burden hours for the third-party disclosure requirements applicable to a single respondent in an FCM bankruptcy as follows:

Estimated number of respondents: 1.

Estimated annual number of responses per respondent: 10,003.32.[318]

Estimated total annual number of responses for all respondents: 10,003.32.

Estimated annual number of burden hours per respondent: 1,336.67.[319]

Estimated total annual burden hours for all respondents: 1,336.67.

4. Reporting Requirements in a Derivatives Clearing Organization (DCO) Bankruptcy

Regulation § 190.12(a)(2) requires a clearing organization that files a petition in bankruptcy to notify the Commission, at or before the time of such filing, of the filing date, the court in which the proceeding will be or has been filed and, as soon as known, the docket number assigned to that proceeding. It further requires a clearing organization against which an involuntary bankruptcy petition is filed to similarly notify the Commission within three hours after the receipt of notice of such filing.

Regulation § 190.12(b)(1) requires the debtor clearing organization to provide to the trustee, no later than three hours following the later of the commencement of a bankruptcy proceeding or the appointment of the trustee, copies of each of the most recent reports that the debtor was required to file with the Commission under § 39.19(c).

Regulation § 190.12(b)(2) requires the debtor clearing organization to provide to the trustee and the Commission, no later than three hours following the commencement of a bankruptcy proceeding, copies of (1) the most recent recovery or wind-down plans of the debtor maintained pursuant to § 39.39(b), and (2) the most recent version of the debtor's default management plan and default rules and procedures maintained pursuant to § 39.16 and, as applicable, § 39.35.

Regulations § 190.12(c)(1) and (2) require the debtor clearing organization

§ 190.03(b)(1), and 0.33 notifications annually pursuant to § 190.03(b)(2), for a total of one notification annually per respondent.

[312] The Commission estimates that (1) the notifications required under § 190.03(b)(1) would take 0.5 hours to make, and (2) the notification required under § 190.03(b)(2) would take 2 hours to make. In terms of burden hours, this amounts to (0.5*0.67 under § 190.03(b)(1)) plus (2*0.33 under § 190.03(b)(2)), or a total of one burden hour annually per respondent.

[313] These estimates express the burdens in terms of those that would be imposed on *one* respondent during the three-year period.

[314] The Commission estimates that (1) under § 190.05(b), a trustee would compute a funded balance for customer accounts 40,000 times; and (2) under § 190.05(d), a trustee would issue 40,000 account statements for customer accounts. Dividing those numbers by three (since the Commission anticipates an FCM bankruptcy occurring once every three years) results in 13,333.33 records annually pursuant to § 190.05(b), and 13,333.33 records annually pursuant to § 190.05(d), for a total of 26,666.67 records annually per respondent.

[315] The Commission estimates that each record required under § 190.05(b) and 190.05(d) would take 0.01 hours to prepare. In terms of burden hours, this amounts to (0.01*13,333.33 under § 190.05(b)) plus (0.01*13,333.33 under § 190.05(d)), or a total of 266.67 burden hours annually per respondent.

[316] The Commission no longer assigns burden hours to the discretionary notice that a trustee may provide to customers in an involuntary FCM bankruptcy proceeding pursuant to § 190.03(c)(3). There have been no involuntary FCM liquidations and none are anticipated. Accordingly, continuing to assign burden hours to this voluntary requirement would inappropriately inflate the burden hours of this information collection.

[317] These estimates express the burdens in terms of those that would be imposed on *one* respondent during the three-year period.

[318] The Commission estimates that a trustee would make the required disclosures under each of § 190.03(c)(1), (2), and (4) 10,000 times per bankruptcy. Dividing those numbers by three (since the Commission anticipates an FCM bankruptcy occurring once every three years) results in 3,333.33 disclosures annually pursuant to each of § 190.03(c)(1), (2), and (4). The Commission further estimates that a trustee would make the required disclosure under § 190.07(b)(5) 10 times per bankruptcy. Dividing this number by three results in 3.33 disclosures annually pursuant to § 190.07(b)(5). This amounts to a total of 10,003.32 disclosures annually per respondent.

[319] The Commission estimates that (1) each disclosure required under § 190.03(c)(1) and (2) and (b) would take 0.1 hours to prepare; (2) each disclosure required under § 190.03(c)(4) would take 0.2 hours to prepare; and (3) each disclosure required under § 190.07(b)(5) would take 1 hour to prepare. In terms of burden hours, this amounts to (0.1*3,333.33 under § 190.03(c)(1)) plus (0.1*3,333.33 under § 190.03(c)(2)) plus (0.2*3,333.33 under § 190.03(c)(4)) plus (1*3.33 under § 190.07(b)(5)), or a total of 1336.66 burden hours annually per respondent.

to make available to the trustee and the Commission, no later than the next business day following commencement of a bankruptcy proceeding, copies of (1) all records maintained by the debtor pursuant to § 39.20(a), and (2) any opinions of counsel or other legal memoranda provided to the debtor in the five years preceding the bankruptcy proceeding relating to the enforceability of the rules and procedures of the debtor in the event of an insolvency proceeding involving the debtor.

Based on its experience, the Commission anticipates that a clearing organization bankruptcy would occur once every fifty years.[320] The Commission has estimated the burden hours for the reporting requirements in a DCO bankruptcy as follows:

Estimated number of respondents: 1.

Estimated annual number of responses per respondent: 2.98.[321]

Estimated total annual number of responses for all respondents: 2.98.

Estimated annual number of burden hours per respondent: 0.61.[322]

Estimated total annual burden hours for all respondents: 0.61.

5. Recordkeeping Requirements in a DCO Bankruptcy

Regulation § 190.14(d) requires the trustee to use reasonable efforts to compute a funded balance for each customer account that contains open commodity contracts or other property as of the close of business each business day subsequent to the order for relief on which liquidation of property within the account has been completed or immediately prior to any distribution of property within the account.

Based on its experience, the Commission anticipates that a clearing organization bankruptcy would occur once every fifty years.[323] The Commission has estimated the burden hours for the recordkeeping requirements in a DCO bankruptcy as follows:

Estimated number of respondents: 1.

Estimated annual number of responses per respondent: 9.[324]

Estimated total annual number of responses for all respondents: 9.

Estimated annual number of burden hours per respondent: 0.9.[325]

Estimated total annual burden hours for all respondents: 0.9.

6. Third-Party Disclosure Requirements Applicable to a Single Respondent in a DCO Bankruptcy

Regulation § 190.14(a) allows the trustee, in their discretion based upon the facts and circumstances of the case, to instruct each customer to file a proof of claim containing such information as is deemed appropriate by the trustee, and seek a court order establishing a bar date for the filing of such proofs of claim.

Based on its experience, the Commission anticipates that a clearing organization bankruptcy would occur once every fifty years.[326] The Commission has estimated the burden hours for the third-party disclosure requirements applicable to a single respondent in a DCO bankruptcy as follows:

Estimated number of respondents: 1.

Estimated annual number of responses per respondent: 0.9.[327]

Estimated total annual number of responses for all respondents: 0.9.

Estimated annual number of burden hours per respondent: 0.18.[328]

Estimated total annual burden hours for all respondents: 0.18.

7. Third-Party Disclosure Requirements Applicable to Multiple Respondents During Business as Usual

As discussed in Section II.B.8 above, the Commission is codifying the provisions proposed as § 190.10(b), (d), and (e) in part 1, along with other regulations that pertain to an FCM's business as usual. Regulation § 1.41, which was proposed as § 190.10(b), requires an FCM to provide an opportunity to each of its customers, upon first opening a futures account or cleared swaps account with such FCM, to designate such account as a hedging account.

Regulation § 1.43, which was proposed as § 190.10(d), prohibits an FCM from accepting a letter of credit as collateral unless such letter of credit may be exercised under certain conditions specified in the regulation.

Regulation § 1.55(p), which was proposed as § 190.10(e), requires an FCM to provide any customer with the disclosure statement set forth in § 1.55(p) prior to accepting property other than cash from or for the account of a customer to margin, guarantee, or secure a commodity contract.

The requirements described above are applicable on a regular basis (*i.e.,* during business as usual) to multiple respondents. The Commission has estimated the burden hours for the third-party disclosure requirements applicable to multiple respondents during business as usual as follows:

Estimated number of respondents: 125.

Estimated annual number of responses per respondent: 3,000.[329]

[320] No U.S. clearing organization has ever been the subject of a bankruptcy proceeding, and none has come anywhere near insolvency. While there have been less than a handful of central counterparties worldwide that became functionally insolvent during the twentieth century, none of those were subject to modern resiliency requirements. Accordingly, the Commission believes that an estimate of one DCO bankruptcy every fifty years is an appropriate estimate. These burden estimates express the burdens in terms of those that would be imposed on *one* respondent during the fifty-year period.

[321] The Commission estimates that (1) under § 190.12(a)(2), a clearing organization would make two notifications per bankruptcy; (2) under § 190.12(b)(1), a clearing organization would provide 40 reports to the trustee; (3) under § 190.12(b)(2), a clearing organization would provide 5 reports to the trustee and the Commission; (4) under § 190.12(c)(1), a clearing organization would provide 100 records to the trustee and the Commission; and (5) under § 190.12(c)(2), a clearing organization would provide 2 records to the trustee and the Commission. Dividing those numbers by 50 (since the Commission anticipates a clearing organization bankruptcy occurring once every 50 years) results in (1) 0.04 reports annually pursuant to § 190.12(a)(2); (2) 0.8 reports annually pursuant to § 190.12(b)(1); (3) 0.1 reports annually pursuant to § 190.12(b)(2); (4) 2 reports annually pursuant to § 190.12(c)(1); and (5) 0.04 reports annually pursuant to § 190.12(c)(2), for a total of 2.98 reports annually per respondent.

[322] The Commission estimates that (1) each notification required under § 190.12(a)(2) and (d)(2) would take 0.5 hours to make; (2) gathering the reports required under § 190.12(b)(1) would take 0.2 hours; (3) gathering the reports required under § 190.12(b)(2) would take 0.2 hours; (4) gathering the reports required under § 190.12(c)(1) would take 0.2 hours; and (5) gathering the reports required under § 190.12(c)(2) would take 0.2 hours. In terms of burden hours, this amounts to (0.5*0.04 under § 190.12(a)(2)) plus (0.2*0.8 under § 190.12(b)(1)) plus (0.2*0.1 under § 190.12(b)(2)) plus (0.2*2 under § 190.12(c)(1)) plus (0.2*0.04 under § 190.12(c)(2)), or a total of 0.61 burden hours annually per respondent.

[323] These estimates express the burdens in terms of those that would be imposed on *one* respondent during the fifty-year period.

[324] The Commission estimates that, under § 190.14(d), a clearing organization would compute a funded balance for customer accounts 450 times during a bankruptcy. This number is based on an average of 45 clearing members, each with two accounts (house and customer). Dividing that number by 50 (since the Commission anticipates a clearing organization bankruptcy occurring once every 50 years) results in 9 records annually per respondent.

[325] The Commission estimates that computing the funded balance of customer accounts pursuant to § 190.14(d) would take 0.1 hours per computation. In terms of burden hours, this amounts to (0.1*9), or 0.9 burden hours annually per respondent.

[326] These estimates express the burdens in terms of those that would be imposed on *one* respondent during the fifty-year period.

[327] The Commission estimates that, under § 190.14(a), a trustee would make the disclosure 45 times during a bankruptcy. This number is based on an average of 45 clearing members. Dividing that number by 50 (since the Commission anticipates a clearing organization bankruptcy occurring once every 50 years) results in 0.9 records annually per respondent.

[328] The Commission estimates that instructing customers to file a proof of claim pursuant to § 190.14(a) would take 0.2 hours. In terms of burden hours, this amounts to (0.2*0.9), or 0.18 burden hours annually per respondent.

[329] The Commission estimates that under §§ 1.41, 1.43, and 1.55(p), an FCM would make the required

Estimated total annual number of responses for all respondents: 375,000.

Estimated annual number of burden hours per respondent: 60.[330]

Estimated total annual burden hours for all respondents: 7,500.

List of Subjects

17 CFR Part 1

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

17 CFR Part 4

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

17 CFR Part 41

Brokers, Reporting and recordkeeping requirements, Securities.

17 CFR Part 190

Bankruptcy, Brokers, Reporting and recordkeeping requirements.

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

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24 (2012).

■ 2. In § 1.25, revise paragraph (a)(2)(ii)(B) to read as follows:

§ 1.25 Investment of customer funds.

(a) * * *

(2) * * *

(ii) * * *

(B) Securities subject to such repurchase agreements must not be ''specifically identifiable property'' as defined in § 190.01 of this chapter.

* * * * *

■ 3. Add § 1.41 to read as follows:

§ 1.41 Designation of hedging accounts.

(a) A futures commission merchant must provide an opportunity to each customer, when it first opens a futures account, foreign futures account or cleared swaps account with such futures commission merchant, to designate such account as a hedging account. The futures commission merchant must indicate prominently in the accounting records in which it maintains open trade balances whether, for each customer account, the account is designated as a hedging account.

(b) A futures commission merchant may permit the customer to open an account as a hedging account only if it obtains the customer's written representation that the customer's trading of futures or options on futures, foreign futures or options on foreign futures, or cleared swaps (as applicable) in the account constitutes hedging as such term may be defined under any relevant Commission regulation or rule of any clearing organization, designated contract market, swap execution facility or foreign board of trade.

(c) The requirements set forth in paragraphs (a) and (b) of this section do not apply to a futures commission merchant with respect to any commodity contract account that the futures commission merchant opened prior to May 13, 2021. The futures commission merchant may continue to designate as a hedging account any account with respect to which the futures commission merchant received written hedging instructions from the customer in accordance with former § 190.06(d) of this chapter.

(d) A futures commission merchant may designate an existing futures account, foreign futures account or cleared swaps account of a particular customer as a hedging account, provided that it has obtained the representation set out in paragraph (b) of this section from such customer.

■ 4. Add § 1.42 to read as follows:

§ 1.42 Delivery accounts.

In connection with the making or taking of delivery of a commodity under a commodity contract whose terms require settlement via physical delivery, if a futures commission merchant facilitates or effects the transfer of the physical delivery property and payment therefor on behalf of the customer, and does so outside the futures account, foreign futures account or cleared swaps account in which the commodity contract was held, the futures commission merchant must do so in a delivery account, *provided, however,* that when the commodity subject to delivery is a security, a futures commission merchant may, consistent with any applicable regulatory requirements, do so in a securities account.

■ 5. Add § 1.43 to read as follows:

§ 1.43 Letters of credit as collateral.

A futures commission merchant shall not accept a letter of credit as collateral unless such letter of credit may be exercised, through its stated date of expiry, under the following conditions, regardless of whether the customer posting that letter of credit is in default in any obligation:

(a) In the event that an order for relief under chapter 7 of the Bankruptcy Code or a protective decree pursuant to section 5(b)(1) of SIPA is entered with respect to the futures commission merchant, or if the FDIC is appointed as receiver for the futures commission merchant pursuant to 12 U.S.C. 5382(a), the trustee for that futures commission merchant (or, as applicable, FDIC) may draw upon such letter of credit, in full or in part, in accordance with § 190.04(d)(3) of this chapter.

(b) If the letter of credit is passed through to a clearing organization, then in the event that an order for relief under chapter 7 of the Bankruptcy Code is entered with respect to the clearing organization, or if the FDIC is appointed as receiver for the clearing organization pursuant to 12 U.S.C. 5382(a), the trustee for that clearing organization (or, as applicable, FDIC) may draw upon such letter of credit, in full or in part, in accordance with § 190.04(d)(3) of this chapter.

(c) A futures commission merchant shall not accept a letter of credit from a customer as collateral if it has any agreement with the customer that is inconsistent with this section.

■ 6. In § 1.55:

■ a. Revise paragraphs (d) and (f);

■ b. Remove the parenthetical control number sentence and parenthetical authority citation following paragraph (h);

■ c. Remove the paragraph (k) heading; and

■ d. Add paragraph (p).

The revision and addition read as follows:

§ 1.55 Public disclosures by futures commission merchants.

* * * * *

(d) Any futures commission merchant, or (in the case of an introduced account) any introducing broker, may open a commodity futures account for a customer without obtaining the separate acknowledgments of disclosure and elections required by this section and by §§ 1.33(g) and 33.7 of this chapter, provided that:

(1) Prior to the opening of such account, the futures commission merchant or introducing broker obtains an acknowledgement from the customer, which may consist of a single signature

disclosures 1,000 times per year. This amounts to a total of 3,000 responses annually per respondent.

[330] The Commission estimates that each disclosure required under §§ 1.41, 1.43, and 1.55(p) would take 0.02 hours to make. In terms of burden hours, this amounts to (0.02*1,000 under § 1.41) plus (0.02*1,000 under § 1.43 plus (0.02*1,000 under § 1.55(p)), or 60 burden hours annually per respondent.

at the end of the futures commission merchant's or introducing broker's customer account agreement, or on a separate page, of the disclosure statements, consents, and elections specified in this section and § 1.33(g), and in §§ 33.7, 155.3(b)(2), and 155.4(b)(2) of this chapter, and which may include authorization for the transfer of funds from a segregated customer account to another account of such customer, as listed directly above the signature line, provided the customer has acknowledged by check or other indication next to a description of each specified disclosure statement, consent, or election that the customer has received and understood such disclosure statement or made such consent or election; and

(2) The acknowledgment referred to in paragraph (d)(1) of this section is accompanied by and executed contemporaneously with delivery of the disclosures and elective provisions required by this section and § 1.33(g), and by § 33.7 of this chapter.

* * * * *

(f) A futures commission merchant or, in the case of an introduced account, an introducing broker, may open a commodity futures account for an ''institutional customer'' as defined in § 1.3 without furnishing such institutional customer the disclosure statements or obtaining the acknowledgments required under paragraph (a) of this section, or §§ 1.33(g), 1.55(p), and 1.65(a)(3), and §§ 30.6(a), 33.7(a), 155.3(b)(2), and 155.4(b)(2) of this chapter.

* * * * *

(p)(1) Except as provided in § 1.65, no commodity broker (other than a clearing organization) may accept property other than cash from or for the account of a customer, other than a customer specified in paragraph (f) of this section, to margin, guarantee, or secure a commodity contract unless the commodity broker first furnishes the customer with the disclosure statement set forth in paragraph (p)(2) of this section in boldface print in at least 10 point type which may be provided as either a separate, written document or incorporated into the customer agreement, or with another statement approved under paragraph (c) of this section and set forth in appendix A to this section which the Commission finds satisfies the requirement of this paragraph (p)(1).

(2) The disclosure statement required by paragraph (p)(1) of this section is as follows:

THIS STATEMENT IS FURNISHED TO YOU BECAUSE REGULATION 1.55(p) OF THE COMMODITY FUTURES TRADING COMMISSION REQUIRES IT FOR REASONS OF FAIR NOTICE UNRELATED TO THIS COMPANY'S CURRENT FINANCIAL CONDITION.

1. YOU SHOULD KNOW THAT IN THE UNLIKELY EVENT OF THIS COMPANY'S BANKRUPTCY, PROPERTY, INCLUDING PROPERTY SPECIFICALLY TRACEABLE TO YOU, WILL BE RETURNED, TRANSFERRED OR DISTRIBUTED TO YOU, OR ON YOUR BEHALF, ONLY TO THE EXTENT OF YOUR PRO RATA SHARE OF ALL PROPERTY AVAILABLE FOR DISTRIBUTION TO CUSTOMERS.

2. THE COMMISSION'S REGULATIONS CONCERNING BANKRUPTCIES OF COMMODITY BROKERS CAN BE FOUND AT 17 CODE OF FEDERAL REGULATIONS PART 190.

(3) The statement contained in paragraph (p)(2) of this section need be furnished only once to each customer to whom it is required to be furnished by this section.

■ 7. In § 1.65, revise paragraphs (a)(3) introductory text and (a)(3)(iii) to read as follows:

§ 1.65 Notice of bulk transfers and disclosure obligations to customers.

(a) * * *

(3) Where customer accounts are transferred to a futures commission merchant or introducing broker, other than at the customer's request, the transferee introducing broker or futures commission merchant must provide each customer whose account is transferred with the risk disclosure statements and acknowledgments required by § 1.55 (domestic futures and foreign futures and options trading) and § 33.7 of this chapter (domestic exchange-traded commodity options) and receive the required acknowledgments within sixty days of the transfer of accounts. This paragraph (a)(3) shall not apply:

* * * * *

(iii) If the transfer of accounts is made from one introducing broker to another introducing broker guaranteed by the same futures commission merchant pursuant to a guarantee agreement in accordance with the requirements of § 1.10(j) and such futures commission merchant maintains the relevant acknowledgments required by §§ 1.55(a)(1)(ii) and 33.7(a)(1)(ii) of this chapter and can establish compliance with § 1.55(p).

* * * * *

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

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

Authority: 7 U.S.C. 1a, 2, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a, and 23.

■ 9. In § 4.5, revise paragraph (c)(2)(iii)(A) to read as follows:

§ 4.5 Exclusion for certain otherwise regulated persons from the definition of the term ''commodity pool operator.''

* * * * *

(c) * * *

(2) * * *

(iii) * * *

(A) Will use commodity futures or commodity options contracts, or swaps solely for bona fide hedging purposes within the meaning and intent of the definition of bona fide hedging transactions and positions for excluded commodities in §§ 1.3 and 151.5 of this chapter; Provided however, That, in addition, with respect to positions in commodity futures or commodity options contracts, or swaps which do not come within the meaning and intent of the definition of bona fide hedging transactions and positions for excluded commodities in §§ 1.3 and 151.5 of this chapter, a qualifying entity may represent that the aggregate initial margin and premiums required to establish such positions will not exceed five percent of the liquidation value of the qualifying entity's portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; and, Provided further, That in the case of an option that is in-the-money at the time of the purchase, the in-the-money amount as defined in § 190.01of this chapter may be excluded in computing such five percent; or

* * * * *

■ 10. In § 4.12, revise the section heading and paragraph (b)(1)(i)(C) to read as follows:

§ 4.12 Exemption from provisions of this part.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(C) Will not enter into commodity interest transactions for which the aggregate initial margin and premiums, and required minimum security deposit for retail forex transactions (as defined in § 5.1(m) of this chapter) exceed 10 percent of the fair market value of the pool's assets, after taking into account unrealized profits and unrealized losses on any such contracts it has entered

into; *Provided, however,* That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in § 190.01 of this chapter may be excluded in computing such 10 percent; and

* * * * *

■ 11. In § 4.13, revise paragraph (a)(3)(ii)(A) to read as follows:

§ 4.13 Exemption from registration as a commodity pool operator.

* * * * *

(a) * * *

(3) * * *

(ii) * * *

(A) The aggregate initial margin, premiums, and required minimum security deposit for retail forex transactions (as defined in § 5.1(m) of this chapter) required to establish such positions, determined at the time the most recent position was established, will not exceed 5 percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into; *Provided,* That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in § 190.01 of this chapter may be excluded in computing such 5 percent; or

* * * * *

PART 41—SECURITY FUTURES PRODUCTS

■ 12. The authority citation for part 41 continues to read as follows:

Authority: Sections 206, 251 and 252, Pub. L. 106–554, 114 Stat. 2763, 7 U.S.C. 1a, 2, 6f, 6j, 7a–2, 12a; 15 U.S.C. 78g(c)(2).

■ 13. In § 41.41, revise paragraph (d) to read as follows:

§ 41.41 Security futures products accounts.

* * * * *

(d) *Recordkeeping requirements.* The Commission's recordkeeping rules set forth in §§ 1.31, 1.32, 1.35, 1.36, 1.37, 4.23, 4.33, and 18.05 of this chapter shall apply to security futures product transactions and positions in a futures account (as that term is defined in § 1.3 of this chapter). The rules in the preceding sentence shall not apply to security futures product transactions and positions in a securities account (as that term is defined in § 1.3 of this chapter); provided, that the SEC's recordkeeping rules apply to those transactions and positions.

* * * * *

■ 14. Revise part 190 to read as follows:

PART 190—BANKRUPTCY RULES

Subpart A—General Provisions

Sec.
190.00 Statutory authority, organization, core concepts, scope, and construction.
190.01 Definitions.
190.02 General.

Subpart B—Futures Commission Merchant as Debtor

190.03 Notices and proofs of claims.
190.04 Operation of the debtor's estate—customer property.
190.05 Operation of the debtor's estate—general.
190.06 Making and taking delivery under commodity contracts.
190.07 Transfers.
190.08 Calculation of funded net equity.
190.09 Allocation of property and allowance of claims.
190.10 Current records during business as usual.

Subpart C—Clearing Organization as Debtor

190.11 Scope and purpose of this subpart.
190.12 Required reports and records.
190.13 Prohibition on avoidance of transfers.
190.14 Operation of the estate of the debtor subsequent to the filing date.
190.15 Recovery and wind-down plans; default rules and procedures.
190.16 Delivery.
190.17 Calculation of net equity.
190.18 Treatment of property.
190.19 Support of daily settlement.

Appendix A to Part 190—Customer Proof of Claim Form

Appendix B to Part 190—Special Bankruptcy Distributions

Authority: 7 U.S.C. 1a, 2, 6c, 6d, 6g, 7a–1, 12, 12a, 19, and 24; 11 U.S.C. 362, 546, 548, 556, and 761–767, unless otherwise noted.

Subpart A—General Provisions

§ 190.00 Statutory authority, organization, core concepts, scope, and construction.

(a) *Statutory authority.* The Commission has adopted the regulations in this part pursuant to its authority under sections 8a(5) and 20 of the Act. Section 8a(5) provides general rulemaking authority to effectuate the provisions and accomplish the purposes of the Act. Section 20 provides that the Commission may, notwithstanding title 11 of the United States Code, adopt certain rules or regulations governing a proceeding involving a commodity broker that is a debtor under subchapter IV of chapter 7 of the Bankruptcy Code. Specifically, the Commission is authorized to adopt rules or regulations specifying:

(1) That certain cash, securities, or other property, or commodity contracts, are to be included in or excluded from customer property or member property;

(2) That certain cash, securities, or other property, or commodity contracts, are to be specifically identifiable to a particular customer in a particular capacity;

(3) The method by which the business of the commodity broker is to be conducted or liquidated after the date of the filing of the petition under chapter 7 of the Bankruptcy Code, including the payment and allocation of margin with respect to commodity contracts not specifically identifiable to a particular customer pending their orderly liquidation;

(4) Any persons to which customer property and commodity contracts may be transferred under section 766 of the Bankruptcy Code; and

(5) How a customer's net equity is to be determined.

(b) *Organization.* This part is organized into three subparts. This subpart contains general provisions applicable in all cases. Subpart B of this part contains provisions that apply when the debtor is a futures commission merchant (as that term is defined in the Act or Commission regulations). This includes acting as a foreign futures commission merchant, as defined in section 761(12) of the Bankruptcy Code, but excludes a person that is ''notice-registered'' as a futures commission merchant pursuant to section 4f(a)(2) of the Act. Subpart C contains provisions that apply when the debtor is registered as a derivatives clearing organization under the Act.

(c) *Core concepts.* The regulations in this part reflect several core concepts. The descriptions of core concepts in paragraphs (c)(1) through (6) of this section are subject to the further specific requirements set forth in this part, and the specific requirements in this part should be interpreted and applied consistently with these core concepts.

(1) *Commodity brokers.* Subchapter IV of chapter 7 of the Bankruptcy Code applies to a debtor that is a commodity broker, against which a customer holds a ''net equity'' claim relating to a commodity contract. This part is limited to a commodity broker that is:

(i) A futures commission merchant; or

(ii) A derivatives clearing organization registered under the Act and § 39.3 of this chapter.

(2) *Account classes.* The Act and Commission regulations in parts 1, 22, and 30 of this chapter provide differing treatment and protections for different types of cleared commodity contracts. This part establishes three account classes that correspond to the different types of accounts that futures

commission merchants and clearing organizations are required to maintain under the regulations in the preceding sentence, specifically, the futures account class (including options on futures), the foreign futures account class (including options on foreign futures), and the cleared swaps account class (including cleared options other than options on futures or foreign futures). This part also establishes a fourth account class, the delivery account class (which may be further subdivided as provided in this part), for property held in an account designated within the books and records of the debtor as a delivery account, for effecting delivery under commodity contracts whose terms require settlement via delivery when the commodity contract is held to expiration or, in the case of a cleared option, is exercised.

(3) *Public customers and non-public customers; Commission segregation requirements; member property*—(i) *Public customers and non-public customers.* This part prescribes separate treatment of ''public customers'' and ''non-public customers'' (as these terms are defined in § 190.01) within each account class in the event of a proceeding under this part in which the debtor is a futures commission merchant. Public customers of a debtor futures commission merchant are entitled to a priority in the distribution of cash, securities, or other customer property over non-public customers, and both have priority over all other claimants (except for claims relating to the administration of customer property) pursuant to section 766(h) of the Bankruptcy Code.

(A) The cash, securities, or other property held on behalf of the public customers of a futures commission merchant in the futures, foreign futures, or cleared swaps account classes are subject to special segregation requirements imposed under parts 1, 22, and 30 of this chapter for each account class. Although such segregation requirements generally are not applicable to cash, securities, or other property received from or reflected in the futures, foreign futures, or cleared swaps accounts of non-public customers of a futures commission merchant, such transactions and property are customer property within the scope of this part.

(B) While parts 1, 22, and 30 of this chapter do not impose special segregation requirements with respect to treatment of cash, securities, or other property of public customers carried in a delivery account, such property does constitute customer property. Thus, the distinction between public and non-public customers is, given the priority for public customers in section 766(h) of the Bankruptcy Code, relevant for the purpose of making distributions to delivery account class customers pursuant to this part.

(C) Where a provision in this part affords the trustee discretion, that discretion should be exercised in a manner that the trustee determines will best achieve the overarching goal of protecting public customers as a class by enhancing recoveries for, and mitigating disruptions to, public customers as a class. In seeking to achieve that overarching goal, the trustee has discretion to balance those two sub-goals when they are in tension. Where the trustee is directed to exercise ''reasonable efforts'' to meet a standard, those efforts should only be less than ''best efforts'' to the extent that the trustee determines that such an approach would support the foregoing goals.

(ii) *Clearing organization bankruptcies: Member property and customer property other than member property.* For a clearing organization, ''customer property'' is divided into ''member property'' and ''customer property other than member property.'' The term member property is used to identify the cash, securities, or property available to pay the net equity claims of clearing members based on their house account at the clearing organization. Thus, in the event of a proceeding under this part in which the debtor is a clearing organization, the classification of customers as public customers or non-public customers also is relevant, in that each member of the clearing organization will have separate claims against the clearing organization (by account class) with respect to:

(A) Commodity contract transactions cleared for its own account or on behalf of any of its non-public customers (which are cleared in a ''house account'' at the clearing organization); and

(B) Commodity contract transactions cleared on behalf of any public customers of the clearing member (which are cleared in accounts at the clearing organization that is separate and distinct from house accounts).

(iii) *Preferential assignment among customer classes and account classes for clearing organization bankruptcies.* Section 190.18 is designed to support the interests of public customers of members of a debtor that is a clearing organization.

(A) Certain customer property is preferentially assigned to ''customer property other than member property'' instead of ''member property'' to the extent that there is a shortfall in funded balances for members' public customer claims. Moreover, to the extent that there are excess funded balances for members' claims in any customer class/account class combination, that excess is also preferentially assigned to ''customer property other than member property'' to the extent of any shortfall in funded balances for members' public customer claims.

(B) Where property is assigned to a particular customer class with more than one account class, it is assigned to the account class for which the funded balance percentage is the lowest until there are two account classes with equal funded balance percentages, then to both such account classes, keeping the funded balance percentage the same, and so forth following the analogous approach if the debtor has more than two account classes within the relevant customer class.

(4) *Porting of public customer commodity contract positions.* In a proceeding in which the debtor is a futures commission merchant, this part sets out a policy preference for transferring to another futures commission merchant, or ''porting,'' open commodity contract positions of the debtor's public customers along with all or a portion of such customers' account equity. Porting mitigates risks to both the customers of the debtor futures commission merchant and to the markets. To facilitate porting, this part addresses the manner in which the debtor's business is to be conducted on and after the filing date, with specific provisions addressing the collection and payment of margin for open commodity contract positions prior to porting.

(5) *Pro rata distribution.* (i) The commodity broker provisions of the Bankruptcy Code, subchapter IV of chapter 7, in particular section 766(h), have long revolved around the principle of pro rata distribution. If there is a shortfall in the cash, securities or other property in a particular account class needed to satisfy the net equity claims of public customers in that account class, the customer property in that account class will be distributed pro rata to those public customers (subject to appendix B of this part). Any customer property not attributable to a specific account class, or that exceeds the amount needed to pay allowed customer net equity claims in a particular account class, will be distributed to public customers in other account classes so long as there is a shortfall in those other classes. Non-public customers will not receive any distribution of customer property so long as there is any shortfall, in any account class, of customer property

needed to satisfy public customer net equity claims.

(ii) The pro rata distribution principle means that, if there is a shortfall of customer property in an account class, all customers within that account class will suffer the same proportional loss relative to their allowed net equity claims. The principle in this paragraph (c)(5)(ii) applies to all customers, including those who post as collateral specifically identifiable property or letters of credit. The pro rata distribution principle is subject to the special distribution provisions set forth in framework 1 in appendix B of this part for cross-margin accounts and framework 2 in appendix B of this part for funds held outside of the U.S. or held in non-U.S. currency.

(6) *Deliveries.* (i) Commodity contracts may have terms that require a customer owning the contract:

(A) To make or take delivery of the underlying commodity if the customer holds the contract to a delivery position; or

(B) In the case of an option on a commodity:

(*1*) To make delivery upon exercise (as the buyer of a put option or seller of a call option); or

(*2*) To take delivery upon exercise (as seller of a put option or buyer of a call option).

(ii) Depending upon the circumstances and relevant market, delivery may be effected via a delivery account, a futures account, a foreign futures account or a cleared swaps account, or, when the commodity subject to delivery is a security, in a securities account (in which case property associated with the delivery held in a securities account is not part of any customer account class for purposes of this part).

(iii) Although commodity contracts with delivery obligations are typically offset before reaching the delivery stage (*i.e.,* prior to triggering bilateral delivery obligations), when delivery obligations do arise, a delivery default could have a disruptive effect on the cash market for the commodity and adversely impact the parties to the transaction. This part therefore sets out special provisions to address open commodity contracts that are settled by delivery, when those positions are nearing or have entered into a delivery position at the time of or after the filing date. The delivery provisions in this part are intended to allow deliveries to be completed in accordance with the rules and established practices for the relevant commodity contract market or clearing organization, as applicable and to the extent permitted under this part.

(iv) In a proceeding in which the debtor is a futures commission merchant, the delivery provisions in this part reflect policy preferences to:

(A) Liquidate commodity contracts that settle via delivery before they move into a delivery position; and

(B) When such contracts are in a delivery position, to allow delivery to occur, where practicable, outside administration of the debtor's estate.

(v) The delivery provisions in this part apply to any commodity that is subject to delivery under a commodity contract, as the term commodity is defined in section of 1a(9) of the Act, whether the commodity itself is tangible or intangible, including agricultural commodities as defined in § 1.3 of this chapter, other non-financial commodities (such as metals or energy commodities) covered by the definition of exempt commodity in section 1a(20) of the Act, and commodities that are financial in nature (such as foreign currencies) covered by the definition of excluded commodity in section 1a(19) of the Act. The delivery provisions also apply to virtual currencies that are subject to delivery under a commodity contract.

(d) *Scope*—(1) *Proceedings*—(i) *Certain commodity broker proceedings under subchapter IV of chapter 7 of the Bankruptcy Code.* (A) Section 101(6) of the Bankruptcy Code recognizes ''futures commission merchants'' and ''foreign futures commission merchants,'' as those terms are defined in section 761(12) of the Bankruptcy Code, as separate categories of commodity broker. The definition of commodity broker in § 190.01, as it applies to a commodity broker that is a futures commission merchant under the Act, also covers foreign futures commission merchants because a foreign futures commission merchant is required to register as a futures commission merchant under the Act.

(B) Section 101(6) of the Bankruptcy Code recognizes ''commodity options dealers,'' and ''leverage transaction merchants'' as defined in sections 761(6) and (13) of the Bankruptcy Code, as separate categories of commodity brokers. There are no commodity options dealers or leverage transaction merchants as of December 8, 2020.

Note 1 to paragraph (b)(1)(i)(B). The Commission intends to adopt rules with respect to commodity options dealers or leverage transaction merchants, respectively, at such time as an entity registers as such.

(ii) *Futures commission merchants subject to a SIPA proceeding.* Pursuant to section 7(b) of SIPA, 15 U.S.C. 78fff–1(b), the trustee in a SIPA proceeding, where the debtor also is a commodity broker, has the same duties as a trustee in a proceeding under subchapter IV of chapter 7 of the Bankruptcy Code, to the extent consistent with the provisions of SIPA or as otherwise ordered by the court. This part therefore also applies to a proceeding commenced under SIPA with respect to a debtor that is registered as a broker or dealer under section 15 of the Securities Exchange Act of 1934 when the debtor also is a futures commission merchant.

(iii) *Commodity brokers subject to an FDIC proceeding.* Section 5390(m)(1)(B) of title 12 of the United States Code provides that the FDIC must apply the provisions of subchapter IV of chapter 7 of the Bankruptcy Code in respect of the distribution of customer property and member property in connection with the liquidation of a covered financial company or a bridge financial company (as those terms are defined in section 5381(a) of title 12) that is a commodity broker as if such person were a debtor for purposes of subchapter IV, except as specifically provided in section 5390 of title 12. This part therefore shall serve as guidance as to such distribution of property in a proceeding in which the FDIC is acting as a receiver pursuant to title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act with respect to a covered financial company or bridge financial company that is a commodity broker whose liquidation otherwise would be administered by a trustee under subchapter IV of chapter 7 of the Bankruptcy Code.

(2) *Account class and implied trust limitations.* (i) The trustee may not recognize any account class that is not one of the account classes enumerated in § 190.01.

(ii) No property that would otherwise be included in customer property, as defined in § 190.01, shall be excluded from customer property because such property is considered to be held in a constructive, resulting, or other trust that is implied in equity.

(3) *Commodity contract exclusions.* For purposes of this part, the following are excluded from the term ''commodity contract'':

(i) Options on commodities (including swaps subject to regulation under part 32 of this chapter) that are not centrally cleared by a clearing organization or foreign clearing organization.

(ii) Transactions, contracts or agreements that are classified as ''forward contracts'' under the Act pursuant to the exclusion from the term ''future delivery'' set out in section 1a(27) of the Act or the exclusion from the definition of a ''swap'' under section

1a(47)(B)(ii) of the Act, in each case that are not centrally cleared by a clearing organization or foreign clearing organization.

(iii) Security futures products as defined in section 1a(45) of the Act when such products are held in a securities account.

(iv) Any off-exchange retail foreign currency transaction, contract or agreement described in sections 2(c)(2)(B) or (C) of the Act.

(v) Any security-based swap or other security (as defined in section 3 of the Exchange Act), but a security futures product or a mixed swap (as defined in 1a(47)(D) of the Act) that is, in either case, carried in an account for which there is a corresponding account class under this part is not so excluded.

(vi) Any off-exchange retail commodity transaction, contract or agreement described in section 2(c)(2)(D) of the Act, unless such transaction, contract or agreement is traded on or subject to the rules of a designated contract market or foreign board of trade as, or as if, such transaction, contract, or agreement is a futures contract.

(e) *Construction.* (1) A reference in this part to a specific section of a Federal statute or specific regulation refers to such section or regulation as the same may be amended or superseded.

(2) Where they differ, the definitions set forth in § 190.01 shall be used instead of defined terms set forth in section 761 of the Bankruptcy Code. In many cases, these definitions are based on definitions in parts 1, 22, and 30 of this chapter. Notwithstanding the use of different defined terms, the regulations in this part are intended to be consistent with the provisions and objectives of subchapter IV of chapter 7 of the Bankruptcy Code.

(3) In the context of portfolio margining and cross margining programs, commodity contracts and associated collateral will be treated as part of the account class in which, consistent with part 1, 22, 30, or 39 of this chapter, or Commission Order, they are held.

(i) Thus, as noted in paragraph (2) of the definition of *account class* in § 190.01, where open commodity contracts (and associated collateral) that would be attributable to one account class are, instead, commingled with the commodity contracts (and associated collateral) in a second account class (the ''home field''), then the trustee must treat all such commodity contracts and collateral as part of, and consistent with the regulations applicable to, the second account class.

(ii) The concept in paragraph (e)(3)(i) of this section, that the rules of the ''home field'' will apply, also pertains to securities positions that are, pursuant to an approved cross margining program, held in a commodities account class (in which case the rules of that commodities account class will apply) and to commodities positions that are, pursuant to an approved cross-margining program, held in a securities account (in which case, the rules of the securities account will apply, consistent with section 16(2)(b)(ii) of SIPA, 15 U.S.C. 78lll(2)(b)(ii)).

§ 190.01 Definitions.

For purposes of this part:

Account class:

(1) Means one or more of each of the following types of accounts maintained by a futures commission merchant or clearing organization (as applicable), each type of which must be recognized as a separate account class by the trustee:

(i) *Futures account* means:

(A) With respect to public customers, the same definition as set forth in § 1.3 of this chapter.

(B) With respect to non-public customers:

(*1*) With respect to a futures commission merchant, an account maintained on the books and records of the futures commission merchant for the purpose of accounting for a person's transactions in futures or options on futures contracts executed on or subject to the rules of a designated contract market registered under the Act (and related cash, securities, or other property); and

(*2*) With respect to a clearing organization, an account maintained on the books and records of the clearing organization for the purpose of accounting for transactions in futures or options on futures contracts cleared or settled by the clearing organization for a member or a member's non-public customers (and related cash, securities, or other property).

(ii) *Foreign futures account* means:

(A) With respect to public customers:

(*1*) With respect to a futures commission merchant, a 30.7 account, as such term is defined in § 30.1(g) of this chapter; and

(*2*) With respect to a clearing organization, an account maintained on the books and records of the clearing organization for the purpose of accounting for transactions in futures or options on futures contracts executed on or subject to the rules of a foreign board of trade, cleared or settled by the clearing organization for a member that is a futures commission merchant (and related cash, securities or other property), on behalf of that member's 30.7 customers (as that latter term is defined in § 30.1(f) of this chapter).

(B) With respect to non-public customers:

(*1*) With respect to a futures commission merchant, an account maintained on the books and records of the futures commission merchant for the purpose of accounting for a person's transactions in futures or options on futures contracts executed on or subject to the rules of a foreign board of trade (and related cash, securities, or other property); and

(*2*) With respect to a clearing organization, an account maintained on the books and records of the clearing organization for the purpose of accounting for transactions in futures or options on futures contracts executed on or subject to the rules of a foreign board of trade, cleared or settled by the clearing organization for a member or a member's non-public customers (and related cash, securities, or other property).

(iii) *Cleared swaps account* means:

(A) With respect to public customers, a cleared swaps customer account, as such term is defined in § 22.1 of this chapter.

(B) With respect to non-public customers:

(*1*) With respect to a futures commission merchant, an account maintained on the books and records of the futures commission merchant for the purpose of accounting for a person's transactions in cleared swaps (as defined in § 22.1 of this chapter) (and related cash, securities, or other property); and

(*2*) With respect to a clearing organization, an account maintained on the books and records of the clearing organization for the purpose of accounting for transactions in cleared swaps (as defined in § 22.1 of this chapter) (or in other contracts permitted to be cleared in the account) cleared or settled by the clearing organization for a member or a member's non-public customers (including any property related thereto).

(iv)(A) *Delivery account* means (for both public and non-public customers, considered separately):

(*1*) An account maintained on the books and records of a futures commission merchant for the purpose of accounting for the making or taking of delivery under commodity contracts whose terms require settlement by delivery of a commodity, and which is designated as a delivery account on the books and records of the futures commission merchant; and

(*2*) An account maintained on the books and records of a clearing organization for a clearing member (or a customer of a clearing member) for the purpose of accounting for the making or taking of delivery under commodity contracts whose terms require settlement by delivery of a commodity, as well as any account in which the clearing organization holds physical delivery property represented by electronic title documents or otherwise existing in an electronic (dematerialized) form in its capacity as a central depository, in each case where the account is designated as a delivery account on the books and the records of the clearing organization.

(B) The delivery account class is further divided into a ''physical delivery account class'' and a ''cash delivery account class,'' as provided in § 190.06(b), each of which shall be recognized as a separate class of account by the trustee.

(2)(i) If open commodity contracts that would otherwise be attributable to one account class (and any property margining, guaranteeing, securing or accruing in respect of such commodity contracts) are, pursuant to a Commission rule, regulation, or order, or a clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter, held separately from other commodity contracts and property in that account class and are commingled with the commodity contracts and property of another account class, then the trustee must treat the former commodity contracts (and any property margining, guaranteeing, securing, or accruing in respect of such commodity contracts), for purposes of this part, as being held in an account of the latter account class.

(ii) The principle in paragraph (2)(i) of this definition will be applied to securities positions and associated collateral held in a commodity account class pursuant to a cross margining program approved by the Commission (and thus treated as part of that commodity account class) and to commodity positions and associated collateral held in a securities account pursuant to a cross margining program approved by the Commission (and thus treated as part of the securities account).

(3) For the purpose of this definition, a commodity broker is considered to maintain an account for another person by establishing internal books and records in which it records the person's commodity contracts and cash, securities or other property received from or on behalf of such person or accruing to the credit of such person's account, and related activity (such as liquidation of commodity contract positions or adjustments to reflect mark-to-market gains or losses on commodity contract positions), regardless whether the commodity broker has kept such books and records current or accurate.

Act means the Commodity Exchange Act.

Bankruptcy Code means, except as the context of the regulations in this part otherwise requires, those provisions of title 11 of the United States Code relating to ordinary bankruptcies (chapters 1 through 5) and liquidations (chapter 7 with the exception of subchapters III and V), together with the Federal Rules of Bankruptcy Procedure relating thereto.

Business day means weekdays, not including Federal holidays as established annually by 5 U.S.C. 6103. A business day begins at 8:00 a.m. in Washington, DC, and ends at 7:59:59 a.m. on the next day that is a business day.

Calendar day means the time from midnight to midnight in Washington, DC.

Cash delivery account class has the meaning set forth under *account class* in this section.

Cash delivery property means any cash or cash equivalents recorded in a delivery account that is, as of the filing date:

(1) Credited to such account to pay for receipt of delivery of a commodity under a commodity contract;

(2) Credited to such account to collateralize or guarantee an obligation to make or take delivery of a commodity under a commodity contract; or

(3) Has been credited to such account as payment received in exchange for making delivery of a commodity under a commodity contract. It also includes property in the form of commodities that have been delivered after the filing date in exchange for cash or cash equivalents held in a delivery account as of the filing date. The cash or cash equivalents must be identified on the books and the records of the debtor as having been received, from or for the account of a particular customer, on or after seven calendar days before the relevant:

(i) First notice date in the case of a futures contract; or

(ii) Exercise date in the case of a (cleared) option.

(4) Cash delivery property also includes any cash transferred by a customer to the trustee on or after the filing date for the purpose of paying for delivery, consistent with § 190.06(a)(3)(ii)(B)(*1*).

(5) In the case of a contract where one fiat currency is exchanged for another fiat currency, each such currency, to the extent that it is recorded in a delivery account, will be considered cash delivery property.

Cash equivalents means assets, other than United States dollar cash, that are highly liquid such that they may be converted into United States dollar cash within one business day without material discount in value.

Cleared swaps account has the meaning set forth under *account class* in this section.

Clearing organization means a derivatives clearing organization that is registered with the Commission as such under the Act.

Commodity broker means any person that is:

(1) A futures commission merchant under the Act, but excludes a person that is ''notice-registered'' as a futures commission merchant under section 4f(a)(2) of the Act; or

(2) A clearing organization, in each case with respect to which there is a ''customer'' as that term is defined in this section.

Commodity contract means:

(1) A futures or options on futures contract executed on or subject to the rules of a designated contract market;

(2) A futures or option on futures contract executed on or subject to the rules of a foreign board of trade;

(3) A swap as defined in section 1a(47) of the Act and § 1.3 of this chapter, that is directly or indirectly submitted to and cleared by a clearing organization and which is thus a cleared swap as that term is defined in section 1a(7) of the Act and § 22.1 of this chapter; or

(4) Any other contract that is a swap for purposes of this part under the definition in this section and is submitted to and cleared by a clearing organization.

(5) Notwithstanding paragraphs (1) through (4) of this definition, a security futures product as defined in section 1a(45) of the Act is not a commodity contract for purposes of this part when such contract is held in a securities account. Moreover, a contract, agreement, or transaction described in § 190.00(d)(3) as excluded from the term ''commodity contract'' is excluded from this definition.

Commodity contract account means:

(1) A futures account, foreign futures account, cleared swaps account, or delivery account; or

(2) If the debtor is a futures commission merchant, for purposes of identifying customer property for the foreign futures account class (subject to § 190.09(a)(1)), an account maintained for the debtor by a foreign clearing

organization or a foreign futures intermediary reflecting futures or options on futures executed on or subject to the rules of a foreign board of trade, including any account maintained on behalf of the debtor's public customers.

Court means the court having jurisdiction over the debtor's estate.

Cover has the meaning set forth in § 1.17(j) of this chapter.

Customer means:

(1)(i) With respect to a futures commission merchant as debtor (including a foreign futures commission merchant as that term is defined in section 761(12) of the Bankruptcy Code), the meaning set forth in sections 761(9)(A) and (B) of the Bankruptcy Code.

(ii) With respect to a clearing organization as debtor, the meaning set forth in section 761(9)(D) of the Bankruptcy Code.

(2) The term customer includes the owner of a portfolio cross-margining account covering commodity contracts and related positions in securities (as defined in section 3 of the Exchange Act) that is carried as a futures account or cleared swaps customer account pursuant to an appropriate rule, regulation, or order of the Commission.

Customer claim of record means a customer claim that is determinable solely by reference to the records of the debtor.

Customer class means each of the following two classes of customers, which must be recognized as separate classes by the trustee: Public customers and non-public customers; *provided, however,* that when the debtor is a clearing organization the references to public customers and non-public customers are based on the classification of customers of, and in relation to, the members of the clearing organization.

Customer property and *customer estate* are used interchangeably to mean the property subject to pro rata distribution in a commodity broker bankruptcy in the priority set forth in sections 766(h) or (i), as applicable, of the Bankruptcy Code, and includes cash, securities, and other property as set forth in § 190.09(a).

Debtor means a person with respect to which a proceeding is commenced under subchapter IV of chapter 7 of the Bankruptcy Code or under SIPA, or for which the Federal Deposit Insurance Corporation is appointed as a receiver pursuant to 12 U.S.C. 5382, *provided, however,* that this part applies only to such a proceeding if the debtor is a commodity broker as defined in this section.

Delivery account has the meaning set forth under *account class* in this section.

Distribution of property to a customer includes transfer of property on the customer's behalf, return of property to a customer, as well as distributions to a customer of valuable property that is different than the property posted by that customer.

Equity means the amount calculated as equity in accordance with § 190.08(b)(1).

Exchange Act means the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a *et seq.*

FDIC means the Federal Deposit Insurance Corporation.

Filing date means the date a petition under the Bankruptcy Code or application under SIPA commencing a proceeding is filed or on which the FDIC is appointed as a receiver pursuant to 12 U.S.C. 5382(a).

Final net equity determination date means the latest of:

(1) The day immediately following the day on which all commodity contracts held by or for the account of customers of the debtor have been transferred, liquidated, or satisfied by exercise or delivery;

(2) The day immediately following the day on which all property other than commodity contracts held for the account of customers has been transferred, returned or liquidated;

(3) The bar date for filing customer proofs of claim as determined by rule 3002(c) of the Federal Rules of Bankruptcy Procedure, the expiration of the six-month period imposed pursuant to section 8(a)(3) of SIPA, or such other date (whether earlier or later) set by the court (or, in the case of the FDIC acting as a receiver pursuant to 12 U.S.C. 5382(a), the deadline set by the FDIC pursuant to 12 U.S.C. 5390(a)(2)(B); or

(4) The day following the allowance (by the trustee or by the bankruptcy court) or disallowance (by the bankruptcy court) of all disputed customer net equity claims.

Foreign board of trade has the same meaning as set forth in § 1.3 of this chapter.

Foreign clearing organization means a clearing house, clearing association, clearing corporation or similar entity, facility, or organization clears and settles transactions in futures or options on futures executed on or subject to the rules of a foreign board of trade.

Foreign future shall have the same meaning as that set forth in section 761(11) of the Bankruptcy Code.

Foreign futures account has the meaning set forth under *account class* in this section.

Foreign futures commission merchant shall have the same meaning as that set forth in section 761(12) of the Bankruptcy Code.

Foreign futures intermediary refers to a foreign futures and options broker, as such term is defined in § 30.1(e) of this chapter, acting as an intermediary for foreign futures contracts between a foreign futures commission merchant and a foreign clearing organization.

Funded balance means the amount calculated as funded balance in accordance with § 190.08(c) and, as applicable, § 190.17(d).

Funded net equity means, for purposes of subpart B of this part, the amount calculated as funded net equity in accordance with § 190.08(a), and for purposes of subpart C of this part, the amount calculated as funded net equity in accordance with § 190.17(c).

Futures and *futures contract* are used interchangeably to mean any contract for the purchase or sale of a commodity (as defined in section 1a(9) of the Act) for future delivery that is executed on or subject to the rules of a designated contract market or on or subject to the rules of a foreign board of trade. The term also covers, for purposes of this part:

(1) Any transaction, contract or agreement described in section 2(c)(2)(D) of the Act and traded on or subject to the rules of a designated contract market or foreign board of trade, to the extent not covered by the foregoing definition; and

(2) Any transaction, contract, or agreement that is classified as a ''forward contract'' under the Act pursuant to the exclusion from the term ''future delivery'' set out in section 1a(27) of the Act or the exclusion from the definition of a ''swap'' under section 1a(47)(B)(ii) of the Act, provided that such transaction, contract, or agreement is traded on or subject to the rules of a designated contract market or foreign board of trade and is cleared by, respectively, a clearing organization or foreign clearing organization the same as if it were a futures contract.

Futures account has the meaning set forth under *account class* in this section.

House account means, in the case of a clearing organization, any commodity contract account of a member at such clearing organization maintained to reflect trades for the member's own account or for any non-public customer of such member.

In-the-money means:

(1) With respect to a call option, when the value of the underlying interest (such as a commodity or futures contract) which is the subject of the

option exceeds the strike price of the option; and

(2) With respect to a put option, when the value of the underlying interest (such as a commodity or futures contract) which is the subject of the option is exceeded by the strike price of the option.

Joint account means any commodity contract account held by more than one person.

Member property means, in connection with a clearing organization bankruptcy, the property which may be used to pay that portion of the net equity claim of a member which is based on the member's house account at the clearing organization, including any claims on behalf of non-public customers of the member.

Net equity means, for purposes of subpart B of this part, the amount calculated as net equity in accordance with § 190.08(b), and for purposes of subpart C of this part, the amount calculated as net equity in accordance with § 190.17(b).

Non-public customer means:

(1) With respect to a futures commission merchant, any customer that is not a public customer; and

(2) With respect to a clearing organization, any person whose account carried on the books and records of:

(i) A member of the clearing organization that is a futures commission merchant, is classified as a proprietary account under § 1.3 of this chapter (in the case of the futures or foreign futures account class) or as a cleared swaps proprietary account under § 22.1 of this chapter (in the case of the cleared swaps account class); or

(ii) A member of the clearing organization that is a foreign broker, is classified or treated as proprietary under and for purposes of:

(A) The rules of the clearing organization; or

(B) The jurisdiction of incorporation of such member.

Open commodity contract means a commodity contract which has been established in fact and which has not expired, been redeemed, been fulfilled by delivery or exercise, or been offset (*i.e.,* liquidated) by another commodity contract.

Order for relief has the same meaning set forth in section 301 of the Bankruptcy Code, in the case of the filing of a voluntary bankruptcy petition, and means the entry of an order granting relief under section 303 of the Bankruptcy Code in an involuntary case. It also means, where applicable, the issuance of a protective decree under section 5(b)(1) of SIPA or the appointment of the FDIC as receiver pursuant to 12 U.S.C. 5382(a)(1)(A).

Person means any individual, association, partnership, corporation, trust, or other form of legal entity.

Physical delivery account class has the meaning set forth under *account class* in this section.

Physical delivery property means:

(1) *In general.* A commodity, whether tangible or intangible, held in a form that can be delivered to meet and fulfill delivery obligations under a commodity contract that settles via delivery if held to a delivery position (as described in § 190.06(a)(1)), including warehouse receipts, other documents of title, or shipping certificates (including electronic versions of any of the foregoing) for the commodity, or the commodity itself:

(i) That the debtor holds for the account of a customer for the purpose of making delivery of such commodity on the customer's behalf, which as of the filing date or thereafter, can be identified on the books and records of the debtor as held in a delivery account for the benefit of such customer. Cash or cash equivalents received after the filing date in exchange for delivery of such physical delivery property shall also constitute physical delivery property;

(ii) That the debtor holds for the account of a customer and that the customer received or acquired by taking delivery under an expired or exercised commodity contract and which, as of the filing date or thereafter, can be identified on the books and records of the debtor as held in a delivery account for the benefit of such customer, regardless how long such property has been held in such account; or

(iii) Where property that the debtor holds in a futures account, foreign futures account, or cleared swaps account, or, if the commodity is a security, in a securities account, would meet the criteria listed in paragraph (1) or (2) of this definition, but for the fact of being held in such account rather than a delivery account, such property will be considered physical delivery property solely for purposes of the obligations to make or take delivery of physical delivery property pursuant to § 190.06.

(iv) Commodities or documents of title that are not held by the debtor and are delivered or received by a customer in accordance with § 190.06(a)(2) (or in accordance with § 190.06(a)(2) in conjunction with § 190.16(a) if the debtor is a clearing organization) to fulfill a customer's delivery obligation under a commodity contract will be considered physical delivery property solely for purposes of the obligations to make or take delivery of physical delivery property pursuant to § 190.06. As this property is held outside of the debtor's estate, it is not subject to pro rata distribution.

(2) *Special cases.* (i) In the case of a contract where one fiat currency is exchanged for another fiat currency, neither such currency, to the extent that it is recorded in a delivery account, will be considered physical delivery property.

(ii) In a case where the final settlement price is negative, *i.e.,* where the party obliged to deliver physical delivery property under an expiring futures contract or an expired options contract is also obliged to make a cash payment to the buyer, such cash or cash equivalents constitute physical delivery property.

Primary liquidation date means the first business day immediately following the day on which all commodity contracts (including any commodity contracts that are specifically identifiable property) have been liquidated or transferred.

Public customer means:

(1) With respect to a futures commission merchant and in relation to:

(i) The futures account class, a futures customer as defined in § 1.3 of this chapter whose futures account is subject to the segregation requirements of section 4d(a) of the Act and the regulations in this chapter that implement section 4d(a), including as applicable §§ 1.20 through 1.30 of this chapter;

(ii) The foreign futures account class, a 30.7 customer as defined in § 30.1 of this chapter whose foreign futures accounts is subject to the segregation requirements of § 30.7 of this chapter;

(iii) The cleared swaps account class, a Cleared Swaps Customer as defined in § 22.1 of this chapter whose cleared swaps account is subject to the segregation requirements of part 22 of this chapter; and

(iv) The delivery account class, a customer that is or would be classified as a public customer if the property reflected in the customer's delivery account had been held in an account described in paragraph (1)(i), (ii), or (iii) of this definition.

(2) With respect to a clearing organization, any customer of that clearing organization that is not a non-public customer.

Securities account means, in relation to a futures commission merchant that is registered as a broker or dealer under the Exchange Act, an account maintained by such futures commission merchant in accordance with the requirements of section 15(c)(3) of the

Exchange Act and § 240.15c3–3 of this title.

Security has the meaning set forth in section 101(49) of the Bankruptcy Code.

SIPA means the Securities Investor Protection Act of 1970, 15 U.S.C 78aaa *et seq.*

Specifically identifiable property means:

(1)(i) The following property received, acquired, or held by or for the account of the debtor from or for the futures account, foreign futures account, or cleared swaps account of a customer:

(A) Any security which as of the filing date is:

(*1*)(*i*) Held for the account of a customer;

(*ii*) Registered in such customer's name;

(*iii*) Not transferable by delivery; and

(*iv*) Has a duration or maturity date of more than 180 days; or

(*2*)(*i*) Fully paid;

(*ii*) Non-exempt; and

(*iii*) Identified on the books and records of the debtor as held by the debtor for or on behalf of the commodity contract account of a particular customer for which, according to such books and records as of the filing date, no open commodity contracts were held in the same capacity.

(B) Any warehouse receipt, bill of lading, or other document of title which as of the filing date:

(*1*) Can be identified on the books and records of the debtor as held for the account of a particular customer; and

(*2*) Is not in bearer form and is not otherwise transferable by delivery;

(ii) Any open commodity contracts treated as specifically identifiable property in accordance with § 190.03(c)(2); and

(iii) Any physical delivery property described in paragraphs (1) through (3) of the definition of physical delivery property in this section.

(2) Notwithstanding paragraphs (1) and (3) of this definition, security futures products, and any money, securities, or property held to margin, guarantee, or secure such products, or accruing as a result of such products, shall not be considered specifically identifiable property for the purposes of subchapter IV of the Bankruptcy Code or this part, if held in a securities account.

(3) No property that is not explicitly included in this definition may be treated as specifically identifiable property.

Strike price means the price per unit multiplied by the total number of units at which a person may purchase or sell a futures contract or a commodity or other interest underlying an option that is a commodity contract.

Substitute customer property means cash or cash equivalents delivered to the trustee by or on behalf of a customer in connection with:

(1) The return of specifically identifiable property by the trustee; or

(2) The return of, or an agreement not to draw upon, a letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract.

Swap has the meaning set forth in section 1a(47) of the Act and § 1.3 of this chapter, and, in addition, also means any other contract, agreement, or transaction that is carried in a cleared swaps account pursuant to a rule, regulation, or order of the Commission, provided, in each case, that it is cleared by a clearing organization as, or the same as if it were, a swap.

Trustee means, as appropriate, the trustee in bankruptcy or in a SIPA proceeding, appointed to administer the debtor's estate and any interim or successor trustee, or the FDIC, where it has been appointed as a receiver pursuant to 12 U.S.C. 5382.

Undermargined means, with respect to a futures account, foreign futures account, or cleared swaps account carried by the debtor, the funded balance for such account is below the minimum amount that the debtor is required to collect and maintain for the open commodity contracts in such account under the rules of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility or foreign board of trade. If any such rules establish both an initial margin requirement and a lower maintenance margin requirement applicable to any commodity contracts (or to the entire portfolio of commodity contracts or any subset thereof) in a particular commodity contract account of the customer, the trustee will use the lower maintenance margin level to determine the customer's minimum margin requirement for such account.

Variation settlement means variation margin as defined in § 1.3 of this chapter plus all other daily settlement amounts (such as price alignment payments) that may be owed or owing on the commodity contract.

§ 190.02 General.

(a) *Request for exemption.* (1) The trustee (or, in the case of an involuntary petition pursuant to section 303 of the Bankruptcy Code, any other person charged with the management of a commodity broker) may, for good cause shown, request from the Commission an exemption from the requirements of any procedural provision in this part, including an extension of any time limit prescribed by this part or an exemption subject to conditions, provided that the Commission shall not grant an extension for any time period established by the Bankruptcy Code.

(2) A request pursuant to paragraph (a)(1) of this section—

(i) May be made *ex parte* and by any means of communication, written or oral, provided that the trustee must confirm an oral request in writing within one business day and such confirmation must contain all the information required by paragraph (b)(3) of this section. The request or confirmation of an oral request must be given to the Commission as provided in paragraph (a) of this section.

(ii) Must state the particular provision of this part with respect to which the exemption or extension is sought, the reason for the requested exemption or extension, the amount of time sought if the request is for an extension, and the reason why such exemption or extension would not be contrary to the purposes of the Bankruptcy Code and this part.

(3) The Director of the Division of Clearing and Risk, or members of the Commission staff designated by the Director, shall grant, deny, or otherwise respond to a request, on the basis of the information provided in any such request and after consultation with the Director of the Market Participants Division or members of the Commission staff designated by the Director, unless exigent circumstances require immediate action precluding such prior consultation, and shall communicate that determination by the most appropriate means to the person making the request.

(b) *Delegation of authority to the Director of the Division of Clearing and Risk.* (1) Until such time as the Commission orders otherwise, the Commission hereby delegates to the Director of the Division of Clearing and Risk, and to such members of the Commission's staff acting under the Director's direction as they may designate, after consultation with the Director of the Market Participants Division, or such members of the Commission's staff under the Director's direction as they may designate, unless exigent circumstances require immediate action, all the functions of the Commission set forth in this part, except the authority to disapprove a pre-relief transfer of a public customer commodity contract account or customer property pursuant to § 190.07(e)(1).

(2) The Director of the Division of Clearing and Risk may submit to the

Commission for its consideration any matter which has been delegated to the Director pursuant to paragraph (b)(1) of this section.

(3) Nothing in this section shall prohibit the Commission, at its election, from exercising its authority delegated to the Director of the Division of Clearing and Risk under paragraph (b)(1) of this section.

(c) *Forward contracts.* For purposes of this part, an entity for or with whom the debtor deals who holds a claim against the debtor solely on account of a forward contract, that is not cleared by a clearing organization, will not be deemed to be a customer.

(d) *Other.* The Bankruptcy Code will not be construed by the Commission to prohibit a commodity broker from doing business as any combination of the following: Futures commission merchant, commodity options dealer, foreign futures commission merchant, or leverage transaction merchant, nor will the Commission construe the Bankruptcy Code to permit any operation, trade, or business, or any combination of the foregoing, otherwise prohibited by the Act or by any of the Commission's regulations in this chapter, or by any order of the Commission.

(e) *Rule of construction.* Contracts in security futures products held in a securities account shall not be considered to be ''from or for the commodity futures account'' or ''from or for the commodity options account'' of such customers, as such terms are used in section 761(9) of the Bankruptcy Code.

(f) *Receivers.* In the event that a receiver for a futures commission merchant is appointed due to the violation or imminent violation of the customer property protection requirements of section 4d of the Act, or of the regulations in part 1, 22, or 30 of this chapter that implement section 4d or 4(b)(2) of the Act, or of the futures commission merchant's minimum capital requirements in § 1.17 of this chapter, such receiver may, in an appropriate case, file a petition for bankruptcy of such futures commission merchant pursuant to section 301 of the Bankruptcy Code.

(g) *Definition of ''allowed.''* The term ''allowed'' in this part shall have the meaning ascribed to it in the Bankruptcy Code.

Subpart B—Futures Commission Merchant as Debtor

§ 190.03 Notices and proofs of claims.

(a) *Notices-means of providing*—(1) *To the Commission.* Unless instructed otherwise by the Commission, all mandatory or discretionary notices to be given to the Commission under this subpart shall be directed by electronic mail to *bankruptcyfilings@cftc.gov.* For purposes of this subpart, notice to the Commission shall be deemed to be given only upon actual receipt.

(2) *To Customers.* The trustee, after consultation with the Commission, and unless otherwise instructed by the Commission, will establish and follow procedures reasonably designed for giving adequate notice to customers under this subpart and for receiving claims or other notices from customers. Such procedures should include, absent good cause otherwise, the use of a prominent website as well as communication to customers' electronic addresses that are available in the debtor's books and records.

(b) *Notices to the Commission and designated self-regulatory organizations*—(1) *Of commencement of a proceeding.* Each commodity broker that is a futures commission merchant and files a petition in bankruptcy shall as soon as practicable before, and in any event no later than, the time of such filing, notify the Commission and such commodity broker's designated self-regulatory organization of the anticipated or actual filing date, the court in which the proceeding will be or has been filed and, as soon as known, the docket number assigned to that proceeding. Each commodity broker that is a futures commission merchant and against which a bankruptcy petition is filed or with respect to which an application for a protective decree under SIPA is filed shall immediately upon the filing of such petition or application notify the Commission and such commodity broker's designated self-regulatory organization of the filing date, the court in which the proceeding has been filed, and, as soon as known, the docket number assigned to that proceeding.

(2) *Of transfers under section 764(b) of the Bankruptcy Code.* As soon as possible, the trustee of a commodity broker that is a futures commissions merchant, the relevant designated self-regulatory organization, or the applicable clearing organization must notify the Commission, and in the case of a futures commission merchant, the trustee shall also notify its designated self-regulatory organization and clearing organization(s), if such person intends to transfer or to apply to transfer open commodity contracts or customer property on behalf of the public customers of the debtor in accordance with section 764(b) of the Bankruptcy Code and § 190.07(c) or (d).

(c) *Notices to customers*—(1) *Specifically identifiable property other than open commodity contracts.* In any case in which an order for relief has been entered, the trustee must use all reasonable efforts to promptly notify, in accordance with paragraph (a)(2) of this section, any customer whose futures account, foreign futures account, or cleared swaps account includes specifically identifiable property, other than open commodity contracts, which has not been liquidated, that such specifically identifiable property may be liquidated commencing on and after the seventh day after the order for relief (or such other date as is specified by the trustee in the notice with the approval of the Commission or court) if the customer has not instructed the trustee in writing before the deadline specified in the notice to return such property pursuant to the terms for distribution of specifically identifiable property contained in § 190.09(d)(1). Such notice must describe the specifically identifiable property and specify the terms upon which that property may be returned, including if applicable and to the extent practicable any substitute customer property that must be provided by the customer.

(2) *Open commodity contracts carried in hedging accounts.* To the extent reasonably practicable under the circumstances of the case, and following consultation with the Commission, the trustee may treat open commodity contracts of public customers identified on the books and records of the debtor as held in a futures account, foreign futures account, or cleared swaps account designated as a hedging account in the debtor's records, as specifically identifiable property of such customer.

(i) If the trustee does not exercise such authority, such open commodity contracts do not constitute specifically identifiable property.

(ii) If the trustee exercises such authority:

(A) The trustee shall use reasonable efforts to promptly notify, in accordance with paragraph (a)(2) of this section, each relevant public customer of such determination.

(B)(*1*) Where, in the judgment of the trustee, the books and records of the debtor reveal a clear preference by a relevant public customer with respect to transfer or liquidation of open commodity contracts, the trustee shall endeavor, to the extent reasonably practicable, to comply with that preference.

(*2*) Where, in the judgment of the trustee, the books and records of the debtor do not reveal a clear preference by a relevant public customer with

respect to transfer or liquidation of open commodity contracts, the trustee will request the customer to provide written instructions whether to transfer or liquidate such open commodity contracts. Such notice must specify the manner for providing such instructions and the deadline by which the customer must provide instructions.

(C) Such notice must also inform the customer that:

(*1*) (Where instructions have been requested pursuant to paragraph (c)(2)(ii)(B)(*2*) of this section), if the customer does not provide instructions in the prescribed manner and by the prescribed deadline, the customer's open commodity contracts will not be treated as specifically identifiable property under this part;

(*2*) Any transfer of the open commodity contracts is subject to the terms for distribution contained in § 190.09(d)(2);

(*3*) Absent compliance with any terms imposed by the trustee or the court, the trustee may liquidate the open commodity contracts; and

(*4*) Providing (or having provided) instructions may not prevent the open commodity contracts from being liquidated.

(3) *Involuntary cases.* Prior to entry of an order for relief, and upon leave of the court, a trustee appointed in an involuntary proceeding pursuant to section 303 of the Bankruptcy Code may notify customers, in accordance with paragraph (a)(2) of this section, of the commencement of such proceeding and may request customer instructions with respect to the return, liquidation, or transfer of specifically identifiable property.

(4) *Notice of bankruptcy and request for proof of customer claim.* The trustee shall promptly notify, in accordance with paragraph (a)(2) of this section, each customer that an order for relief has been entered and instruct each customer to file a proof of customer claim containing the information specified in paragraph (e) of this section. Such notice may be given separately from any notice provided in accordance with paragraph (c) of this section. The trustee shall cause the proof of customer claim form referred to in paragraph (e) of this section to set forth the bar date for its filing.

(d) *Notice of court filings.* The trustee shall promptly provide the Commission with copies of any complaint, motion, or petition filed in a commodity broker bankruptcy which concerns the disposition of customer property. Court filings shall be directed to the Commission addressed as provided in paragraph (a)(1) of this section.

(e) *Proof of customer claim.* The trustee shall request that customers provide, to the extent reasonably practicable, information sufficient to determine a customer's claim in accordance with the regulations contained in this part, including in the discretion of the trustee:

(1) The class of commodity contract account upon which each claim is based (*i.e.,* futures account, foreign futures account, cleared swaps account, or delivery account (and, in the case of a delivery account, how much is based on cash delivery property and how much is based on the value of physical delivery property);

(2) Whether the claimant is a public customer or a non-public customer;

(3) The number of commodity contract accounts held by each claimant, and, for each such account:

(i) The account number;

(ii) The name in which the account is held;

(iii) The balance as of the last account statement for the account, and information regarding any activity in the account from the date of the last account statement up to and including the filing date that affected the balance of the account;

(iv) The capacity in which the account is held;

(v) Whether the account is a joint account and, if so, the amount of the claimant's percentage interest in that account and whether participants in the joint account are claiming jointly or separately;

(vi) Whether the account is a discretionary account;

(vii) Whether the account is an individual retirement account for which there is a custodian; and

(viii) Whether the account is a cross-margining account for futures and securities;

(4) A description of any accounts held by the claimant with the debtor that are not commodity contract accounts;

(5) A description of all claims against the debtor not based upon a commodity contract account of the claimant or an account listed in response to paragraph (e)(4) of this section;

(6) A description of all claims of the debtor against the claimant not included in the balance of a commodity contract account of the claimant;

(7) A description of and the value of any open positions, unliquidated securities, or other unliquidated property held by the debtor on behalf of the claimant, indicating the portion of such property, if any, which was included in the information provided in paragraph (e)(3) of this section, and identifying any such property which would be specifically identifiable property as defined in § 190.01;

(8) Whether the claimant holds positions in security futures products, and, if so, whether those positions are held in a futures account, a foreign futures account, or a securities account;

(9) Whether the claimant wishes to receive payment in kind, to the extent practicable, for any claim for unliquidated securities or other unliquidated property; and

(10) Copies of any documents which support the information contained in the proof of customer claim, including without limitation, customer confirmations, account statements, and statements of purchase or sale.

(f) *Proof of claim form.* A template customer proof of claim form which may (but is not required to) be used by the trustee is set forth in appendix A to this part.

(1) If there are no open commodity contracts that are being treated as specifically identifiable property (*e.g.,* if the customer proof of claim form was distributed after the primary liquidation date), the trustee should modify the customer proof of claim form to delete references to open commodity contracts as specifically identifiable property.

(2) In the event the trustee determines that the debtor's books and records reflecting customer transactions are not reasonably reliable, or account statements are not available from which account balances as of the date of transfer or liquidation of customer property may be determined, the proof of claim form used by the trustee should be modified to take into account the particular facts and circumstances of the case.

§ 190.04 Operation of the debtor's estate—customer property.

(a) *Transfers*—(1) *All cases.* The trustee for a commodity broker shall promptly use its best efforts to effect a transfer in accordance with § 190.07(c) and (d) no later than the seventh calendar day after the order for relief of the open commodity contracts and property held by the commodity broker for or on behalf of its public customers.

(2) *Involuntary cases.* A commodity broker against which an involuntary petition in bankruptcy is filed, or the trustee if a trustee has been appointed in such case, shall use its best efforts to effect a transfer in accordance with § 190.07(c) and (d) of all open commodity contracts and property held by the commodity broker for or on behalf of its public customers and such other property as the Commission in its discretion may authorize, on or before the seventh calendar day after the filing

date, and immediately cease doing business; *provided, however,* that if the commodity broker demonstrates to the Commission within such period that it was in compliance with the segregation and financial requirements of this chapter on the filing date, and the Commission determines, in its sole discretion, that such transfer is neither appropriate nor in the public interest, the commodity broker may continue in business subject to applicable provisions of the Bankruptcy Code and of this chapter.

(b) *Treatment of open commodity contracts*—(1) *Payments by the trustee.* Prior to the primary liquidation date, the trustee may make payments of initial margin and variation settlement to a clearing organization, commodity broker, foreign clearing organization, or foreign futures intermediary, carrying the account of the debtor, pending the transfer, or liquidation of any open commodity contracts, whether or not such contracts are specifically identifiable property of a particular customer, provided, that:

(i) To the extent within the trustee's control, the trustee shall not make any payments on behalf of any commodity contract account on the books and records of the debtor that is in deficit; *provided, however,* that the provision in this paragraph (b)(1) shall not be construed to prevent a clearing organization, foreign clearing organization, futures commission merchant, or foreign futures intermediary carrying an account of the debtor from exercising its rights to the extent permitted under applicable law;

(ii) Any margin payments made by the trustee with respect to a specific customer account shall not exceed the funded balance for that account;

(iii) The trustee shall not make any payments on behalf of non-public customers of the debtor from funds that are segregated for the benefit of public customers;

(iv) If the trustee receives payments from a customer in response to a margin call, then to the extent within the trustee's control, the trustee must use such payments to make margin payments for the open commodity contract positions of such customer;

(v) The trustee may not use payments received from one public customer to meet the margin (or any other) obligations of any other customer; and

(vi) If funds segregated for the benefit of public customers in a particular account class exceed the aggregate net equity claims for all public customers in such account class, the trustee may use such excess funds to meet the margin obligations for any public customer in such account class whose account is under-margined (as described in paragraph (b)(4) of this section) but not in deficit, provided that the trustee issues a margin call to such customer and provided further that the trustee shall liquidate such customer's open commodity contracts if the customer fails to make the margin payment within a reasonable time as provided in paragraph (b)(4) of this section.

(2) *Margin calls.* The trustee (or, prior to appointment of the trustee, the debtor against which an involuntary petition was filed) may issue a margin call to any public customer whose commodity contract account contains open commodity contracts if such account is under-margined.

(3) *Margin payments by the customer.* The full amount of any margin payment by a customer in response to a margin call under paragraph (b)(2) of this section must be credited to the funded balance of the particular account for which it was made.

(4) *Trustee obligation to liquidate certain open commodity contracts.* The trustee shall, as soon as practicable under the circumstances, liquidate all open commodity contracts in any commodity contract account that is in deficit, or for which any mark-to-market calculation would result in a deficit, or for which the customer fails to meet a margin call made by the trustee within a reasonable time. Except as otherwise provided in this part, absent exigent circumstances, a reasonable time for meeting margin calls made by the trustee shall be deemed to be one hour, or such greater period not to exceed one business day, as the trustee may determine in its sole discretion.

(5) *Partial liquidation of open commodity contracts by others.* In the event that a clearing organization, foreign clearing organization, futures commission merchant, foreign futures intermediary, or other person carrying a commodity customer account for the debtor in the nature of an omnibus account has liquidated only a portion of open commodity contracts in such account, the trustee will exercise reasonable business judgment in assigning the liquidating transactions to the underlying commodity customer accounts carried by the debtor. Specifically, the trustee should endeavor to assign the contracts as follows: First, to liquidate open commodity contracts in a risk-reducing manner in any accounts that are in deficit; second, to liquidate open commodity contracts in a risk-reducing manner in any accounts that are undermargined; third, to liquidate open commodity contracts in a risk-reducing manner in any other accounts, and finally to liquidate any remaining open commodity contracts in any accounts. If more than one commodity contract account reflects open commodity contracts in a particular account class for which liquidating transactions have been executed, the trustee shall to the extent practicable allocate the liquidating transactions to such commodity contract accounts pro rata based on the number of open commodity contracts of such commodity contract accounts. For purposes of this section, the term ''a risk-reducing manner'' is measured by margin requirements set using the margin methodology and parameters followed by the derivatives clearing organization at which such contracts are cleared.

(c) *Contracts moving into delivery position.* After entry of the order for relief and subject to paragraph (a) of this section, which requires the trustee to attempt to make transfers to other commodity brokers permitted by § 190.07 and section 764(b) of the Bankruptcy Code, the trustee shall use its best efforts to liquidate any open commodity contract that settles upon expiration or exercise via the making or taking of delivery of a commodity:

(1) If such contract is a futures contract or a cleared swaps contract, before the earlier of the last trading day or the first day on which notice of intent to deliver may be tendered with respect thereto, or otherwise before the debtor or its customer incurs an obligation to make or take delivery of the commodity under such contract;

(2) If such contract is a long option on a commodity and has value, before the first date on which the contract could be automatically exercised or the last date on which the contract could be exercised if not subject to automatic exercise; or

(3) If such contract is a short option on a commodity that is in-the-money in favor of the long position holder, before the first date on which the long option position could be exercised.

(d) *Liquidation or offset.* After entry of the order for relief and subject to paragraph (a) of this section, which requires the trustee to attempt to make transfers to other commodity brokers permitted by § 190.07 and section 764(b) of the Bankruptcy Code, and except as otherwise set forth in this paragraph (d), the following commodity contracts and other property held by or for the account of a debtor must be liquidated in the market in accordance with paragraph (e)(1) of this section or liquidated via book entry in accordance with paragraph (e)(2) of this section by

the trustee promptly and in an orderly manner:

(1) *Open commodity contracts.* All open commodity contracts, except for:

(i) Commodity contracts that are specifically identifiable property (if applicable) and are subject to customer instructions to transfer (in lieu of liquidating) as provided in § 190.03(c)(2), provided that the customer is in compliance with the terms of § 190.09(d)(2); and

(ii) Open commodity contract positions that are in a delivery position, which shall be treated in accordance with the provisions of § 190.06.

(2) *Specifically identifiable property, other than open commodity contracts or physical delivery property.* Specifically identifiable property, other than open commodity contracts or physical delivery property, to the extent that:

(i) The fair market value of such property is less than 75% of its fair market value on the date of entry of the order for relief;

(ii) Failure to liquidate the specifically identifiable property may result in a deficit balance in the applicable customer account; or

(iii) The trustee has not received instructions to return pursuant to § 190.03(c)(1), or has not returned such property upon the terms contained in § 190.09(d)(1).

(3) *Letters of credit.* The trustee may request that a customer deliver substitute customer property with respect to any letter of credit received, acquired, or held to margin, guarantee, secure, purchase, or sell a commodity contract, whether the letter of credit is held by the trustee on behalf of the debtor's estate or a derivatives clearing organization or a foreign intermediary or foreign clearing organization on a pass-through or other basis, including in cases where the letter of credit has expired since the date of the order for relief. The amount of the request may equal the full face amount of the letter of the credit or any portion thereof, to the extent required or may be required in the trustee's discretion to ensure pro rata treatment among customer claims within each account class, consistent with §§ 190.08 and 190.09.

(i) If a customer fails to provide substitute customer property within a reasonable time specified by the trustee, the trustee may, if the letter of credit has not expired, draw upon the full amount of the letter of credit or any portion thereof.

(ii) For any letter of credit referred to in this paragraph (d)(3), the trustee shall treat any portion that is not drawn upon (less the value of any substitute customer property delivered by the customer) as having been distributed to the customer for purposes of calculating entitlements to distribution or transfer. The expiration of the letter of credit on or at any time after the date of the order for relief shall not affect such calculation.

(iii) Any proceeds of a letter of credit drawn by the trustee, or substitute customer property posted by a customer, shall be considered customer property in the account class applicable to the original letter of credit.

(iv) The trustee shall, in exercising their discretion with regard to addressing letters of credit, including as to the timing and amount of a request for substitute customer property, endeavor to mitigate, to the extent practicable, the adverse effects upon customers that have posted letters of credit, in a manner that achieves *pro rata* treatment among customer claims.

(4) *All other property.* All other property, other than physical delivery property held for delivery in accordance with the provisions of § 190.06, which is not required to be transferred or returned pursuant to customer instructions and which has not been liquidated in accordance with paragraphs (d)(1) through (3) of this section.

(e) *Liquidation of open commodity contracts*—(1) *By the trustee or a clearing organization in the market*—(i) *Debtor as a clearing member.* For open commodity contracts cleared by the debtor as a member of a clearing organization, the trustee or clearing organization, as applicable, shall liquidate such open commodity contracts pursuant to the rules of the clearing organization, a designated contract market, or a swap execution facility, if and as applicable. Any such rules providing for liquidation other than on the open market shall be designed to achieve, to the extent feasible under market conditions at the time of liquidation, a process for liquidating open commodity contracts that results in competitive pricing. For open commodity contracts that are futures or options on futures that were established on or subject to the rules of a foreign board of trade and cleared by the debtor as a member of a foreign clearing organization, the trustee shall liquidate such open commodity contracts pursuant to the rules of the foreign clearing organization or foreign board of trade or, in the absence of such rules, in the manner the trustee determines appropriate.

(ii) *Debtor not a clearing member.* For open commodity contracts submitted by the debtor for clearing through one or more accounts established with a futures commission merchant (as defined in § 1.3 of this chapter) or foreign futures intermediary, the trustee shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation and subject to any rules or orders of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility, or foreign board of trade governing the liquidation of open commodity contracts.

(2) *By the trustee or a clearing organization via book entry offset.* Upon application by the trustee or clearing organization, the Commission may permit open commodity contracts to be liquidated, or settlement on such contracts to be made, by book entry. Such book entry shall offset open commodity contracts, whether matched or not matched on the books of the commodity broker, using the settlement price for such commodity contracts as determined by the clearing organization in accordance with its rules. Such rules shall be designed to establish, to the extent feasible under market conditions at the time of liquidation, such settlement prices in a competitive manner.

(3) *By a futures commission merchant or foreign futures intermediary.* For open commodity contracts cleared by the debtor through one or more accounts established with a futures commission merchant or a foreign futures intermediary, such futures commission merchant or foreign futures intermediary may exercise any enforceable contractual rights it has to liquidate such commodity contracts, provided, that it shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation and subject to any rules or orders of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility, or foreign board of trade governing its liquidation of such open commodity contracts. If a futures commission merchant or foreign futures intermediary fails to use commercially reasonable efforts to liquidate open commodity contracts to achieve competitive pricing in accordance with this paragraph (e)(3), the trustee may seek damages reflecting the difference between the price (or prices) at which the relevant commodity contracts would have been liquidated using commercially reasonable efforts to

achieve competitive pricing and the price (or prices) at which the commodity contracts were liquidated, which shall be the sole remedy available to the trustee. In no event shall any such liquidation be voided.

(4) *Liquidation only.* (i) Nothing in this part shall be interpreted to permit the trustee to purchase or sell new commodity contracts for the debtor or its customers except to offset open commodity contracts or to transfer any transferable notice received by the debtor or the trustee under any commodity contract; *provided, however,* that the trustee may, in its discretion and with approval of the Commission, cover uncovered inventory or commodity contracts of the debtor which cannot be liquidated immediately because of price limits or other market conditions, or may take an offsetting position in a new month or at a strike price for which limits have not been reached.

(ii) Notwithstanding paragraph (e)(4)(i) of this section, the trustee may, with the written permission of the Commission, operate the business of the debtor in the ordinary course, including the purchase or sale of new commodity contracts on behalf of the customers of the debtor under appropriate circumstances, as determined by the Commission.

(f) *Long option contracts.* Subject to paragraphs (d) and (e) of this section, the trustee shall use its best efforts to assure that a commodity contract that is a long option contract with value does not expire worthless.

§ 190.05 Operation of the debtor's estate—general.

(a) *Compliance with the Act and regulations in this chapter.* Except as specifically provided otherwise in this part, the trustee shall use reasonable efforts to comply with all of the provisions of the Act and of the regulations in this chapter as if it were the debtor.

(b) *Computation of funded balance.* The trustee shall use reasonable efforts to compute a funded balance for each customer account that contains open commodity contracts or other property as of the close of business each business day subsequent to the order for relief until the date all open commodity contracts and other property in such account have been transferred or liquidated, which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.

(c) *Records*—(1) *Maintenance.* Except as otherwise ordered by the court or as permitted by the Commission, records required under this chapter to be maintained by the debtor, including records of the computations required by this part, shall be maintained by the trustee until such time as the debtor's case is closed.

(2) *Accessibility.* The records required to be maintained by paragraph (c)(1) of this section shall be available during business hours to the Commission and the U.S. Department of Justice. The trustee shall give the Commission and the U.S. Department of Justice access to all records of the debtor, including records required to be retained in accordance with § 1.31 of this chapter and all other records of the commodity broker, whether or not the Act or this chapter would require such records to be maintained by the commodity broker.

(d) *Customer statements.* The trustee shall use all reasonable efforts to continue to issue account statements with respect to any customer for whose account open commodity contracts or other property is held that has not been liquidated or transferred. With respect to such accounts, the trustee must also issue an account statement reflecting any liquidation or transfer of open commodity contracts or other property promptly after such liquidation or transfer.

(e) *Other matters*—(1) *Disbursements.* With the exception of transfers of customer property made in accordance with § 190.07, the trustee shall make no disbursements to customers except with approval of the court.

(2) *Investment.* The trustee shall promptly invest the proceeds from the liquidation of commodity contracts or specifically identifiable property, and may invest any other customer property, in obligations of the United States and obligations fully guaranteed as to principal and interest by the United States, provided that such obligations are maintained in a depository located in the United States, its territories or possessions.

(f) *Residual interest.* The trustee shall apply the residual interest provisions of § 1.11 of this chapter in a manner appropriate to the context of their responsibilities as a bankruptcy trustee pursuant subchapter IV of chapter 7 of the Bankruptcy Code and this part, and in light of the existence of a surplus or deficit in customer property available to pay customer claims.

§ 190.06 Making and taking delivery under commodity contracts.

(a) *Deliveries*—(1) *General.* The provisions of this paragraph (a) apply to commodity contracts that settle upon expiration or exercise by making or taking delivery of physical delivery property, if such commodity contracts are in a delivery position on the filing date, or the trustee is unable to liquidate such commodity contracts in accordance with § 190.04(c) to prevent them from moving into a delivery position, *i.e.,* before the debtor or its customer incurs bilateral contractual obligations to make or take delivery under such commodity contracts.

(2) *Delivery made or taken on behalf of a customer outside of the administration of the debtor's estate.* (i) The trustee shall use reasonable efforts to allow a customer to deliver physical delivery property that is held directly by the customer and not by the debtor (and thus not recorded in any commodity contract account of the customer) in settlement of a commodity contract, and to allow payment in exchange for such delivery, to occur outside the administration of the debtor's estate, when the rules of the exchange or other market listing the commodity contract, or the clearing organization or the foreign clearing organization clearing the commodity contract, as applicable, prescribe a process for delivery that allows the delivery to be fulfilled:

(A) In the normal course directly by the customer;

(B) By substitution of the customer for the commodity broker; or

(C) Through agreement of the buyer and seller to alternative delivery procedures.

(ii) Where a customer delivers physical delivery property in settlement of a commodity contract outside of the administration of the debtors' estate in accordance with paragraph (a)(2)(i) of this section, any property of such customer held at the debtor in connection with such contract must nonetheless be included in the net equity claim of that customer, and, as such, can only be distributed pro rata at the time of, and as part of, any distributions to customers made by the trustee.

(3) *Delivery as part of administration of the debtor's estate.* When the trustee determines that it is not practicable to effect delivery as provided in paragraph (a)(2) of this section:

(i) To facilitate the making or taking of delivery directly by a customer, the trustee may, as it determines reasonable under the circumstances of the case and consistent with the pro rata distribution of customer property by account class:

(A) When a customer is obligated to make delivery, return any physical delivery property to the customer that is held by the debtor for or on behalf of the customer under the terms set forth in § 190.09(d)(1)(ii), to allow the customer to deliver such property to fulfill its

delivery obligation under the commodity contract; or

(B) When a customer is obligated to take delivery:

(*1*) Return any cash delivery property to the customer that is reflected in the customer's delivery account, provided that cash delivery property returned under this paragraph (a)(3)(i)(B)(*1*) shall not exceed the lesser of:

(*i*) The amount the customer is required to pay for delivery of the commodity; or

(*ii*) The customer's net funded balance for all of the customer's commodity contract accounts;

(*2*) Return cash, securities, or other property held in the customer's non-delivery commodity contract accounts, provided that property returned under this section shall not exceed the lesser of:

(*i*) The amount the customer is required to pay for delivery of the commodity; or

(*ii*) The net funded balance for all of the customer's commodity contract accounts reduced by any amount returned to the customer pursuant to paragraph (a)(3)(i)(B)(*1*) of this section, and provided further, however, that the trustee may distribute such property only to the extent that the customer's funded balance for each such account exceeds the minimum margin obligations for such account (as described in § 190.04(b)(2)); and

(C) Impose such conditions on the customer as it considers appropriate to assure that property returned to the customer is used to fulfill the customer's delivery obligations.

(ii) If the trustee does not return physical delivery property, cash delivery property, or other property in the form of cash or cash equivalents to the customer as provided in paragraph (a)(3)(i) of this section, subject to paragraph (a)(4) of this section:

(A) To the extent practical, the trustee shall make or take delivery of physical delivery property in the same manner as if no bankruptcy had occurred, and when making delivery, the party to which delivery is made must pay the full price required for taking such delivery; or

(B) When taking delivery of physical delivery property:

(*1*) The trustee shall pay for the delivery first using the customer's cash delivery property or other property, limited to the amounts set forth in paragraph (a)(3)(i)(B) of this section, along with any cash transferred by the customer to the trustee on or after the filing date for the purpose of paying for delivery.

(*2*) If the value of the cash or cash equivalents that may be used to pay for deliveries as described in paragraph (a)(3)(i)(B) of this section is less than the amount required to be paid for taking delivery, the trustee shall issue a payment call to the customer. The full amount of any payment made by the customer in response to a payment call must be credited to the funded balance of the particular account for which such payment is made.

(*3*) If the customer fails to meet a call for payment under paragraph (a)(3)(ii)(B)(*2*) of this section before payment is made for delivery, the trustee must convert any physical delivery property received on behalf of the customer to cash as promptly as possible.

(4) *Deliveries in a securities account.* If an open commodity contract held in a futures account, foreign futures account, or cleared swaps account requires delivery of a security upon expiration or exercise of such commodity contract, and delivery is not completed pursuant to paragraph (a)(2) or (a)(3)(i) of this section, the trustee may make or take delivery in a securities account in a manner consistent with paragraph (a)(3)(ii) of this section, *provided, however,* that the trustee may transfer property from the customer's commodity contract accounts to the securities account to fulfill the delivery obligation only to the extent that the customer's funded balance for such commodity contract account exceeds the customer's minimum margin obligations for such accounts (as described in § 190.04(b)(2)) and provided further that the customer is not under-margined or does not have a deficit balance in any other commodity contract accounts.

(5) *Delivery made or taken on behalf of proprietary account.* If delivery of physical delivery property is to be made or taken on behalf of the debtor's own account or the account of any non-public customer of the debtor, the trustee shall make or take delivery, as the case may be, on behalf of the debtor's estate, provided that if the trustee takes delivery of physical delivery property it must convert such property to cash as promptly as possible.

(b) *Special account class provisions for delivery accounts.* (1) Within the delivery account class, the trustee shall treat—

(i) Physical delivery property held in delivery accounts as of the filing date, and the proceeds of any such physical delivery property subsequently received, as part of the physical delivery account class; and

(ii) Cash delivery property in delivery accounts as of the filing date, along with any physical delivery property for which delivery is subsequently taken on behalf of a customer in accordance with paragraph (a)(3) of this section, as part of a separate cash delivery account class.

(2)(i) If the debtor holds any cash or cash equivalents in an account maintained at a bank, clearing organization, foreign clearing organization, or other person, under a name or in a manner that clearly indicates that the account holds property for the purpose of making payment for taking delivery, or receiving payment for making delivery, of a commodity under commodity contracts, such property shall (subject to § 190.09) be considered customer property—

(A) In the cash delivery account class if held for making payment for taking delivery; and

(B) In the physical delivery account class, if held as a result of receiving such payment for a making delivery after the filing date.

(ii) Any other property (excluding property segregated for the benefit of customer in the futures, foreign futures or cleared swaps account class) that is traceable as having been held or received for the purpose of making delivery, or as having been held or received as a result of taking delivery, of a commodity under commodity contracts, shall (subject to § 190.09) be considered customer property—

(A) In the cash delivery account class if received after the filing date in exchange for taking delivery; and

(B) Otherwise shall be considered customer property in the physical delivery account class.

§ 190.07 Transfers.

(a) *Transfer rules.* No clearing organization or self-regulatory organization may adopt, maintain in effect, or enforce rules that:

(1) Are inconsistent with the provisions of this part;

(2) Interfere with the acceptance by its members of transfers of commodity contracts, and the property margining or securing such contracts, from futures commission merchants that are required to transfer accounts pursuant to § 1.17(a)(4) of this chapter; or

(3) Interfere with the acceptance by its members of transfers of commodity contracts, and the property margining or securing such contracts, from a futures commission merchant that is a debtor as defined in § 190.01, if such transfers have been approved by the Commission,

provided, however, that this paragraph (a)(3) shall not—

(i) Limit the exercise of any contractual right of a clearing organization or other registered entity to liquidate or transfer open commodity contracts; or

(ii) Be interpreted to limit a clearing organization's ability adequately to manage risk.

(b) *Requirements for transferees.* (1) It is the duty of each transferee to assure that it will not accept a transfer that would cause the transferee to be in violation of the minimum financial requirements set forth in this chapter.

(2) Any transferee that accepts a transfer of open commodity contracts from the estate of the debtor—

(i) Accepts the transfer subject to any loss that may arise in the event the transferee cannot recover from the customer any deficit balance that may arise related to the transferred open commodity contracts.

(ii) If the commodity contracts were held for the account of a customer:

(A) Must keep such commodity contracts open at least one business day after their receipt, unless the customer for whom the transfer is made fails to respond within a reasonable time to a margin call for the difference between the margin transferred with such commodity contracts and the margin which such transferee would require with respect to a similar set of commodity contracts held for the account of a customer in the ordinary course of business; and

(B) May not collect commissions with respect to the transfer of such commodity contracts.

(3) A transferee may accept open commodity contracts and property, and open accounts on its records, for customers whose commodity contracts and property are transferred pursuant to this part prior to completing customer diligence, provided that account opening diligence as required by law (including the risk disclosures referred to in § 1.65(a)(3) of this chapter) is performed, and records and information required by law are obtained, as soon as practicable, but in any event within six months of the transfer, unless this time is extended for a particular account, transferee, or debtor by the Commission.

(4)(i) Any account agreements governing a transferred account (including an account that has been partially transferred) shall be deemed assigned to the transferee by operation of law and shall govern the transferee and customer's relationship until such time as the transferee and customer enter into a new agreement; *provided, however,* that any breach of such agreement by the debtor existing at or before the time of the transfer (including, but not limited to, any failure to segregate sufficient customer property) shall not constitute a default or breach of the agreement on the part of the transferee, or constitute a defense to the enforcement of the agreement by the transferee.

(ii) Paragraph (b)(4)(i) of this section shall not apply where the customer has a pre-existing account agreement with the transferee futures commission merchant. In such a case, the transferred account will be governed by that pre-existing account agreement.

(5) If open commodity contracts or any specifically identifiable property has been, or is to be, transferred in accordance with section 764(b) of the Bankruptcy Code and this section, customer instructions previously received by the trustee with respect to open commodity contracts or with respect to specifically identifiable property, shall be transmitted to the transferee of property, which shall comply therewith to the extent practicable.

(c) *Eligibility for transfer under section 764(b) of the Bankruptcy Code—accounts eligible for transfer.* All commodity contract accounts (including accounts with no open commodity contract positions) are eligible for transfer after the order for relief pursuant to section 764(b) of the Bankruptcy Code, except:

(1) The debtor's own account or the accounts of general partners of the debtor if the debtor is a partnership; and

(2) Accounts that are in deficit.

(d) *Special rules for transfers under section 764(b) of the Bankruptcy Code—*(1) *Effecting transfer.* The trustee for a commodity broker shall use its best efforts to effect a transfer to one or more other commodity brokers of all eligible commodity contract accounts, open commodity contracts and property held by the debtor for or on behalf of its customers, based on customer claims or record, no later than the seventh calendar day after the order for relief.

(2) *Partial transfers; multiple transferees—*(i) *Of the customer estate.* If all eligible commodity contract accounts held by a debtor cannot be transferred under this section, a partial transfer may nonetheless be made. The Commission will not disapprove such a transfer for the sole reason that it was a partial transfer. Commodity contract accounts may be transferred to one or more transferees, and, subject to paragraph (d)(4) of this section, may be transferred to different transferees by account class.

(ii) *Of a customer's commodity contract account.* If all of a customer's open commodity contracts and property cannot be transferred under this section, a partial transfer of contracts and property may be made so long as such transfer would not result in an increase in the amount of any customer's net equity claim. One, but not the only, means to effectuate a partial transfer is by liquidating a portion of the open commodity contracts held by a customer such that sufficient value is realized, or margin requirements are reduced to an extent sufficient, to permit the transfer of some or all of the remaining open commodity contracts and property. If any open commodity contract to be transferred in a partial transfer is part of a spread or straddle, to the extent practicable under the circumstances, each side of such spread or straddle must be transferred or none of the open commodity contracts comprising the spread or straddle may be transferred.

(3) *Letters of credit.* A letter of credit received, acquired, or held to margin, guarantee, secure, purchase, or sell a commodity contract may be transferred with an eligible commodity contract account if it is held by a derivatives clearing organization on a pass-through or other basis or is transferable by its terms, so long as the transfer will not result in a recovery which exceeds the amount to which the customer would be entitled under §§ 190.08 and 190.09. If the letter of credit cannot be transferred as provided for in the foregoing sentence, and the customer does not deliver substitute customer property to the trustee in accordance with § 190.04(d)(3), the trustee may draw upon a portion or all of the letter of credit, the proceeds of which shall be treated as customer property in the applicable account class.

(4) *Physical delivery property.* The trustee shall use reasonable efforts to prevent physical delivery property held for the purpose of making delivery on a commodity contract from being transferred separate and apart from the related commodity contract, or to a different transferee.

(5) *No prejudice to other customers.* No transfer shall be made under this part by the trustee if, after taking into account all customer property available for distribution to customers in the applicable account class at the time of the transfer, such transfer would result in insufficient remaining customer property to make an equivalent percentage distribution (including all previous transfers and distributions) to all customers in the applicable account class, based on—

(i) Customer claims of record; and

(ii) Estimates of other customer claims made in the trustee's reasonable discretion based on available information, in each case as of the calendar day immediately preceding transfer.

(e) *Prohibition on avoidance of transfers under section 764(b) of the Bankruptcy Code*—(1) *Pre-relief transfers.* Notwithstanding the provisions of paragraphs (c) and (d) of this section, the following transfers are approved and may not be avoided under sections 544, 546, 547, 548, 549, or 724(a) of the Bankruptcy Code:

(i) The transfer of commodity contract accounts or customer property prior to the entry of the order for relief in compliance with § 1.17(a)(4) of this chapter unless such transfer is disapproved by the Commission;

(ii) The transfer, withdrawal, or settlement, prior to the order for relief at the request of a public customer, including a transfer, withdrawal, or settlement at the request of a public customer that is a commodity broker, of commodity contract accounts or customer property held from or for the account of such customer by or on behalf of the debtor unless:

(A) The customer acted in collusion with the debtor or its principals to obtain a greater share of customer property or the bankruptcy estate than that to which it would be entitled under this part; or

(B) The transfer is disapproved by the Commission;

(iii) The transfer prior to the order for relief by a clearing organization, or by a receiver that has been appointed for the futures commission merchant (FCM) that is now a debtor, of one or more accounts held for or on behalf of customers of the debtor, or of commodity contracts and other customer property held for or on behalf of customers of the debtor, provided that the transfer is not disapproved by the Commission.

(2) *Post-relief transfers.* Notwithstanding the provisions of paragraphs (c) and (d) of this section, the following transfers are approved and may not be avoided under sections 544, 546, 547, 548, 549, or 724(a) of the Bankruptcy Code:

(i) The transfer of a commodity contract account or customer property eligible to be transferred under paragraphs (c) and (d) of this section made by the trustee or by any clearing organization on or before the seventh calendar day after the entry of the order for relief, as to which the Commission has not disapproved the transfer; or

(ii) The transfer of a commodity contract account or customer property at the direction of the Commission on or before the seventh calendar day after the order for relief, upon such terms and conditions as the Commission may deem appropriate and in the public interest.

(f) *Commission action.* Notwithstanding any other provision of this section (other than paragraphs (d)(2)(ii) and (d)(5) of this section), in appropriate cases and to protect the public interest, the Commission may:

(1) Prohibit the transfer of a particular set or sets of commodity contract accounts and customer property; or

(2) Permit transfers of a particular set or sets of commodity contract accounts and customer property that do not comply with the requirements of this section.

§ 190.08 Calculation of funded net equity.

For purposes of this subpart, funded net equity shall be computed as follows:

(a) *Funded claim.* The funded net equity claim of a customer shall be equal to the aggregate of the funded balances of such customer's net equity claim for each account class.

(b) *Net equity.* Net equity means a customer's total customer claim of record against the estate of the debtor based on the customer property, including any commodity contracts, held by the debtor for or on behalf of such customer less any indebtedness of the customer to the debtor. Net equity shall be calculated as follows:

(1) *Step 1-equity determination.* (i) Determine the equity balance of each commodity contract account of a customer by computing, with respect to such account, the sum of:

(A) The ledger balance;

(B) The open trade balance; and

(C) The realizable market value, determined as of the close of the market on the last preceding market day, of any securities or other property held by or for the debtor from or for such account, plus accrued interest, if any.

(ii) For the purposes of this paragraph (b)(1), the ledger balance of a customer account shall be calculated by:

(A) Adding:

(*1*) Cash deposited to purchase, margin, guarantee, secure, or settle a commodity contract;

(*2*) Cash proceeds of liquidations of any securities or other property referred to in paragraph (b)(1)(i)(C) of this section;

(*3*) Gains realized on trades; and

(*4*) The face amount of any letter of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract; and

(B) Subtracting from the result:

(*1*) Losses realized on trades;

(*2*) Disbursements to or on behalf of the customer (including, for these purposes, transfers made pursuant to §§ 190.04(a) and 190.07); and

(*3*) The normal costs attributable to the payment of commissions, brokerage, interest, taxes, storage, transaction fees, insurance, and other costs and charges lawfully incurred in connection with the purchase, sale, exercise, or liquidation of any commodity contract in such account.

(iii) For purposes of this paragraph (b)(1), the open trade balance of a customer's account shall be computed by subtracting the unrealized loss in value of the open commodity contracts held by or for such account from the unrealized gain in value of the open commodity contracts held by or for such account.

(iv) For purposes of this paragraph (b)(1), in calculating the ledger balance or open trade balance of any customer, exclude any security futures products, any gains or losses realized on trades in such products, any property received to margin, guarantee, or secure such products (including interest thereon or the proceeds thereof), to the extent any of the foregoing are held in a securities account, and any disbursements to or on behalf of such customer in connection with such products or such property held in a securities account.

(2) *Step 2-customer determination (aggregation).* Aggregate the credit and debit equity balances of all accounts of the same class held by a customer in the same capacity. Paragraphs (b)(2)(i) through (xii) of this section prescribe which accounts must be treated as being held in the same capacity and which accounts must be treated as being held in a separate capacity.

(i) Except as otherwise provided in this paragraph (b)(2), all accounts that are maintained with a debtor in a person's name and that, under this paragraph (b)(2), are deemed to be held by that person in its individual capacity shall be deemed to be held in the same capacity.

(ii) An account maintained with a debtor by a guardian, custodian, or conservator for the benefit of a ward, or for the benefit of a minor under the Uniform Gift to Minors Act, shall be deemed to be held in a separate capacity from accounts held by such guardian, custodian or conservator in its individual capacity.

(iii) An account maintained with a debtor in the name of an executor or administrator of an estate in its capacity as such shall be deemed to be held in a separate capacity from accounts held by such executor or administrator in its individual capacity.

(iv) An account maintained with a debtor in the name of a decedent, in the name of the decedent's estate, or in the name of the executor or administrator of such estate in its capacity as such shall be deemed to be accounts held in the same capacity.

(v) An account maintained with a debtor by a trustee shall be deemed to be held in the individual capacity of the grantor of the trust unless the trust is created by a valid written instrument for a purpose other than avoidance of an offset under the regulations contained in this part. A trust account which is not deemed to be held in the individual capacity of its grantor under this paragraph (b)(2)(v) shall be deemed to be held in a separate capacity from accounts held in an individual capacity by the trustee, by the grantor or any successor in interest of the grantor, or by any trust beneficiary, and from accounts held by any other trust.

(vi) An account maintained with a debtor by a corporation, partnership, or unincorporated association shall be deemed to be held in a separate capacity from accounts held by the shareholders, partners or members of such corporation, partnership, or unincorporated association, if such entity was created for purposes other than avoidance of an offset under the regulations contained in this part.

(vii) A hedging account of a person shall be deemed to be held in the same capacity as a speculative account of such person.

(viii) Subject to paragraphs (b)(2)(ix) and (xiv) of this section, the futures accounts, foreign futures accounts, delivery accounts, and cleared swaps accounts of the same person shall not be deemed to be held in separate capacities: *Provided, however,* that such accounts may be aggregated only in accordance with paragraph (b)(3) of this section.

(ix) An omnibus customer account for public customers of a futures commission merchant maintained with a debtor shall be deemed to be held in a separate capacity from any omnibus customer account for non-public customers of such futures commission merchant and from any account maintained with the debtor on its own behalf or on behalf of any non-public customer.

(x) A joint account maintained with the debtor shall be deemed to be held in a separate capacity from any account held in an individual capacity by the participants in such account, from any account held in an individual capacity by a commodity pool operator or commodity trading advisor for such account, and from any other joint account; *provided, however,* that if such account is not transferred in accordance with §§ 190.04(a) and 190.07, it shall be deemed to be held in the same capacity as any other joint account held by identical participants and a participant's percentage interest therein shall be deemed to be held in the same capacity as any account held in an individual capacity by such participant.

(xi) An account maintained with a debtor in the name of a plan that is subject to the terms of the Employee Retirement Income Security Act of 1974 and the regulations in 29 CFR chapter XXV, or similar state, Federal, or foreign laws or regulations applicable to retirement or pension plans, shall be deemed to be held in a separate capacity from an account held in an individual capacity by the plan administrator, any employer, employee, participant, or beneficiary with respect to such plan.

(xii) Except as otherwise provided in this section, an account maintained with a debtor by an agent or nominee for a principal or a beneficial owner shall be deemed to be an account held in the individual capacity of such principal or beneficial owner.

(xiii) With respect to the cleared swaps account class, each individual cleared swaps customer account within each cleared swap omnibus customer account referred to in paragraph (b)(2)(viii) of this section shall be deemed to be held in a separate capacity from each other such individual cleared swaps customer account, subject to the provisions of paragraphs (b)(2)(i) through (xi) of this section.

(xiv) Accounts held by a customer in separate capacities shall be deemed to be accounts of different customers. The burden of proving that an account is held in a separate capacity shall be upon the customer.

(3) *Step 3-setoffs.* (i) The net equity of one customer account may not be offset against the net equity of any other customer account.

(ii) Any obligation to the debtor owed by a customer which is not required to be included in computing the equity of that customer under paragraph (b)(1) of this section (defined as x), must be deducted from any obligation to the customer owed by the debtor which is not required to be included in computing the equity of that customer (defined as y). If the former amount (x) exceeds the latter (y), the excess (x-y) must be deducted from the equity balance of the customer obtained after performing the preceding calculations required by paragraph (b) of this section, provided, that if the customer owns more than one class of accounts with a positive equity balance, the excess (again, x-y) must be allocated and offset against each positive equity balance in the same proportion as that positive equity balance bears to the total of all positive equity balances of accounts of different classes held by such customer.

(iii) A negative equity balance obtained with respect to one customer account class must be set off against a positive equity balance in any other account class of such customer held in the same capacity, provided, that if a customer owns more than one class of accounts with a positive equity balance, such negative equity balance must be offset against each positive equity balance in the same proportion as that positive equity balance bears to the total of all positive equity balances in accounts of different classes held by such customer.

(iv) To the extent any indebtedness of the debtor to the customer which is not required to be included in computing the equity of such customer under paragraph (b)(1) of this section exceeds such indebtedness of the customer to the debtor, the customer claim therefor will constitute a general creditor claim rather than a customer property claim, and the net equity therefor shall be separately calculated.

(v) The rules pertaining to separate capacities and permitted setoffs contained in this section shall only be applied subsequent to the entry of an order for relief; prior to that date, the provisions of § 1.22 of this chapter and of sections 4d(a)(2) and 4d(f) of the Act (and, in each case, the regulations in part 1, 22, or 30 of this chapter that implement sections 4d(a)(2) and 4d(f)) shall govern what setoffs are permitted.

(4) *Step 4-correction for distributions.* The value on the date of transfer or distribution of any property transferred or distributed subsequent to the filing date and prior to the primary liquidation date with respect to each class of account held by a customer must be added to the equity obtained for that customer for accounts of that class after performing the steps contained in paragraphs (b)(1) through (3) of this section: *Provided, however,* that if all accounts for which there are customer claims of record and 100% of the equity pertaining thereto is transferred in accordance with § 190.07 and section 764(b) of the Bankruptcy Code, net equity shall be computed based solely upon those allowed customer claims, if any, filed subsequent to the order for relief which are not claims of record on the filing date.

(5) *Step 5-correction for ongoing events.* Compute any adjustments to the steps in paragraphs (b)(1) through (4) of this section required to correct

misestimates or errors including, without limitation, corrections for ongoing events such as the liquidation of unliquidated claims or specifically identifiable property at a value different from the estimated value previously used in computing net equity.

(c) *Calculation of funded balance. Funded balance* means a customer's pro rata share of the customer estate with respect to each account class available for distribution to customers of the same customer class.

(1) *Funded balance computation.* The funded balance of any customer claim shall be computed (separately by account class and customer class) by:

(i) Multiplying the ratio of the amount of the net equity claim of such customer (defined as x) less the amounts referred to in paragraph (c)(1)(ii) of this section of such customer for any account class (defined as y) divided by the sum of the net equity claims of all customers for accounts of that class (defined as p) less the amounts referred to in paragraph (c)(1)(ii) of this section of all customers for accounts of that class (defined as q) (thus, ((x-y)/(p-q)) by the sum of:

(A) The value of letters of credit received, acquired, or held to margin, guarantee, secure, purchase, or sell a commodity contract relating to all customer accounts of the same class;

(B) The value of the money, securities, or other property segregated on behalf of all customer accounts of the same class less the amounts referred to in paragraph (c)(1)(ii) of this section;

(C) The value of any money, securities, or other property which must be allocated under § 190.09 to all customer accounts of the same class; and

(D) The amount of any add-back required under paragraph (b)(4) of this section; and

(ii) Then adding 100% of—

(A) Any margin payment made between the entry of the order for relief (or, in an involuntary case, the date on which the petition for bankruptcy is filed) and the primary liquidation date; *provided, however,* that if margin is posted to substitute for a letter of credit, such margin does not increase the funded balance; and

(B) For cash delivery property, any cash transferred to the trustee on or after the filing date for the purpose of paying for delivery.

(2) *Corrections to funded balance.* The funded balance must be adjusted to correct for ongoing events including, without limitation:

(i) Added claimants;

(ii) Disallowed claims;

(iii) Liquidation of unliquidated claims at a value other than their estimated value; and

(iv) Recovery of property.

(d) *Valuation.* In computing net equity, commodity contracts and other property held by or for a commodity broker must be valued as provided in this paragraph (d).

(1) *Commodity contracts*—(i) *Open contracts.* Unless otherwise specified in this paragraph (d), the value of an open commodity contract shall be equal to the settlement price as calculated by the clearing organization pursuant to its rules; *provided, however,* that if an open commodity contract is transferred to another commodity broker, its value on the debtor's books and records shall be determined as of the end of the last settlement cycle on the day preceding such transfer.

(ii) *Liquidated contracts.* Except as specified in paragraphs (d)(1)(ii)(A) and (B) of this section, the value of a commodity contract liquidated on the open market shall equal the actual value realized on liquidation of the commodity contract.

(A) *Weighted average.* If identical commodity contracts are liquidated within a 24-hour period or business day (or such other period as the bankruptcy court may determine is appropriate) as part of a general liquidation of commodity contracts, but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer for which the debtor held such commodity contracts.

(B) *Bulk liquidation.* The value of a commodity contract liquidated as part of a bulk auction, taken into inventory or under management by a clearing organization, or similarly liquidated outside of the open market shall be equal to the settlement price calculated by the clearing organization as of the end of the settlement cycle during which the commodity contract was liquidated.

(2) *Securities.* The value of a listed security shall be equal to the closing price for such security on the exchange upon which it is traded. The value of all securities not traded on an exchange shall be equal in the case of a long position, to the average of the bid prices for long positions, and in the case of a short position, to the average of the asking prices for the short positions. If liquidated, the value of such security shall be equal to the actual value realized on liquidation of the security; *provided, however,* that if identical securities are liquidated within a 24-hour period or business day (or such other period as the bankruptcy court may determine is appropriate) as part of a general liquidation of securities, but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer for which the debtor held such securities. Securities which are not publicly traded shall be valued by the trustee pursuant to paragraph (d)(5) of this section.

(3) *Commodities held in inventory.* Commodities held in inventory, as collateral or otherwise, shall be valued at their fair market value. If such fair market value is not readily ascertainable based upon public sources of prices, the trustee shall value such commodities pursuant to paragraph (d)(5) of this section.

(4) *Letters of credit.* The value of any letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract shall be its face amount, less the amount, if any, drawn and outstanding, provided that, if the trustee makes a determination in good faith that a draw on a letter of credit is unlikely to be honored on either a temporary or a permanent basis, the trustee shall value the letter of credit pursuant to paragraph (d)(5) of this section.

(5) *All other property.* Subject to the other provisions of this paragraph (d), all other property shall be valued by the trustee using such professional assistance as the trustee deems necessary in its sole discretion under the circumstances; *provided, however,* that if such property is sold, its value for purposes of the calculations required by this part shall be equal to the actual value realized on the sale of such property; and, provided further, that the sale shall be made in compliance with all applicable statutes, rules, and orders of any court or governmental entity with jurisdiction there over.

§ 190.09 Allocation of property and allowance of claims.

The property of the debtor's estate must be allocated among account classes and between customer classes as provided in this section. (Property connected with certain cross-margining arrangements is subject to the provisions of framework 1 in appendix B to this part.) The property so allocated will constitute a separate estate of the customer class and the account class to which it is allocated, and will be designated by reference to such customer class and account class.

(a) *Scope of customer property.* (1) Customer property includes the following:

(i) All cash, securities, or other property or the proceeds of such cash, securities, or other property received, acquired, or held by or for the account of the debtor, from or for the account of a customer, including a non-public customer, which is:

(A) Property received, acquired, or held to margin, guarantee, secure, purchase or sell a commodity contract;

(B) Open commodity contracts;

(C) Physical delivery property as that term is defined in paragraphs (1) through (3) in the definition of that term in § 190.01;

(D) Cash delivery property, or other cash, securities, or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the commodity customer account of a customer;

(E) Profits or contractual rights accruing to a customer as the result of a commodity contract;

(F) Letters of credit, including any proceeds of a letter of credit drawn by the trustee, or substitute customer property posted by the customer, pursuant to § 190.04(d)(3);

(G) Securities held in a portfolio margining account carried as a futures account or a cleared swaps customer account; or

(H) Property hypothecated under § 1.30 of this chapter to the extent that the value of such property exceeds the proceeds of any loan of margin made with respect thereto; and

(ii) All cash, securities, or other property which:

(A) Is segregated for customers on the filing date;

(B) Is a security owned by the debtor to the extent there are customer claims for securities of the same class and series of an issuer;

(C) Is specifically identifiable to a customer;

(D) Was property of a type described in paragraph (a)(1)(i)(A) of this section that is subsequently recovered by the avoidance powers of the trustee or is otherwise recovered by the trustee on any other claim or basis;

(E) Represents recovery of any debit balance, margin deficit, or other claim of the debtor against a customer;

(F) Was unlawfully converted but is part of the debtor's estate;

(G) Constitutes current assets of the debtor (as of the date of the order for relief) within the meaning of § 1.17(c)(2) of this chapter, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, in the greater of—

(*1*) The amount that the debtor is obligated to set aside as its targeted residual interest amount pursuant to § 1.11 of this chapter and the debtor's residual interest policies adopted thereunder, with respect to each of the futures account class, the foreign futures account class, and the cleared swaps account class; or

(*2*) The debtor's obligations to cover debit balances or under-margined amounts as provided in §§ 1.20, 1.22, 22.2, and 30.7 of this chapter;

(H) Is other property of the debtor that any applicable law, rule, regulation, or order requires to be set aside for the benefit of customers;

(I) Is property of the debtor's estate recovered by the Commission in any proceeding brought against the principals, agents, or employees of the debtor;

(J) Is proceeds from the investment of customer property by the trustee pending final distribution;

(K) Is a payment from an insurer to the trustee arising from or related to a claim related to the conversion or misuse of customer property; or

(L) Is cash, securities, or other property of the debtor's estate, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, but only to the extent that the property enumerated in paragraphs (a)(1)(i)(F) and (a)(1)(ii)(A) through (K) of this section is insufficient to satisfy in full all claims of public customers. Such property includes ''customer property,'' as defined in section 16(4) of SIPA, 15 U.S.C. 78lll(4), that remains after allocation in accordance with section 8(c)(1)(A)–(D) of SIPA, 15 U.S.C. 78fff–2(c)(1)(A)–(D) and that is allocated to the debtor's general estate in accordance with section 8(c)(1) of SIPA, 15 U.S.C. 78fff–2(c)(1).

(2) Customer property will not include:

(i) Claims against the debtor for damages for any wrongdoing of the debtor, including claims for misrepresentation or fraud, or for any violation of the Act or of the regulations in this chapter;

(ii) Other claims for property which are not based upon property received, acquired, or held by or for the account of the debtor, from or for the account of the customer;

(iii) Forward contracts (unless such contracts are cleared by a clearing organization or, in the case of forward contracts treated as foreign futures, a foreign clearing organization);

(iv) Physical delivery property that is not held by the debtor, and is delivered or received by a customer in accordance with § 190.06(a)(2) or § 190.16(a) to fulfill the customer's delivery obligation under a commodity contract;

(v) Property deposited by a customer with a commodity broker after the entry of an order for relief which is not necessary to meet the margin requirements applicable to the accounts of such customer;

(vi) Property hypothecated pursuant to § 1.30 of this chapter to the extent of the loan of margin with respect thereto;

(vii) Money, securities, or property held to margin, guarantee or secure security futures products, or accruing as a result of such products, if held in a securities account; and

(viii) Money, securities, or property held in a securities account to fulfill delivery, under a commodity contract from or for the account of a customer, as described in § 190.06(b)(2).

(3) Nothing contained in this section, including, but not limited to, the satisfaction of customer claims by operation of this section, shall prevent a trustee from asserting claims against any person to recover the shortfall of property enumerated in paragraphs (a)(1)(i)(F) and (a)(1)(ii)(A) through (L) of this section.

(b) *Allocation of customer property between customer classes.* No customer property may be allocated to pay non-public customer claims until all public customer claims have been satisfied in full. Any property segregated on behalf of or attributable to non-public customers must be treated initially as part of the public customer estate and allocated in accordance with paragraph (c)(2) of this section.

(c) *Allocation of customer property among account classes*—(1) *Property identified to an account class*—(i) *Segregated property.* Subject to paragraph (b) of this section, property held by or for the account of a customer, which is segregated on behalf of a specific account class, or readily traceable on the filing date to customers of such account class, or recovered by the trustee on behalf of or for the benefit of an account class, must be allocated to the customer estate of the account class for which it is segregated, to which it is readily traceable, or for which it is recovered.

(ii) *Excess property.* If, after payment in full of all allowed customer claims in a particular account class, any property remains allocated to that account class, such excess shall be allocated in accordance with paragraph (c)(2) of this section.

(2) *All other property.* Money, securities, and property received from or for the account of customers which cannot be allocated in accordance with

paragraph (c)(1)(i) of this section, must be allocated in the following order:

(i) To the estate of the account class for which, after the allocation required in paragraph (c)(1) of this section, the percentage of each public customer net equity claim which is funded is the lowest, until the funded percentage of net equity claims of such class equals the percentage of each public customer's net equity claim which is funded for the account class with the next lowest percentage of the funded claims; and then

(ii) To the estate of the two account classes referred to in paragraph (c)(2)(i) of this section so that the percentage of the net equity claims which are funded for each class remains equal until the percentage of each public customer net equity claim which is funded equals the percentage of each public customer net equity claim which is funded for the account class with the next lowest percentage of funded claims, and so forth, until the percentage of each public customer net equity claim which is funded is equal for all classes of accounts; and then,

(iii) Among account classes in the same proportion as the public customer net equity claims for each such account class bears to the total of public customer net equity claims of all account classes until the public customer claims of each account class are paid in full; and, thereafter,

(iv) To the non-public customer estate for each account class in the same order as is prescribed in paragraphs (c)(2)(i) through (iii) of this section for the allocation of the customer estate among account classes.

(d) *Distribution of customer property*—(1) *Return or transfer of specifically identifiable property.* Specifically identifiable property not required to be liquidated under § 190.04(d)(2) may be returned or transferred on behalf of the customer to which it is identified:

(i) If it is margining an open commodity contract, only if substitute customer property is first deposited with the trustee with a value equal to the greater of the full fair market value of such property on the return date or the balance due on the return date on any loan by the debtor to the customer for which such property constitutes security; or

(ii) If it is not margining an open commodity contract, at the option of the customer, either pursuant to the terms of paragraph (d)(1)(i) of this section, or pursuant to the following terms: Such customer first deposits substitute customer property with the trustee with a value equal to the amount by which the greater of the value of the specifically identifiable property to be transferred or returned on the date of such transfer or return or the balance due on the return date on any loan by the debtor to the customer for which such property constitutes security, together with any other disbursements made, or to be made, to such customer, plus a reasonable reserve in the trustee's sole discretion, exceeds the estimated aggregate of the funded balances for each class of account of such customer less the value on the date of its transfer or return of any property transferred or returned prior to the primary liquidation date with respect to the customer's net equity claim for such account; *provided, however,* that adequate security to assure the recovery of any overpayments by the trustee is provided to the debtor's estate by the customer.

(2) *Transfers of specifically identifiable commodity contracts under section 766 of the Bankruptcy Code.* Any open commodity contract that is specifically identifiable property and which is not required to be liquidated under § 190.04(d), and which is not otherwise liquidated, may be transferred on behalf of a public customer, *provided, however,* that such customer must first deposit substitute customer property with the trustee with a value equal to the amount by which the equity to be transferred to margin such contract together with any other transfers or returns of specifically identifiable property or disbursements made, or to be made, to such customer, plus a reasonable reserve in the trustee's sole discretion, exceeds the estimated aggregate of the funded balances for each class of account of such customer less the value on the date of its transfer or return of any property transferred or returned prior to the primary liquidation date with respect to the customer's net equity claim for such account; and, provided further, that adequate security to assure the recovery of any overpayments by the trustee is provided to the debtor's estate by the customer.

(3) *Distribution in kind of specifically identifiable securities.* If any securities of a customer are specifically identifiable property as defined in paragraph (1)(i)(A) of the definition of that term in § 190.01 of this chapter, but the customer has no open commodity contracts, the customer may request that the trustee purchase or otherwise obtain the largest whole number of like-kind securities (*i.e.,* securities of the same class and series of an issuer), with a fair market value (inclusive of transaction costs) which does not exceed that portion of the funded balance of such customer's allowed net equity claim that constitutes a claim for securities, if like-kind securities can be purchased in a fair and orderly manner.

(4) *Proof of customer claim.* No distribution shall be made pursuant to paragraphs (d)(1) and (3) of this section prior to receipt of a completed proof of customer claim as described in § 190.03(e) or (f).

(5) *No differential distributions.* No further disbursements may be made to customers with respect to a particular account class for whom transfers have been made pursuant to § 190.07 and paragraph (d)(2) of this section, until a percentage of each net equity claim equivalent to the percentage distributed to such customers is distributed to all public customers in such account class. Partial distributions, other than the transfers referred to in § 190.07 and paragraph (d)(2) of this section, with respect to a particular account class made prior to the final net equity determination date must be made pursuant to a preliminary plan of distribution approved by the court, upon notice to the parties and to all customers, which plan requires adequate security to the debtor's estate to assure the recovery of any overpayments by the trustee and distributes an equal percentage of net equity to all public customers in such account class.

§ 190.10 Current records during business as usual.

A person that is a futures commission merchant is required to maintain current records relating to its customers' accounts, including copies of all account agreements and related account documentation, and ''know your customer'' materials, pursuant to §§ 1.31, 1.35, 1.36, and 1.37 of this chapter, which may be provided to another futures commission merchant to facilitate the transfer of open commodity contracts or other customer property held by such person for or on behalf of its customers to the other futures commission merchant, in the event an order for relief is entered with respect to such person.

Subpart C—Clearing Organization as Debtor

§ 190.11 Scope and purpose of this subpart.

(a) This subpart applies to a proceeding commenced under subchapter IV of chapter 7 of the Bankruptcy Code in which the debtor is a clearing organization.

(b) If the debtor clearing organization is organized outside the United States,

and is subject to a foreign proceeding, as defined in 11 U.S.C. 101(23), in the jurisdiction in which it is organized, then only the following provisions of this part shall apply:

(1) Subpart A.

(2) Section 190.12.

(3) Section 190.13, but only with respect to futures contracts and cleared swaps contracts cleared by FCM clearing members on behalf of their public customers and the property margining or securing such contracts.

(4) Sections 190.17 and 190.18, but only with respect to claims of FCM clearing members on behalf of their public customers, as well as to property that is or should have been segregated for the benefit of FCM clearing members' public customers, or that has been recovered for the benefit of FCM clearing members' public customers.

§ 190.12 Required reports and records.

(a) *Notices*—(1) *Means of providing*—(i) *To the Commission.* Unless instructed otherwise by the Commission, all mandatory or discretionary notices to be given to the Commission under this subpart shall be directed by electronic mail to *bankruptcyfilings@cftc.gov.* For purposes of this subpart, notice to the Commission shall be deemed to be given only upon actual receipt.

(ii) *To members.* The trustee, after consultation with the Commission, and unless otherwise instructed by the Commission, will establish and follow procedures reasonably designed for giving adequate notice to members under this subpart and for receiving claims or other notices from members. Such procedures should include, absent good cause otherwise, the use of a prominent website as well as communication to members' electronic addresses that are available in the debtor's books and records.

(2) *Of commencement of a proceeding.* A debtor that files a petition in bankruptcy that is subject to this subpart shall, at or before the time of such filing, and a debtor against which such a petition is filed shall, as soon as possible, but in any event no later than three hours after the receipt of notice of such filing, notify the Commission of the filing date, the court in which the proceeding has been or will be filed, and, as soon as available, the docket number assigned to that proceeding by the court.

(b) *Reports and records to be provided to the trustee and the Commission within three hours.* (1) As soon as practicable following the commencement of a proceeding that is subject to this subpart and in any event no later than three hours following the later of the commencement of such proceeding or the appointment of the trustee, the debtor shall provide to the trustee copies of each of the most recent reports that the debtor was required to file with the Commission under § 39.19(c) of this chapter, including copies of any reports required under § 39.19(c)(2), (3), and (4) of this chapter (including the most up-to-date version of any recovery and wind-down plans of the debtor maintained pursuant to § 39.39(b) of this chapter) that the debtor filed with the Commission during the preceding 12 months.

(2) As soon as practicable following the commencement of a proceeding that is subject to this subpart and in any event no later than three hours following the commencement of such proceeding (or, with respect to the trustee, the appointment of the trustee), the debtor shall provide to the trustee and the Commission copies of the most up-to-date versions of the default management plan and default rules and procedures maintained by the debtor pursuant to § 39.16 and, as applicable, § 39.35 of this chapter.

(c) *Records to be provided to the trustee and the Commission by the next business day.* As soon as practicable following commencement of a proceeding that is subject to this subpart and in any event no later than the next business day, the debtor shall make available to the trustee and the Commission copies of the following records:

(1) All records maintained by the debtor described in § 39.20(a) of this chapter; and

(2) Any opinions of counsel or other legal memoranda provided to the debtor (whether by external or internal counsel) in the five years preceding the commencement of such proceeding relating to the enforceability of the rules and procedures of the debtor in the event of an insolvency proceeding involving the debtor.

§ 190.13 Prohibition on avoidance of transfers.

The following transfers are approved and may not be avoided under sections 544, 546, 547, 548, 549, or 724(a) of the Bankruptcy Code:

(a) *Pre-relief transfers.* Any transfer of open commodity contracts and the property margining or securing such contracts made to another clearing organization that was approved by the Commission, either before or after such transfer, and was made prior to entry of the order for relief; and

(b) *Post-relief transfers.* Any transfers of open commodity contracts and the property margining or securing such contracts made to another clearing organization on or before the seventh calendar day after the entry of the order for relief, that was made with the approval of the Commission, either before or after such transfer.

§ 190.14 Operation of the estate of the debtor subsequent to the filing date.

(a) *Proofs of claim.* The trustee may, in its discretion based upon the facts and circumstances of the case, instruct each customer to file a proof of claim containing such information as is deemed appropriate by the trustee, and seek a court order establishing a bar date for the filing of such proofs of claim.

(b) *Operation of the derivatives clearing organization.* Subsequent to the order for relief, the derivatives clearing organization shall cease making calls for variation settlement or initial margin.

(c) *Liquidation.* (1) The trustee shall liquidate all open commodity contracts that have not been terminated, liquidated, or transferred no later than seven calendar days after entry of the order for relief. Such liquidation of open commodity contracts shall be conducted in accordance with the rules and procedures of the debtor, to the extent applicable and practicable.

(2) In lieu of liquidating securities held by the debtor and making distributions in the form of cash, the trustee may, in its reasonable discretion, make distributions in the form of securities that are equivalent (*i.e.,* securities of the same class and series of an issuer) to the securities originally delivered to the debtor by a clearing member or such clearing member's customer.

(d) *Computation of funded balance.* The trustee shall use reasonable efforts to compute a funded balance for each customer account immediately prior to any distribution of property within the account, which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.

§ 190.15 Recovery and wind-down plans; default rules and procedures.

(a) *Prohibition on avoidance of actions taken pursuant to recovery and wind-down plans.* Subject to the provisions of section 766 of the Bankruptcy Code and §§ 190.13 and 190.18, the trustee shall not avoid or prohibit any action taken by a debtor subject to this subpart that was reasonably within the scope of and was provided for in any recovery and wind-down plans maintained by the debtor and filed with the Commission pursuant to § 39.39 of this chapter.

(b) *Implementation of debtor's default rules and procedures.* In administering a proceeding under this subpart, the trustee shall implement, in consultation with the Commission, the default rules and procedures maintained by the debtor under § 39.16 and, as applicable, § 39.35 of this chapter and any termination, close-out and liquidation provisions included in the rules of the debtor, subject to the reasonable discretion of the trustee and to the extent that implementation of such default rules and procedures is practicable.

(c) *Implementation of recovery and wind-down plans.* In administering a proceeding under this subpart, the trustee shall, in consultation with the Commission, take actions in accordance with any recovery and wind-down plans maintained by the debtor and filed with the Commission pursuant to § 39.39 of this chapter, to the extent reasonable and practicable, and consistent with the protection of customers.

§ 190.16 Delivery.

(a) *General.* In the event that a commodity contract, cleared by the derivatives clearing organization, that settles upon expiration or exercise by making or taking delivery of physical delivery property, has moved into delivery position prior to the date and time of the order for relief, or moves into delivery position after that date and time, but before being terminated, liquidated, or transferred, then, in either such event, the trustee must use reasonable efforts to facilitate and cooperate with the completion of delivery on behalf of the clearing member or the clearing member's customer in a manner consistent with § 190.06(a) and the pro rata distribution principle addressed in § 190.00(c)(5).

(b) *Special provisions for delivery accounts.* (1) Consistent with the separation of the physical delivery property account class and the cash delivery account class set forth in § 190.06(b), the trustee shall treat—

(i) Physical delivery property held in delivery accounts as of the filing date, along with the proceeds from any subsequent sale of such physical delivery property in accordance with § 190.06(a)(3) to fulfill a clearing member's or its customer's delivery obligation or any other subsequent sale of such property, as part of the physical delivery account class; and

(ii) Cash delivery property in delivery accounts as of the filing date, along with any physical delivery property for which delivery is subsequently taken on behalf of a clearing member or its customer in accordance with § 190.06(a)(3), as part of the separate cash delivery account class.

(2) If the debtor holds any cash or property in the form of cash equivalents in an account with a bank or other person under a name or in a manner that clearly indicates that the account holds property for the purpose of making payment for taking physical delivery, or receiving payment for making physical delivery, of a commodity under any commodity contracts, such property shall (subject to § 190.19) be considered customer property in the cash delivery account class if held for making payment for taking delivery, or in the physical delivery account class, if held for the purpose of receiving such payment.

§ 190.17 Calculation of net equity.

(a) *Net equity–separate capacities and calculations.* (1) If a member of the clearing organization clears trades in commodity contracts through a commodity contract account carried by the debtor as a customer account for the benefit of the clearing member's public customers and separately through a house account, the clearing member shall be treated as having customer claims against the debtor in separate capacities with respect to the customer account and house account at the clearing organization, and by account class. A member shall be treated as part of the public customer class with respect to claims based on any commodity customer accounts carried as ''customer accounts'' by the clearing organization for the benefit of the member's public customers, and as part of the non-public customer class with respect to claims based on its house account.

(2) Net equity shall be calculated separately for each separate customer capacity in which the clearing member has a claim against the debtor, *i.e.,* separately by the member's customer account and house account and by account class.

(b) *Net equity—application of debtor's loss allocation rules and procedures.* (1)(i) The calculation of a clearing member's net equity claim shall include the full application of the debtor's loss allocation rules and procedures, including the default rules and procedures referred to in § 39.16 and, if applicable, § 39.35 of this chapter.

(ii) The calculation in paragraph (b)(1)(i) of this section will include, with respect to the clearing member's house account, any assessments or similar loss allocation arrangements provided for under those rules and procedures that were not called for before the filing date, or, if called for, have not been paid. Such loss allocation arrangements shall be applied to the extent necessary to address losses arising from default by clearing members.

(2) Appropriate adjustments shall be made to the net equity claims of the clearing members that are so entitled under the following circumstances: Where the debtor's loss allocation rules and procedures would entitle clearing members to additional payments of cash or other property due to—

(i) Portions of mutualized default resources that are prefunded, or assessed and collected, but in either event not used; or

(ii) The debtor's recoveries on claims against others (including, but not limited to, recoveries on claims against clearing members who have defaulted on their obligations to the debtor).

(c) *Net equity—general.* Subject to paragraph (b) of this section, net equity shall be calculated in the manner provided in § 190.08, to the extent applicable.

(d) *Calculation of funded balance. Funded balance* means a clearing member's pro rata share of customer property other than member property (for accounts for a clearing member's customer accounts) or member property (for a clearing member's house accounts) with respect to each account class available for distribution to customers of the same customer class, calculated in the manner provided in § 190.08(c) to the extent applicable.

§ 190.18 Treatment of property.

(a) *General.* The property of the debtor's estate must be allocated between member property and customer property other than member property as provided in this section to satisfy claims of clearing members, as customers of the debtor. The property so allocated will constitute a separate estate of the customer class (*i.e.,* member property, and customer property other than member property) and the account class to which it is allocated, and will be designated by reference to such customer class and account class.

(b) *Scope of customer property.* Customer property is the property available for distribution within the relevant account class in respect of claims by clearing members, as customers of the clearing organization, based on customer accounts carried by the debtor for the benefit of such members' public customers or, considered separately, such members' house accounts.

(1) Customer property includes the following:

(i) All cash, securities, or other property, or the proceeds of such cash, securities, or other property, that is received, acquired, or held by or for the account of the debtor, from or for any commodity contract account of a clearing member carried by the debtor, which is:

(A) Property received, acquired, or held, in order to margin, guarantee, secure, purchase, or sell a commodity contract;

(B) Open commodity contracts;

(C) Physical delivery property as that term is defined in paragraphs (1) through (3) of the definition of that term in § 190.01;

(D) Cash, securities or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the commodity customer account of a clearing member or a customer of a clearing member;

(E) Profits or contractual rights accruing as a result of a commodity contract;

(F) Letters of credit, including any proceeds of a letter of credit drawn upon by the trustee, or substitute customer property posted by a clearing member or a customer of a clearing member, pursuant to § 190.04(d)(3); or

(G) Securities held in a portfolio margining account carried as a futures account or a cleared swaps customer account;

(ii) All cash, securities, or other property which:

(A) Is segregated by the debtor on the filing date for the benefit of clearing members' house accounts or clearing members' public customer accounts;

(B) Was of a type described in paragraph (b)(1)(i)(A) of this section that is subsequently recovered by the avoidance powers of the trustee or is otherwise recovered by the trustee on any other claim or basis;

(C) Represents a recovery of any debit balance, margin deficit or other claim of the debtor against any commodity contract account carried for the benefit of a member's house accounts or a member's public customer accounts;

(D) Was unlawfully converted but is part of the debtor's estate; or

(E) Was of a type described in paragraphs (a)(1)(ii)(H) through (K) of § 190.09 (as if the term debtor used therein refers to a clearing organization as debtor);

(iii) Any guaranty fund deposit, assessment, or similar payment or deposit made by a clearing member, or recovered by the trustee, to the extent any remains following administration of the debtor's default rules and procedures, and any other property of a member available under the debtor's rules and procedures to satisfy claims made by or on behalf of public customers of a member; and

(iv) Amounts of its own funds that the debtor had committed as part of its loss allocation rules, to the extent that such amounts have not already been applied under such rules.

(2) Customer property will not include property of the type described in § 190.09(a)(2), as if the term debtor used therein refers to a clearing organization and to the extent relevant to a clearing organization.

(c) *Allocation of customer property between customer classes.* (1) Where the funded balance for members' house accounts is greater than one hundred percent with respect to any account class:

(i) Any excess should be allocated to customer property other than member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' public customers in any account class; and

(ii) Any remaining excess after the application of paragraph (c)(1)(i) of this section should be allocated to member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' house accounts in any other account class.

(2) Where the funded balance for members' public customers in any account class is greater than one hundred percent:

(i) Any excess should be allocated to customer property other than member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' public customers in any other account class; and

(ii) Any remaining excess after the application of paragraph (c)(2)(i) of this section should be allocated to member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' house accounts in any account class.

(d) *Allocation of customer property among account classes*—(1) *Segregated property.* Subject to paragraph (b) of this section, property held by or for the account of a customer, which is segregated on behalf of a specific account class within a customer class, or readily traceable on the filing date to customers of such account class within a customer class, or recovered by the trustee on behalf of or for the benefit of an account class within a customer class, must be allocated to the customer estate of the account class for which it is segregated, to which it is readily traceable, or for which it is recovered.

(2) *All other property.* Customer property which cannot be allocated in accordance with paragraph (d)(1) of this section, shall be allocated within customer classes, but between account classes, in the following order:

(i) To the estate of the account class for which the percentage of each members' net equity claim which is funded is the lowest, until the funded percentage of net equity claims of such account class equals the percentage of each members' net equity claim which is funded for the account class with the next lowest percentage of the funded claims; and then

(ii) To the estate of the two account classes so that the percentage of the net equity claims which are funded for each such account class remains equal until the percentage of each net equity claim which is funded equals the percentage of each net equity claim which is funded for the account class with the next lowest percentage of funded claims, and so forth, until all account classes within the customer class are fully funded.

(e) *Accounts without separation by account class.* Where the debtor has, prior to the order for relief, kept initial margin for house accounts in accounts without separation by account class, then member property will be considered to be in a single account class.

(f) *Assertion of claims by trustee.* Nothing in this section, including, but not limited to, the satisfaction of customer claims by operation of this section, shall prevent a trustee from asserting claims against any person to recover the shortfall of property enumerated in paragraphs (b)(1)(i)(E) and (b)(1)(ii) and (iii) of this section.

§ 190.19 Support of daily settlement.

(a) Notwithstanding any other provision of this part, funds received (whether from clearing members' house or customer accounts) by a debtor clearing organization as part of the daily settlement required pursuant to § 39.14 of this chapter shall, upon and after an order for relief, be included as customer property that is reserved for and traceable to, and promptly shall be distributed to, members entitled to payments of such funds with respect to such members' house and customer accounts as part of that same daily settlement. Such funds when received, other than deposits of initial margin described in § 39.14(a)(1)(iii) of this chapter, shall be considered member property and, separately, customer property other than member property, in

proportion to the ratio of total gains in member accounts with net gains, and total gains in clearing members' customer accounts with net gains, respectively. Deposits of initial margin described in § 39.14(a)(1)(iii) of this chapter shall be considered member property and, separately, customer property other than member property, to the extent deposited on behalf of, respectively, clearing members' house accounts and customer accounts.

(b) To the extent there is a shortfall in funds received pursuant to paragraph (a) of this section:

(1) Such funds shall be supplemented with the property described in paragraphs (b)(1)(i) through (iv) of this section, as applicable, to the extent necessary to meet the shortfall, in accordance with the derivatives clearing organization's default rules and procedures adopted pursuant to § 39.16 and, as applicable, § 39.35 of this chapter, and (with respect to paragraph (b)(1)(ii) of this section) any recovery and wind-down plans maintained pursuant to § 39.39 of this chapter and submitted pursuant to § 39.19 of this chapter. Such funds shall be included as member property and customer property other than member property in the proportion described in paragraph (a) of this section, and shall be distributed promptly to members' house accounts and members' customer accounts which accounts are entitled to payment of such funds as part of that daily settlement.

(i) Initial margin held for the account of a member, including initial margin segregated for the customers of such member, that has defaulted on payments required pursuant to a daily settlement, but only to the extent that such margin is permitted to be used pursuant to parts 1, 22, and 30 of this chapter.

(ii) Assets of the debtor, to the extent dedicated to such use as part of the debtor's default rules and procedures, and any recovery and wind-down plans, described in this paragraph (b)(1).

(iii) Prefunded guarantee or default funds maintained pursuant to the debtor's default rules and procedures.

(iv) Payments made by members pursuant to assessment powers maintained pursuant to the debtor's default rules and procedures.

(2) If the funds that are included as customer property pursuant to paragraph (a) of this section, supplemented as described in paragraph (b)(1) of this section, are insufficient to pay in full members entitled to payment of such funds as part of daily settlement, then such funds shall be distributed pro rata to such members' house accounts and customer accounts in proportion to the ratio of total gains in member accounts with net gains, and total gains in customer accounts with net gains, respectively.

Appendix A to Part 190—Customer Proof of Claim Form

[CASE CAPTION]

CLAIM FORM FOR COMMODITY BROKER CUSTOMERS OF [DEBTOR]

Debtor: [INSERT]	
Customer Name:	**COURT USE ONLY**
Account Number(s): Daytime Telephone number: Email:	❒ Check this box if this claim amends a previously filed claim. **Court Claim Number:**_____ (*If known*) Filed on:_____
Name and address where payment should be sent (if different from above): Telephone number: Email:	❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

THIS CLAIM FORM SHOULD BE USED ONLY IF YOU ARE A CUSTOMER HOLDING A CLAIM BASED ON A COMMODITY CONTRACT ACCOUNT (A FUTURES, FOREIGN FUTURES, CLEARED SWAPS OR DELIVERY ACCOUNT) AT THE DEBTOR. A DIFFERENT CLAIM FORM MUST BE USED TO ASSERT OTHER TYPES OF CLAIMS AGAINST THE DEBTOR.

THE DEADLINE FOR FILING ALL CUSTOMER CLAIMS BASED ON COMMODITY CONTRACT ACCOUNTS IS [BAR DATE]. NO CUSTOMER CLAIM WILL BE ALLOWED IF IT IS RECEIVED AFTER THIS DATE. CLAIMS MUST BE RECEIVED BY 11:59 P.M. ([TIME ZONE]) ON _____ TO BE CONSIDERED TIMELY.

[Include case-specific instructions for how to file a claim]

If you require additional space to answer any question, please attach separate pieces of paper and label the answers to the corresponding questions.

I. CLAIM AMOUNT

For each type of commodity contract account that is applicable, state the amount of your claim against the Debtor.

(1) Futures account claim: $_____[§ 190.03(e)(1)][331]

(2) Foreign futures account claim: $_____[§ 190.03(e)(1)]

(3) Cleared swaps account claim: $_____[§ 190.03(e)(1)]

(4) Delivery account claim: $_____[§ 190.03(e)(1)]

Of the amount in (4), please note how much is in the form of cash or cash equivalents ($) and how much is the value of commodities that have been or were/are to be delivered ($_____)

(5) Total claim: $_____

(6) Date on which your claim is valued (*see instructions*): _____

II. ACCOUNT INFORMATION

For each commodity contract account with the Debtor, please provide the following information. To the extent you have multiple commodity contract accounts with the Debtor, please provide the following information for each account separately in an attachment.

(1) Account number: _____[§ 190.03(e)(3)(i)]

(2) Name in which the account is held: _____[§ 190.03(e)(3)(ii)]

(3) Please specify all capacities in which you hold the account (check all that are applicable) [§ 190.03(e)(3)(iv)]:

- ☐ a. Individual capacity
- ☐ b. Guardian, custodian, or conservator for the benefit of a ward or a minor under the Uniform Gift to Minors Act
- ☐ c. Executor or administrator of an estate
- ☐ d. Trustee for a trust beneficiary
- ☐ e. Corporation, partnership, or unincorporated association
- ☐ f. Omnibus customer account of a futures commission merchant
- ☐ g. Part owner of a joint account
- ☐ h. Individual retirement account

[331] Bracketed references are to the corresponding provision in § 190.03(e) where the relevant information item is listed.

☐ i. Agent or nominee for a principal or beneficial owner (and not described in Items (a)-(h))

☐ j. In any other capacity not described above in Items (a)-(i) (please specify the capacity): _____

If you selected more than one box, please attach an explanation.

(4) Please specify whether the account is a joint account [§ 190.03(e)(3)(v)]:

Check one: ☐ YES ☐ NO

If you selected "YES," please specify your percentage interest in the account, and whether all participants in the joint account are claiming jointly. In addition, please see the instructions for additional information required for joint accounts.

a. My percentage interest in the joint account is: _____%

b. Participants in the joint account are claiming:

Check one: ☐ SEPARATELY ☐ JOINTLY

(5) Please specify whether the account is a discretionary account (*i.e.*, does another person have trading authority over the account) [§ 190.03(e)(3)(vi)]:

Check one: ☐ YES ☐ NO

If you selected "YES," please see the instructions for additional information required for discretionary accounts.

(6) Please specify whether the account is an individual retirement account for which there is a custodian [§ 190.03(e)(3)(vii)]:

Check one: ☐ YES ☐ NO

1. If you selected "YES," please see the instructions for additional information required for individual retirement accounts for which there is a custodian.

(7) Please specify whether the account is a cross-margining account for futures and securities [§ 190.03(e)(3)(viii)]:

Check one: ☐ YES ☐ NO

If you selected "YES," please see the instructions for additional information required for cross-margining accounts for futures and securities.

III. ACCOUNT STATEMENT: OPEN POSITIONS, UNLIQUIDATED SECURITIES AND OTHER UNLIQUIDATED PROPERTY

(1) Account balance per most recent account statement: $_____ [§ 190.03(e)(3)(iii)]

a. Date of the most recent account statement: _____

PLEASE ATTACH A* COPY *OF THIS STATEMENT (NOT THE ORIGINAL)

b. Do you agree with the account balance(s) on your most recent account statement(s), as set forth above?

Check one: ☐ YES ☐ NO

If you selected "NO," please explain in an attachment the reasons why you disagree with the account balance reflected on your most recent statement.

c. Has there been activity in the account since the date of the last account statement up to and including the filing date that has affected the balance of the account ("subsequent activity")?

Check one: ☐ YES ☐ NO

If you selected "YES," please provide full information regarding any such subsequent activity in an attachment.

(2) On the date on which your claim is valued, did you have any open positions, unliquidated securities and/or other unliquidated property in or associated with any of your commodity contract accounts? [§ 190.03(e)(7)]

2. **Check one:** ☐ YES ☐ NO

If you selected "YES," please state below the value of your open positions, unliquidated securities and/or other unliquidated property. In addition, please see the instructions for additional information required regarding open positions, unliquidated securities and other unliquidated property.

Value of all open positions, unliquidated securities and/or other unliquidated property: $_____

(3) To the extent you are claiming unliquidated securities or other unliquidated property held in your account, do you wish to receive payment in kind, if possible? [§ 190.03(e)(9)]

Check one: ☐ YES ☐ NO

If you selected "YES," please see the instructions for additional required information.

IV. CONNECTIONS WITH THE DEBTOR [§ 190.03(e)(2)]

(1) Is the customer making this claim one of the following persons (check all that are applicable):

☐ a. Officer, director, general partner or owner of ten percent or more of the capital stock of the Debtor.

☐ b. An employee, limited partner or special partner of the Debtor whose duties include (1) the management of the business of the Debtor or any part thereof; (2) the handling of the trades or customer funds; (3) the keeping of records pertaining to the trades or funds of customers; or (4) the signing or cosigning of checks or drafts on behalf of Debtor.

☐ c. A spouse or minor dependent living in the same household as any person listed in this section.

☐ d. A business affiliate that directly or indirectly controls the Debtor, or is directly or indirectly controlled by or is under common control with the Debtor.

(2) Is the customer making the claim on behalf of any account that is owned 10% or more by the Debtor or by any of the persons, alone or jointly, identified in IV.(1)?

Check one: ☐ YES ☐ NO

If you selected "YES," please identify such person(s) and the category identified in IV.(1) under which they fit.

V. SECURITY FUTURES PRODUCTS [§ 190.03(e)(8)][332]

Is any portion of your claim based on security futures products (i.e. futures whose underlying instrument is either a single security or a narrow-based security index) held in a securities account with the Debtor?

Check one: ☐ **YES** ☐ **NO**

If you selected "YES," you will need to file a separate claim in accordance with the procedures established for claims based on securities accounts at the Debtor.

[332] This section is for use only in cases where the debtor is jointly registered as a futures commission merchant and securities broker-dealer.

VI. OTHER ACCOUNTS WITH DEBTOR [§ 190.03(e)(4)]

Do you have any accounts with the Debtor that are not commodity contract accounts listed in response to Section III above?

Check one: ☐ YES ☐ NO

If you selected "YES," specify the other account number(s) and the type of each such account.

Account Number	Type of Account
1. _____	_____
2. _____	_____

(Attach additional page(s) if necessary)

VII. OTHER CLAIMS AGAINST DEBTOR [§ 190.03(e)(5)]

Do you have any other claims against the Debtor not already taken into account in the claim and account information provided in response to Sections I, II, III and VI above?

Check one: ☐ YES ☐ NO

If you selected "YES," please provide a detailed description in an attachment of any such claim or claims, and attach any supporting documentation you have.

VIII. AMOUNTS OWED TO DEBTOR [§ 190.03(e)(6)]

Do you owe any amounts to the Debtor not already taken into account in the claim and account balance information provided in response to the questions in sections I and II above?

Check one: YES ☐ NO ☐

If you selected "YES," please provide a detailed description in an attachment of any such claim or claims, and attach any supporting documentation you have.

IX. VERIFICATION

CHECK THE APPROPRIATE BOX:

❒ I am the customer ❒ I am the customer's authorized agent.

❒ I am a guarantor, surety, indorser
or other (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____

Title: _____

Company: _____

Address and telephone number (if different from notice address above):

_____

_____

_____

Telephone number:_____

Email:_____

_____
Signature (Date)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR CUSTOMER PROOF OF CLAIM FORM

Customer's Name and Address:
Fill in the name of the person or entity asserting the claim, and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The customer has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

Date on Which Claim is Valued:
Your claim should be valued as of [the last date on which any contracts or property not liquidated to cash balances remained in your account. Do not include the value of any contracts, funds or other property transferred to another commodity broker] [^, the date established by the Court as the date on which customer accounts should be valued].

- **Types of Customer Accounts**:

- A "futures account" is an account opened for the purpose of trading futures or options on futures on a U.S. futures exchange. Your account statement for a "futures account" would typically include the term "SEG" in the title or description of the account.

- A "foreign futures account" is an account opened for the purpose of trading futures or options on futures on an exchange located outside the U.S. Your account statement for a "foreign futures account" would typically include the term "30.7" in the title or description of the account.

- A "cleared swaps account" is an account opened for the purpose of holding swaps traded bilaterally or in off-exchange markets that are submitted to a CFTC-registered derivatives clearing organization for settlement and clearing. A "cleared swaps account" also is an account opened for the purpose of trading swaps or options on swaps on a designated contract market or swap execution facility and cleared by a CFTC-registered derivatives clearing organization. Your account statement for a "cleared swaps account" would typically include the term "swap" in the title or description of the account.

- A "delivery account" is an account denominated as such and through which deliveries of commodities, whether tangible or intangible, occur or have occurred under expiring futures contracts. A delivery account also may hold cash balances, title documents for commodities such as metals warehouse receipts, or other commodities, whether tangible or intangible, that are deliverable under an exchange's futures contract.

- Your account statement may include multiple types of customer accounts in a single account statement.

Estimated Claim Amount: If you cannot compute the amount of your claim, you **must** file an estimated claim. In that case, please be sure to indicate that your claim is an estimated claim.

Joint Accounts: If any commodity contract account for which you are making a claim is a joint account, please include an attachment listing the account number and the name, address and contact information for each joint account holder other than yourself.

If you are making a claim with respect to multiple joint accounts, and those joint accounts are not owned by the same holders in the same legal capacities and in identical ownership percentages, please complete a separate claim form for each joint account.

Discretionary Accounts: If any commodity contract account for which you are making a claim is a discretionary account, please include an attachment listing the account number and the name, address, and contact information for all persons with trading authority over any of those accounts. If different persons have trading authority over different accounts, please provide this information for each such account, listing applicable account numbers.

Individual Retirement Accounts for which there is a Custodian: If any commodity contract account for which you are making a claim is an individual retirement account for which there is a custodian, please include an attachment listing the account number and the name, address, and contact information for both the custodian and the account owner.

Cross-Margining Accounts for Futures and Securities: If any commodity contract account for which you are making a claim is a cross-margining account for futures and securities, please include an attachment listing the account number and whether the securities positions are held in an account with the debtor or in an account with an affiliate of the debtor. If such positions are held in an account with an affiliate of the debtor, please identify and include contact information for such affiliate.

Other types of derivatives trading accounts that you may have with the debtor, such as accounts holding off-exchange retail forex positions subject to part 5 of the regulations of the CFTC and funds to margin such positions, are not customer accounts entitled to special protection under the Bankruptcy Code. **Claim in foreign currencies**: If some or all of your claim is based on a currency other than U.S. dollars, please file you claim in U.S. dollars based on the exchange rate in effect as of the petition date ([INSERT]), and identify the exchange rate used in calculating your claim in a separate attachment.	
Open positions, Unliquidated Securities and Other Unliquidated Property: To the extent you have any open positions, unliquidated securities and/or other unliquidated property in a commodity contract account, please include an attachment (i) describing each such open position, unliquidated security and/or other item of unliquidated property (*e.g.*, for positions, by contract, delivery date, long/short, quantity, and strike price for options; for securities, by CUSIP and quantity); (ii) identifying whether such open position, unliquidated security and/or other unliquidated property is specifically identifiable property; and (iii) identifying whether you would prefer, if practicable, payment in kind for each unliquidated security or other item of unliquidated property or to have it liquidated. If the position, unliquidated security or other item of unliquidated property is already reflected in the account statement that you attached in response to Section III of this form, and you agree with the quantity and any value set forth therein, please say so. Otherwise, please (i) state the quantity and value you claim with respect to such open position, unliquidated security and/or other unliquidated property, and explain the basis for that quantity and value; and (ii) attach any documentary evidence supporting such value.	• **Documentation**: • Please attach a copy (not the original) of the most recent account statement for each account on which this claim is based. • Please enclose copies (not originals) of any documentation or correspondence you believe will be of assistance in processing your claim, including, but not limited to, customer confirmations, account statements, and statements of purchase or sale. If, at any time, you complained in writing about the handling of your account to any person or entity or regulatory authority, and the complaint relates to the claim that you are asserting in this claim form, please provide copies of the complaint and all related correspondence, as well as any replies that you received.

Verification: The individual completing this proof of claim must sign and date it. If the claim is filed electronically, the Bankruptcy Code authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. • Print the name and title, if any, of the customer or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. Criminal penalties apply for making a false statement on a proof of claim.	**Credits:** An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the customer gave the Debtor credit for any obligations of the customer to the Debtor.
ADDITIONAL INFORMATION	
Acknowledgment of Receipt of Claim [Instructions for acknowledgment of filing]	**Offers to Purchase a Claim** Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact you and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the Debtor. These entities do not represent the Bankruptcy Court or the Debtor. A customer has no obligation to sell its claim. However, if a customer decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the Bankruptcy Court.

Appendix B to Part 190—Special Bankruptcy Distributions

Framework 1—Special Distribution of Customer Funds When the Cross-Margining Account Is a Futures Account

(a) This framework 1 applies when a debtor futures commission merchant has participated in a cross-margining (''XM'') program for futures and securities under which the cross-margined positions of its futures customers (as defined in § 1.3 of this chapter) and the property received to margin, secure or guarantee such positions are held in one or more accounts pursuant to a Commission order that requires such positions and property to be segregated, pursuant to section 4d(a) of the Act, from the positions and property of:

(1) The futures commission merchant;

(2) If applicable, any affiliate carrying the securities positions as a participant in the XM program (''Affiliate''); and

(3) Other futures customers of the futures commission merchant (such segregated accounts, the ''XM accounts'').

(b) The futures commission merchant may, and any Affiliate that holds the securities positions in an XM account that it directly carries will, be registered as a broker-dealer under the Exchange Act. The Commission order approving the XM program may limit participating customers to market professionals and will require a participating customer to sign an agreement, in a form approved by the Commission, that refers to this distributional rule.

(c) A futures commission merchant is deemed to receive securities held in an XM account, including securities and other property held by an Affiliate in an XM account, as ''futures customer funds'' (as defined in § 1.3 of this chapter) that margin, guarantee or secure commodity contracts in the XM account (or paired XM accounts at the futures commission merchant and an Affiliate). Under the agreement signed by the customer, in the event that the futures commission merchant (or Affiliate) is the subject of a SIPA proceeding, the customer agrees that securities in an XM account are excluded from the securities estate for purposes of SIPA, and that its claim for return of the securities will not be

treated as a customer claim under SIPA. These restrictions apply to the customer only, and should not be read to limit any action that the trustee may take to seek recovery of property in an XM account carried by an Affiliate as part of the customer estate of the futures commission merchant.

(d) XM accounts, and other futures accounts that are subject to segregation under section 4d(a) of the Act (pursuant to the Commission's regulations in part 1 of this chapter) (''non-XM accounts''), are treated as two subclasses of futures account with two separate pools of segregated futures customer property, an XM pool and a non-XM pool, each of which constitutes a segregated pool under section 4d(a) of the Act. If the futures commission merchant has participated in multiple XM programs, the XM accounts in the different programs are combined and treated as part of the same XM subclass of futures accounts. A futures customer could hold both non-XM and XM accounts.

(e) Customer claims under this part arising out of the XM subclass of accounts are subordinated to customer claims arising out of the non-XM subclass of accounts in certain circumstances in which the futures commission merchant does not meet its segregation requirements. The segregation requirement is the amount of futures customer funds that the futures commission merchant is required by the Act and Commission regulations in part 1 of this chapter or Commission orders to hold on deposit in segregated accounts on behalf of its futures customers (exclusive of its targeted residual amount obligations pursuant to § 1.3 of this chapter).

(f)(1) If there is a shortfall in the non-XM pool and no shortfall in the XM pool, all customer net equity claims, whether or not they arise out of the XM subclass of accounts, will be combined and paid pro rata out of the combined XM and non-XM pools of futures customer property.

(2) If there is a shortfall in the XM pool and no shortfall in the non-XM pool, customer net equity claims arising from the XM subclass of accounts must be satisfied first from the XM pool, and customer net equity claims arising from the non-XM subclass of accounts must be satisfied first from the non-XM pool.

(3) If there is a shortfall in both the non-XM and XM pools:

(i) If the non-XM shortfall as a percentage of the segregation requirement for the non-XM pool is greater than or equal to the XM shortfall as a percentage of the segregation requirement for the XM pool, all customer net equity claims will be paid pro rata out of the combined XM and non-XM pools of futures customer property; and

(ii) If the XM shortfall as a percentage of the segregation requirement for the XM pool is greater than the non-XM shortfall as a percentage of the segregation requirement for the non-XM pool, non-XM customer net equity claims will be paid pro rata out of the available non-XM pool, and XM customer net equity claims will be paid pro rata out of the available XM pool.

(4) In this way, non-XM customers will never be adversely affected by an XM shortfall.

(g) The following examples illustrate the operation of this framework 1. The examples assume that the FCM has two futures customers, one with exclusively XM accounts and one with exclusively non-XM accounts.

1. Sufficient Funds to Meet Non-XM and XM Customer Claims:

	Non-XM	XM	Total
Funds in 4d(a) segregation	150	150	300
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	0	0	
Shortfall (percent)	0	0	
Distribution	150	150	300

There are adequate funds available and both the non-XM and the XM customer claims will be paid in full.

2. Shortfall in Non-XM Only:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	150	250
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	0	
Shortfall (percent)	50/150=33.3	0	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	125	125	
Distribution	125	125	250

Due to the non-XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Each customer will receive his pro rata share of the funds available, or 50% of the $250 available, or $125.

3. Shortfall in XM Only:

	Non-XM	XM	Total
Funds in 4d(a) segregation	150	100	250
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	0	50	
Shortfall (percent)	0	50/150=33.3	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	125	125	
Distribution	150	100	250

Due to the XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Accordingly, the XM funds and non-XM funds are treated as separate pools, and the non-XM customer will be paid in full, receiving $150 while the XM customer will receive the remaining $100.

4. Shortfall in Both, With XM Shortfall Exceeding Non-XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	125	100	225
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	25	50	
Shortfall (percent)	25/150=16.7	50/150=33.3	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	112.50	112.50	
Distribution	125	100	225

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the XM shortfall exceeds the non-XM shortfall. The non-XM

customer will receive the $125 available with respect to non-XM claims while the XM customer will receive the $100 available with respect to XM claims.

5. Shortfall in Both, With Non-XM Shortfall Exceeding XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	125	225
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	25	
Shortfall (percent)	50/150=33.3	25/150=16.7	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	112.50	112.50	
Distribution	112.50	112.50	225

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall exceeds the XM shortfall. Each customer will receive 50% of the $225 available, or $112.50.

6. Shortfall in Both, Non-XM Shortfall = XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	100	200
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	50	
Shortfall (percent)	50/150=33.3	50/150=33.3	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	100	100	
Distribution	100	100	200

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall equals the XM shortfall. Each customer will receive 50% of the $200 available, or $100.

These examples illustrate the principle that pro rata distribution across both accounts is the preferable approach except when a shortfall in the XM account could harm non-XM customers. Thus, pro rata distribution occurs in Examples 1, 2, 5 and 6. Separate treatment of the XM and non-XM accounts occurs in Examples 3 and 4.

Framework 2—Special Allocation of Shortfall to Customer Claims When Customer Funds for Futures Contracts and Cleared Swaps Customer Collateral are Held in a Depository Outside of the United States or in a Foreign Currency

The Commission has established the following allocation convention with respect to futures customer funds (as § 1.3 of this chapter defines such term) and Cleared Swaps Customer Collateral (as § 22.1 of this chapter defines such term) (both of which are customer funds (as § 1.3 of this chapter defines such term) that are segregated pursuant to the Act and Commission rules thereunder), which applies in certain circumstances when futures customer funds or Cleared Swaps Customer Collateral are held by a futures commission merchant in a depository outside the United States (''U.S.'') or in a foreign currency. If a futures commission merchant enters into bankruptcy and maintains futures customer funds or Cleared Swaps Customer Collateral in a depository outside the U.S. or in a depository located in the U.S. in a currency other than U.S. dollars, the trustee shall use the following allocation procedures to calculate the claim of each public customer in the futures account class or each public customer in the cleared swaps account class, as applicable, when a sovereign action of a foreign government or court has occurred that contributes to shortfalls in the amounts of futures customer funds or Cleared Swaps Customer Collateral. In the event a sovereign action creates or contributes to a shortfall in customer property, applying the allocation convention will result in a reallocation of distributions of futures customer funds or Cleared Swaps Collateral to take into account the impact of the sovereign action. For purposes of this bankruptcy convention, sovereign action of a foreign government or court would include, but not be limited to, the application or enforcement of statutes, rules, regulations, interpretations, advisories, decisions, or orders, formal or informal, by a Federal, state, or provincial executive, legislature, judiciary, or government agency. The trustee should perform the allocation procedures separately with respect to each public customer in the futures account class or cleared swaps account class.

I. **Reduction In Distributions For General Shortfall**

A. ***Determination of losses not attributable to sovereign action***

1. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars at the exchange rate in effect on the Final Net Equity Determination Date, as defined in §190.01(s) (the "Exchange Rate").

2. Determine the amount of assets available for distribution to futures customers or Cleared Swaps Customers. In making this calculation, include customer funds for futures contracts and Cleared Swaps Customer Collateral that would be available for distribution but for the sovereign action.

3. Convert the amount of customer funds for futures contracts and Cleared Swaps Customer Collateral available for distribution to U.S. Dollars at the Exchange Rate.

4. Determine the Shortfall Percentage that is <u>not</u> attributable to sovereign action, as follows:

Shortfall Percentage =	(	1-	[	Total Customer Assets / Total Customer Claims	]	)

B. ***Allocation of Losses Not Attributable to Sovereign Action***

1. Reduce the claim of each futures customer or Cleared Swaps Customer by the Short fall Percentage.

II. **Reduction in Distributions for Sovereign Loss**

A. ***Determination of Losses Attributable to Sovereign Action ("Sovereign Loss")***

1. If any portion of the claim of a futures customer or Cleared Swaps Customer is required to be kept in U.S. dollars in the U.S., that portion of the claim is not exposed to Sovereign Loss.

2. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one location and that location is:

a. The U.S. or a location in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.

b. A location in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.

3. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one currency and that currency is:

a. U.S. dollars or a currency in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.

b. A currency in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.

4. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to he kept in more than one location and:

a. There is no Sovereign Loss in any of those locations, then that portion of the claim is not exposed to Sovereign Loss.

b. There is Sovereign Loss in one of those locations, then that entire portion of the claim is exposed to Sovereign Loss.

c. There is Sovereign Loss in more than one of those locations, then an equal share of that portion of the claim will be exposed to Sovereign Loss in each such location.

5. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one currency and:

a. There is no Sovereign Loss in any of those currencies, then that portion of the claim is not exposed to Sovereign Loss.

b. There is Sovereign Loss in one of those currencies, then that entire portion of the claim is exposed to Sovereign Loss.

c. There is Sovereign Loss in more than one of those currencies, then an equal share of that portion of the claim will be exposed to Sovereign Loss.

B. ***Calculation of Sovereign Loss***

1. The total Sovereign Loss for each location is the difference between:

a. The total customer funds for futures contracts or Cleared Swaps Customer Collateral deposited in depositories in that location and

b. The amount of customer funds for futures contracts or Cleared Swaps Customer Collateral in that location that is available to be distributed to futures customers or Cleared Swaps Customers, after taking into account any sovereign action.

2. The total Sovereign Loss for each currency is the difference between:

a. The value, in U.S. dollars, of the customer funds for futures contracts or Cleared Swaps Customer Collateral held in that currency on the day before the sovereign action took place and

b. The value, in U.S. dollars, of the customer funds for futures contracts or Cleared Swaps Customer Collateral held in that currency on the date of the calculation.

C. *Allocation of Sovereign Loss*

1. Each distribution on account of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location will be reduced by:

$$\text{Total Sovereign Loss } x \left| \frac{\text{Portion of the customer's claim exposed to loss in that location}}{\text{All portions of customer claims exposed to loss in that location}} \right|$$

2. Each distribution on account of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a currency will be reduced by:

$$\text{Total Sovereign Loss } x \left| \frac{\text{Portion of the customer's claim exposed to loss in that currency}}{\text{All portions of customer claims exposed to loss in that currency}} \right|$$

3. A distribution to a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location or currency will not be reduced below zero. (The above calculations might yield a result below zero where the FCM kept more customer funds for futures contracts or Cleared Swaps Customer Funds in a location or currency than it was authorized to keep.)

4. Any amount of Sovereign Loss from a location or currency in excess of the total amount of customer funds for futures contracts or Cleared Swaps Customer Funds authorized to be kept in that location or currency (calculated in accord with section II.1 above) ("Total Excess Sovereign Loss") will be allocated among all futures customers or Cleared Swaps Customer that have authorized funds to be kept outside the U.S., or in currencies other than U.S. dollars, with each such futures customer or Cleared Swaps Customer distribution reduced by the following amount:

$$\text{Total Excess Sovereign Loss } x \left[\frac{\text{This customer's total claim} - \text{The portion of this Customer's claim required to be kept in U.S. dollars, in the U.S.}}{\text{Total customer claims} - \text{Total of all customer claims required to be kept in U.S. dollar, in the U.S.}} \right]$$

The following examples illustrate the operation of this convention.

Example 1. No shortfall in any location.

Customer	Claim	Location(s) customer has consented to having funds held
A	$50	U.S.
B	€50	U.K.
C	€50	Germany
D	£300	U.K.
Location		**Actual asset balance**
U.S.		$50
U.K.		£300
U.K.		€50
Germany		€50

Note: Conversion Rates: €1 = $1; £1=$1.5.

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in U.S. dollars
A	$50	1.0	$50
B	€50	1.0	50
C	€50	1.0	50
D	£300	1.5	450
Total			$600

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$50	1.0	$50			$50
U.K.	£300	1.5	450			450
U.K.	€50	1.0	50			50
Germany	€50	1.0	50			50
Total			$600		0	$600

There are no shortfalls in funds held in any location. Accordingly, there will be no reduction in distributions to holders of futures or Cleared Swaps Customer claims.

Claims:

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action	Distributions after all reductions
A	$50	$0	$50
B	50	0	50
C	50	0	50
D	450	0	450
Total	$600	$0	$600

Example 2. Shortfall in funds held in the U.S.

Customer	Claim	Location(s) customer has consented to having funds held
A	$100	U.S.
B	€50	U.K.
C	€100	U.S., Germany, or Japan
Location		**Actual asset balance**
U.S.		$50
U.K.		€100
Germany		€50

Note: Conversion Rates: €1=$1.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

There is a shortfall in the funds held in the U.S. such that only 1/2 of the finds are available. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Convert each customer's claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$100	1.0	$100
B	€50	1.0	50
C	€100	1.0	100
Total			$250

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$50	1.0	$50			$50
U.K.	€100	1.0	100			100
Germany	€50	1.0	50			50
Total			$200			$200

Determine the percentage of shortfall that is not attributable to sovereign action:
Shortfall Percentage = (1–(200/250)) = (1–80%) = 20%.

Reduce each distribution to the holder of a futures or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US$	Allocation shortfall (non-sovereign)	Distribution in U.S. dollars after allocated shortfall
A	$100	$20	$80
B	50	10	40
C	100	20	80
Total	$250	$50	$200

REDUCTION IN DISTRIBUTIONS DUE TO SOVEREIGN ACTION

There is no shortfall due to sovereign action. Accordingly, distributions to holders of futures or Cleared Swaps Customer claims will not be further reduced.

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action	Distribution after all reductions
A	$80		$80
B	40		40
C	80		80
Total	$200	$0	$200

Example 3. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action.

Customer	Claim	Location(s) customer has consented to having funds held
A	$150	U.S.
B	€100	U.K.
C	€50	Germany
D	$100	U.S.
D	€100	U.K. or Germany
Location		**Actual asset balance**
U.S.		$250
U.K.		€50
Germany		€100

Note: Conversion Rates: €1=$1.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$150	1.0	$150
B	€100	1.0	100
C	€50	1.0	50
D	$100	1.0	100
D	€100	1.0	100
Total			$500

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$250	1.0	$250			$250
U.K.	€50	1.0	50			50
Germany	€100	1.0	100			100
Total			$400		$0	$400

Determine the percentage of shortfall that is not attributable to sovereign action:
Shortfall Percentage = (1–400/500) = (1–80%) = 20%.

Reduce each distribution to the holder of a futures customer or Cleared Swaps Customer by the Shortfall Percentage:

Customer	Claim in US$	Allocation shortfall (non-sovereign)	Distribution in U.S. dollars after allocated shortfall
A	$150	$30	$120
B	100	20	80
C	50	10	40
D	200	40	160
Total	$500	$100	$400

REDUCTION IN DISTRIBUTIONS DUE TO SOVEREIGN ACTION

There is no shortfall due to sovereign action. Accordingly, the distributions will not be further reduced.

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action	Distribution after all reductions
A	$120		$120
B	80		80
C	40		40
D	160	0	160
Total	$400	$0	$400

Example 4. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action.

Customer	Claim	Location(s) customer has consented to having funds held
A	$50	U.S.
B	€50	U.K.
C	€50	Germany
D	$100	U.S.
D	€100	U.K. or Germany
Location		**Actual asset balance**
U.S.		$150
U.K.		100
Germany		100

Notice: Conversion Rates: €1 = $1; £1 = $1.5.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$50	1.0	$50
B	€50	1.0	50
C	€50	1.0	50
D	$100	1.0	100
D	€100	1.0	100
Total			$350

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$150	1.0	$150			$150
U.K.	€100	1.0	100			100
Germany	€100	1.0	100	50%	50	50
Total			$350		$50	$300

Determine the percentage of shortfall that is not attributable to sovereign action:
Shortfall Percentage = (1–350/350) = (1–100%) = 0%.

Reduce each distribution to the holder of a futures customer or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US$	Allocation shortfall (non-sovereign)	Distribution in U.S. dollars after allocated shortfall
A	$50	$0	$50
B	50	0	50
C	50	0	50
D	200	0	200
Total	$350	$0	$350

REDUCTION IN DISTRIBUTIONS FOR DUE TO SOVEREIGN ACTION

Due to sovereign action, only 1/2 of the funds in Germany are available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	$50		
B		$50	
C			$50
D	100		100
Total	$150	$50	$150

Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

Customer	Allocation share	Allocation share of actual shortfall	Actual shortfall allocated
C	$50/$150	33.3% of $50	$16.67
D	$100/$150	66.7% of $50	33.33
Total			$50.00

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Distribution after all reductions
A	$50		$50
B	50		50
C	50	$16.67	33.33
D	200	33.33	166.67
Total	$350.00	$50.00	$300.00

Example 5. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action and a shortfall in funds held in the U.S.

Customer	Claim	Location(s) customer has consented to having funds held
A	$100	U.S.
B	€50	U.K.
C	€150	Germany
D	$100	U.S.
D	£300	U.K.
D	€150	U.K. or Germany

Location	Actual asset balance
U.S.	$100
U.K.	£300
U.K.	€200
Germany	€150

Conversion Rates: €1 = $1; £1 = $1.5.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$100	1.0	$100
B	€50	1.0	50
C	€150	1.0	150
D	$100	1.0	100
D	£300	1.5	450
D	€150	1.0	150
Total			$1000

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$100	1.0	$100			$100
U.K.	£300	1.5	450			450
U.K.	€200	1.0	200			200
Germany	€150	1.0	150	100%	$150	0
Total			$900		$150	$750

Determine the percentage of shortfall that is not attributable to sovereign action:
Shortfall Percentage = (1 – 900 / 1000) = (1 – 90%) = 10%.

Reduce each distribution to the holder of a futures customer or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US$	Allocation shortfall (non-sovereign)	Distribution in U.S. dollars after allocated shortfall
A	$100	$10	$90
B	50	5	45
C	150	15	135
D	700	70	630
Total	$1000	$100	$900

REDUCTION IN DISTRIBUTIONS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	$100		
B		$50	
C			$150
D	100	450	150
Total	$200	$500	$300

Calculation of the allocation of the shortfall due to sovereign action Germany ($150 shortfall to be allocated):

Customer	Allocation share	Allocation Share of actual shortfall	Actual shortfall allocated
C	$150/$300	50% of $150	$75
D	$150/$300	50% of $150	75
Total			$150

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Distributions after all reductions
A	$90		$90
B	45		45
C	135	$75	60
D	630	75	555
Total	$900	$150	$750

Example 6. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action, shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action, and a shortfall in funds held in the U.S.

Customer	Claim	Location(s) customer has consented to having funds held
A	$50	U.S.
B	€50	U.K.
C	$20	U.S.
C	€50	Germany
D	$100	U.S.
D	£300	U.K.
D	€100	U.K., Germany, or Japan
E	$80	U.S.
E	¥10,000	Japan

Location	Actual asset balance
U.S.	$200
U.K.	£200
U.K.	€100
Germany	€50
Japan	¥10,000

Conversion Rates: €1 = $1; ¥1 = $0.01, £1 = $1.5.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim In US$
A	$50	1.0	$50
B	€50	1.0	50
C	$20	1.0	20
C	€50	1,0	50
D	$100	1.0	100
D	£300	1.5	450
D	€100	1.0	100
E	$80	1.0	80
E	¥10,000	0.01	100
Total			$1000

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$200	1.0	$200			$200
U.K.	£200	1.5	300			300
U.K.	€100	1.0	100			100
Germany	€50	1.0	50	100%	$50	0
Japan	¥10,000	0.01	100	50%	50	50
Total			$750		$100	$650

Determine the percentage of shortfall that is not attributable to sovereign action:
Shortfall Percentage = (1=750/1000) = (1=75%) = 25%.

Reduce each distribution to the holder of a futures or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US$	Allocation shortfall (non-sovereign)	Distributions in U.S. dollars after allocated shortfall
A	$50	$12.50	$37.50
B	50	12.50	37.50
C	70	17.50	52.50
D	650	162.50	487.50
E	180	45.00	135.00
Total	$1000.00	$250.00	$750.00

REDUCTION IN DISTRIBUTIONS DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany and only 1/2 of the funds in Japan are available.

Customer	Presumed location of funds			
	U.S.	U.K.	Germany	Japan
A	$50			
B		$50		
C	20		$50	
D	100	450	50	$50
E	80			100
Total	$250	$500	$100	$150

Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

Customer Allocation	Allocation share	Allocation Share of actual shortfall	Actual shortfall allocated
C	$50/$100	50% of $50	$25
D	50/100	50% of 50	25
Total			50

Japan ($50 shortfall to be allocated):

Customer Allocation	Allocation share	Allocation Share of actual shortfall	Actual shortfall allocated
D	$50/$150	33.3% of $50	$16.67
E	100/150	66.6% of 50	33.33
Total			$50.00

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Allocation of shortfall due to sovereign action from Japan	Distribution after all reductions
A	$37.50			37.50
B	37.50			37.50
C	52.50	$25		27.50
D	487.50	$25	16.67	445.83
E	135.00		33.33	101.67
Total	$750.00	$50.00	$50.00	$650.00

Example 7. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollar, due to sovereign action, where the FCM kept more funds than permitted in such location or currency.

Customer	Claim	Location(s) customer has consented to having funds held
A	$50	U.S.
B	50	U.S.
B	€50	U.K.
C	€50	Germany
D	100	U.S.
C	€100	U.K. or Germany
E	50	U.S.
E	€50	U.K.

Location	Actual asset balance
U.S.	$250
U.K.	€50
Germany	€200

Conversion Rates: 1 = $1.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$50	1.0	$50
B	50	1.0	50
B	€50	1.0	50
C	€50	1.0	50
D	€100	1.0	100
D	€100	1.0	100
E	50	1.0	50
E	€50	1.0	50
Total			500.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$250	1.0	$250			$250
U.K.	€50	1.0	50			50
Germany	€200	1.0	200	100%	200	0
Total			$500		$200	$300

Determine the percentage of shortfall that is not attributable to sovereign
Shortfall Percentage = (1–500/500) = (1–100%) = 0%.

Reduce each distribution to the holder of a futures or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US$	Allocation shortfall (non-sovereign)	Distribution in U.S. dollars after allocated shortfall
A	$50	$0	$50
B	100	0	100
C	50	0	50
D	200	0	200
E	100	0	100
Total	$500	$0	$500

REDUCTION IN DISTRIBUTIONS DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	$50		
B	50	50	
C			50
D	100		100
E	50	50	
Total	$250	$100	$150

Calculation of the allocation of the shortfall due to sovereign action—Germany ($200 shortfall to be allocated):

Customer	Allocation share	Allocation Share of actual shortfall	Actual shortfall allocated
C	$50/$150	33.3% of $200	$66.67
D	$100/$150	66.7% of $200	$133.33
Total			$200.00

This would result in the distributions to customers C and D being reduced below zero.

Accordingly, the distributions to customer C and D will only be reduced to zero, or $50 allocated to C and $100 allocated to D. This results in a Total Excess Shortfall of $50.

Actual shortfall	Allocation of shortfall for customer C	Allocation of shortfall for customer D	Total excess shortfall
$200	$50	$100	$50

This shortfall will be allocated among the remaining futures customers or Cleared Swaps Customers who have authorized funds to be held outside the U.S. or in a currency other than U.S. dollars.

Customer	Total claims of customers permitting funds to be held outside the U.S.	Portion of claim required to be in the U.S.	Allocation share (column B-C/column B Total—all customer claims in U.S.)	Allocation share of actual total excess shortfall	Actual total excess shortfall allocated
B	$100	$50	$50/$200	25% of $50	$12.50
C	50	0	(1)		0
D	200	100	$100/200	50% of $50	25
E	100	50	50/100	25% of $50	12.50
Total	$450.00				$50.00

[1]Claim already reduced to $0.

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action Germany	Allocation of total excess shortfall	Distribution after all reductions
A	$50			$50.00
B	100		12.50	87.50
C	50	50		0
D	200	100	25	75.00
E	100		12.50	87.50
Total	$500.00	$150.00	$50.00	$300.00

Issued in Washington, DC, on December 17, 2020, by the Commission.

Christopher Kirkpatrick,
Secretary of the Commission.

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

Appendices to Bankruptcy Regulations—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1—Commission Voting Summary

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

Appendix 2—Statement of Support of Chairman Heath P. Tarbert

When our Commission considered the proposal to amend the CFTC's bankruptcy rules in Part 190,[1] I noted that, in his 1926 novel *The Sun Also Rises,* Ernest Hemingway offered what is perhaps the best chronicle of the anatomy of a typical bankruptcy. In the novel, the character Mike Campbell is asked how he went bankrupt. He answers: ''two ways . . . gradually and then suddenly.'' [2]

As Hemingway's dialogue succinctly describes, bankruptcies often come on unexpectedly. A business's relatively minor financial or operational troubles may be exacerbated by a sudden crisis—whether a firm-level issue, or a national or even global event. Many catalysts for insolvency are entirely unpredictable. We must therefore be prepared with a bankruptcy regime that fosters a swift and equitable resolution to protect customer funds and promote financial stability.

Background on the CFTC's Bankruptcy Regime

Part 190 of the CFTC's rules, addressing commodity broker [3] bankruptcies, was finalized in 1983. Since that time, the commodity broker bankruptcy process and the state of the industry have gradually changed. Yet in the nearly four decades since, Part 190 has never been comprehensively updated. This regime is intended to protect customer funds, but having antiquated rules does not help achieve that goal.

CFTC staff has accordingly embarked on a process of updating Part 190 over the last several years, when a then-healthy economy made bankruptcies relatively unlikely. Now that we find ourselves in the midst of the COVID–19 pandemic and its economic ramifications, the fruits of our investment arguably could have not been better timed. The good news is that during 2020, U.S. derivatives markets and their participants have weathered the volatility associated with the coronavirus pandemic admirably. But as I just noted, we cannot know for certain what the future holds—for bankruptcy often comes ''gradually and then

[1] Bankruptcy Regulations, 85 FR 36000 (June 12, 2020).

[2] *See* Statement of Chairman Heath P. Tarbert in Support of Long-Awaited Updates to the CFTC's Bankruptcy Regime (Apr. 14, 2020), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement041420.*

[3] The term ''commodity broker'' may refer either to a futures commission merchant (''FCM'') or a derivatives clearing organization (''DCO''). 11 U.S.C. 101(6).

suddenly.'' We must therefore be prepared for all contingencies.

Accordingly, I am pleased to support today's final rule to update Part 190 for the 21st century.[4] The final rule is a product of both hard work by CFTC staff and Commissioners as well as contributions from external stakeholders and subject matter experts, including a subcommittee of the American Bar Association. The final rule promotes the CFTC's core values in a number of ways, particularly the values of *clarity* and *forward thinking.* It also furthers the agency's strategic goal of regulating our derivatives markets to promote the interests of all Americans.[5]

Clarity for Customers and Creditors

The final rule serves our core value of clarity by incorporating key principles and actual practice as they have evolved in commodity broker bankruptcies and related judicial decisions in the years since 1983.

A new introductory section of the rule enumerates certain ''core concepts'' of commodity broker bankruptcies. This section is intended to offer a readily understandable primer on relevant law, policy, and practical considerations in this area, thereby providing a common mental framework for brokers, customers, bankruptcy trustees, courts, and the public. Among other things, this section provides an overview of the various classes of customer segregated accounts held by a commodity broker; the priority of public customers over insiders; the requirement of *pro rata* distribution; and the preference to transfer rather than liquidate open positions.

The final rule codifies a number of approaches and practices that have proven necessary or desirable in commodity broker bankruptcies in the intervening years since 1983. For example, the final rule authorizes a bankruptcy trustee to treat a broker's customers in the aggregate for certain purposes, rather than handling each customer's account on a bespoke basis. This aggregate treatment has in practice proven unavoidable in more recent commodity broker bankruptcies, which have required disposition of hundreds of thousands of derivatives contracts—on behalf of thousands or tens of thousands of customers—within days or even hours. By making clear that such aggregate disposition of accounts is permissible and may even be more likely to occur than the alternative, the final rule provides greater clarity on potential outcomes for trustees, brokers, and customers.

For example, the final rule expressly permits the trustee—following consultation with CFTC staff—to determine whether to treat open positions of public customers in a designated hedging account as specifically identifiable property (requiring the trustee to solicit and comply with individual customer instructions), or instead transfer or ''port'' all such positions to a solvent commodity broker where possible. This provision recognizes that requiring the trustee to identify hedging accounts and provide account holders the opportunity to give individual instructions is often a resource-intensive endeavor, which could interfere with the trustee's ability to act in a timely and effective manner to protect all the broker's customers.[6]

The final rule also includes explicit rules governing the bankruptcy of a clearinghouse, otherwise known as a derivatives clearing organization or DCO. Since its inception, Part 190 has contemplated only a ''case-by-case'' approach with no corresponding rules to spell out what would happen in the event of a DCO bankruptcy. While such a bankruptcy is extremely unlikely, it is important to provide *ex ante* clarity to DCO members and customers as to how it would be handled. The final rule favors following the DCO's existing default management and recovery and wind-down rules and procedures, but gives the trustee discretion to apply them reasonably and practicably. This allows the bankruptcy trustee to take advantage of and adapt an established ''playbook,'' rather than being forced either to follow a rigid, ''one-size-fits-all'' framework or to form a resolution plan in a matter of hours during the onset of a crisis. The final rule also gives legal certainty to DCO actions taken in accordance with a recovery and wind-down plan filed with the CFTC by precluding the trustee from voiding any such action.

I support codifying these and other practices within our rules in order to provide greater transparency and predictability to brokers, customers, and other key stakeholders regarding permissible and expected procedures in a bankruptcy scenario.

Forward Thinking on Future Insolvencies

The final rule updates a number of provisions to reflect changes in financial technology since Part 190 was enacted 37 years ago. The enhanced discretion discussed above would in many cases help the trustee to account for the increase in transaction execution and processing speed, as well as the potential for large and unpredictable market moves given the rise of global trading and the 24-hour trading cycle. In addition, the final rule acknowledges digital assets as a physically deliverable asset class, in light of the listing of a number of physically delivered ''virtual currency'' derivatives contracts.

The final rule also reflects advances in communications technology. For example, under the final rule, notice of a bankruptcy filing and related filed documents will be provided to the CFTC by electronic rather than paper means. Furthermore, required customer notice procedures no longer include publication in a ''newspaper of general circulation'' in light of the downward trend in newspaper readership. The final rule similarly recognizes changes from paper-based to electronic recording of documents of title.

Promoting the Interests of All Americans

Protection of customer funds is the lynchpin of the commodity broker bankruptcy regime of Part 190. The final rule includes a number of measures to enhance those protections, including by buttressing provisions already in place under existing law and regulation. In doing so, the final rule seeks to ensure that the CFTC's bankruptcy regime works for the derivatives market participants it was meant to serve—particularly public brokerage customers, with a special emphasis on customers using derivatives to hedge their commercial risks.

For example, the final rule reinforces the bankruptcy priority of public broker customers over ''non-public'' customers (*e.g.,* the broker's proprietary and affiliate accounts). It also strengthens the CFTC's longstanding position that shortfalls in segregated customer assets should be made up from the broker's general estate. As a result, our final rule

[4] After considering comments that were received on the original proposal, our Commission subsequently issued a Supplemental Proposal that withdrew § 190.14(b)(2) and (3), and proposed other revisions to § 190.14. *See* Bankruptcy Regulations, 85 FR 60110 (Sept. 24, 2020) (''Supplemental Proposal''). However, in light of comments raised on the Supplemental Proposal, as well as the original proposal, our Commission concluded that, at this point, it should engage in further analysis and development before proposing this, or any other, alternative approach. Such further analysis and development will better enable the CFTC to propose, in detail, a solution that is effective, and that mitigates any attendant concerns.

[5] *See* Remarks of CFTC Chairman Heath P. Tarbert to the 35th Annual FIA Expo 2019 (Oct. 30, 2019), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/opatarbert2* (outlining the CFTC's strategic goals).

[6] The final rule also grants the trustee appropriate discretion in other respects—for example, by allowing the trustee to modify the customer proof of claim form as needed for a particular bankruptcy.

makes clear that the CFTC's bankruptcy regime is complementary to relatively recently-enacted customer protection rules for day-to-day broker operations.[7]

The final rule also furthers the preference—consistent with Subchapter IV of the Bankruptcy Code[8]—for transferring or ''porting'' customer positions to a solvent broker, rather than liquidating those positions. Porting of positions protects the utility of customer hedges by avoiding the risk of market moves between liquidation and re-establishment of the customer's hedging position. It also mitigates the risk that liquidation itself will cause such market moves. Among other measures, the grant of trustee discretion as to whether to treat hedging positions as specifically identifiable property will serve these objectives by facilitating porting of such positions *en masse,* promptly and efficiently, along with other customer property.

Conclusion

While updates to the CFTC's bankruptcy rules have been years in the making, I believe today's final rule was well worth the wait. The commodity broker resolution regime of Part 190 is respected throughout the world for its effectiveness and efficiency. In addition, Part 190 is important to the continued global competitiveness of American exchanges, clearinghouses, and market intermediaries. The final rule further enhances these features of our regime. Through its focus on promoting customer protection, clarity, and forward thinking, I believe the final rule will position us well for this decade and beyond.

Appendix 3—Statement of Support of Commissioner Brian D. Quintenz

I am pleased to support today's final rule amending the Commission's regulations governing the bankruptcy proceedings of commodity brokers.[1] This rulemaking makes the first comprehensive change to these regulations since they were first issued in 1983. I commend both Chairman Tarbert for his leadership in continuing the Commission's rulemaking agenda and former Chairman Giancarlo for laying the groundwork for this important rulemaking when he launched the CFTC's Project KISS initiative.[2]

I am pleased that today's final rule carefully took into consideration comments from FCMs, DCOs, asset managers and other market participants. I would like to highlight a few aspects of today's final rule. The rulemaking reaffirms the special treatment the U.S. Bankruptcy Code affords to the customer account of an insolvent commodity broker, so that customers' positions can promptly be transferred.[3] The Commission is, for the first time, issuing rules specific to an insolvent DCO, which are similar to the rules applicable to an insolvent FCM. Next, taking advantage of the Commission's experience with a few insolvent FCMs over the past decades, the final rule provides deference to the trustee that a U.S. Bankruptcy Court appoints to oversee the proceedings of an insolvent commodity broker. This increased deference is intended to expedite the transfer of customer funds. In response to comments from the asset management community, the final provisions provide additional guidance on how a trustee should balance various interests in seeking to protect public customers.[4] In light of the Commission's experience from the bankruptcy of MF Global in 2011, the new bankruptcy rules generally treat letters of credit equivalently to other collateral posted by customers, so that the *pro rata* distribution of customer property in the event of a shortfall in the customer account will apply equally to all collateral. The final rule also reflects experience from MF Global by dividing the delivery account into ''physical delivery'' and ''cash delivery'' account classes. Property other than cash is generally easier to trace, so it should have the benefit of a separate account class. Finally, the final rule's revised treatment of the ''delivery account,'' applicable in the context of physically-settled futures and cleared swaps, will apply not only to tangible commodities, as is currently the case, but also to digital assets. This amendment will provide important legal certainty to the growing exchange-traded market for cleared, physically-settled, digital asset derivatives.

I acknowledge that the asset management community has raised concerns with certain existing DCO rules that would be recognized in the bankruptcy of an FCM or DCO. I would support an on-going dialogue between the DCOs and their members and customers on resolution and resiliency concerns.

Appendix 4—Statement of Commissioner Rostin Behnam

I respectfully support the Commodity Futures Trading Commission's (the ''Commission'' or ''CFTC'') final rule amending Part 190 of its regulations, which governs bankruptcy proceedings of commodity brokers. First and foremost, I want to thank Commission staff for all of their hard work on the final rule. This is the first major update of the CFTC's existing Part 190 since 1983, when it was originally implemented by the Commission.[1]

The final rule is the product of years of staff analysis and engagement with market participants, including the Part 190 Subcommittee of the Business Law Section of the American Bar Association, which provided a detailed submission of suggested model Part 190 rules in response to a prior Commission request for information.[2] Several agency Chairs going back many years deserve recognition and thanks for pushing to update Part 190 and starting this process. Customer protections are at the heart of the Commodity Exchange Act, and it is imperative that the Commission have clear rules that direct how proceedings occur during a commodity broker bankruptcy.

The revision is designed to recognize the many changes in our industry over the past 37 years. Most importantly, it is informed by the Commission's experience with past bankruptcies. More recently, the MF Global bankruptcy in 2011 was the eighth largest corporate bankruptcy in American history.[3] It gave the Commission first hand experience with what worked, what did not, and what could be improved.

I was a lead advisor during the U.S. Senate's investigation of the MF Global bankruptcy, and during the Senate investigation, I learned the intricate contours of Part 190, its relationship to the Bankruptcy Code, and how the larger puzzle of creditors, customers, and equity holders, among others, fits

[7] 17 CFR 1.23 (enacted in 2013 and revised in 2014) (requiring an FCM to contribute its own funds as ''residual interest'' to top up shortfalls in customer segregated accounts in the ordinary course of business).

[8] Statutory authority for Part 190 includes Subchapter IV of Chapter 7 of the Bankruptcy Code.

[1] Part 190 of the Commission's regulations (17 CFR part 190).

[2] CFTC Requests Public Input on Simplifying Rules, *https://www.cftc.gov/PressRoom/PressReleases/pr7555-17.*

[3] 11 U.S.C. 761 *et seq.*

[4] § 190.00(c)(3)(i)(C).

[1] *Bankruptcy,* 48 FR 8716 (March 1, 1983).

[2] 82 FR 23765 (May 3, 2017). The ABA Submission can be found at: *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61331&SearchText;* the accompanying cover note (''ABA Cover Note'') can be found at: *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61330&SearchText.*

[3] John Gapper and Isabella Kaminska, *Downfall of MF Global,* Financial Times, Nov. 4, 2011, *available at https://www.ft.com/content/2882d766-06fb-11e1-90de-00144feabdc0.*

together. It was during those frenzied days that I truly appreciated the regulatory principle that *customer margin is sacrosanct property.* Because of my experience during those few months, I have made customer protections an absolute priority in my time as a Commissioner. Having spoken with many market participants throughout the MF Global bankruptcy proceedings, including those whose money disappeared in the days immediately following, customer protection is my most pressing responsibility.

Just a few months later in early 2012, the bankruptcy of Peregrine Financial Group (''PFG''), the catastrophic culmination of a fraudulent scheme by a futures commission merchant (''FCM'') involving over $220M in customer funds,[4] further laid bare the strengths and weaknesses of the Commission's bankruptcy regime. Important lessons have been learned, both in terms of what works and what does not, and I believe today's final rule implements the lessons learned in both of those events, and those that preceded them.

Many of the changes to Part 190 in today's final rule further support provisions that have worked in prior bankruptcies. One of the themes of this refresh is clarity. The goal is to be as clear as possible about the Commission's intentions regarding Part 190 in order to enhance the understanding of Designated Clearing Organizations (''DCOs''), FCMs, their customers, trustees, and the public at large. Changes in this final rule will foster the longstanding and continuing policy preference for transferring (as opposed to liquidating) the positions of public customers—an important customer protection aimed at preserving the status quo/asset value. Other changes further support existing requirements including that shortfalls in segregated property should be shored up from the FCM's general assets, and that *public customers are favored over non-public customers.* The new provisions provide trustees with enhanced discretion based upon prior positive experience, and codify practice adopted in past bankruptcies by requiring FCMs to notify the Commission of their intent to file for voluntary bankruptcy.

Other changes address what has not worked or become outdated. In light of lessons learned from MF Global, the Commission is enacting changes to the treatment of letters of credit as collateral, both during business as usual and during bankruptcy, in order to ensure that customers who post letters of credit as collateral have the same proportional loss as customers who post other types of collateral.

The final rule also addresses a number of changes that have naturally occurred in our markets since the original Part 190 finalization in 1983. The Commission is promulgating a new subpart C to part 190, specifically governing the bankruptcy of a clearing organization. As DCOs have grown in importance over time, including being deemed systemically important by the Financial Stability Oversight Council following the financial crisis,[5] the Commission believes that it is imperative to have a clear plan in place for exactly how a DCO bankruptcy would be resolved. The final rule also addresses changes in technology over the past 37 years, and the movement from paper-based to electronic-based means of communication—a lesson learned from the PFG bankruptcy.

In many ways, this final rule is exactly how the rulemaking process should work. It looks retrospectively at major relevant events, and applies important lessons learned regarding what works in the existing Part 190 rules, what does not, and what can be improved. But it also looks forward in a sense, recognizing changes in market structure and thinking ahead to the possibility of the bankruptcy of a clearing organization. This is a stark contrast to the risk principles final rule that we consider today. While the bankruptcy final rule looks back at the Commission's past experiences with MF Global and PFG, the risk principles final rule seems to ignore past events. While the bankruptcy final rule looks ahead and plans for the possibility of addressing a DCO bankruptcy, the risk principles final rule ignores future events such as climate change.

My only concern regarding the bankruptcy rule, and it is a relatively small one, is one of timing. The proposal for this rule was issued this past April.[6] The comment period just closed on July 13. The Commission then issued a supplemental notice of proposed rulemaking in September.[7] That comment period ended October 26. Particularly for a rule of this size and intricacy, the time that staff had to review and analyze the comment letters and draft the final rule and preamble has been incredibly short. Staff has worked tirelessly on this rule to get to the finish line. However, I think both the Commission and the public might well have benefited from more time for review and reflection before issuing such an important rule.

On that note, I would like to close by again thanking staff for all of their hard work in producing this refresh of the Commission's part 190 rules to provide important customer protections.

Appendix 5—Statement of Commissioner Dan M. Berkovitz

I support the final rule amending the Commission's part 190 bankruptcy regulations. The amendments comprehensively update these regulations to address the increased size and speed of our markets and incorporate ''lessons learned'' from futures commission merchant (FCM) bankruptcies that occurred since the regulations were first adopted in 1983. The new derivatives clearing organization (DCO) bankruptcy regulations provide a framework to help market participants be prepared for such an event. While FCM bankruptcies are infrequent, and a registered DCO has never gone bankrupt, any such event could have significant financial impacts on many market participants, which, in turn, could have systemic implications. Improving the overall effectiveness and efficiency of the bankruptcy process fosters systemic stability and helps to better protect, preserve, and quickly return customer assets.

The Bankruptcy Code provides express preferences for positions and property of customers of an FCM or DCO debtor so that the customers and their counterparties can be assured that those positions and property will not be included in the debtor's general assets or clawed back post-filing. As a result, those positions and property (*e.g.,* customer margin) can be transferred to another FCM or liquidated for value quickly and returned to customers following the filing of the bankruptcy. In this way, an FCM bankruptcy can be resolved expeditiously, greatly reducing any uncertainty as to the treatment of positions and property held in the name of the debtor.[1] The protection of

[4] *See* Press Release Number 6300–12, CFTC, CFTC Files Complaint Against Peregrine Financial Group, Inc. and Russell R. Wasendorf, Sr., Alleging Fraud, Misappropriation of Customer Funds, Violation of Customer Fund Segregation Laws, and Making False Statements (July 10, 2012), *https://www.cftc.gov/PressRoom/PressReleases/6300-12.*

[5] *https://www.federalreserve.gov/paymentsystems/designated_fmu_about.htm.*

[6] Bankruptcy Regulations, 85 FR 36000 (June 12, 2020). *https://www.cftc.gov/LawRegulation/FederalRegister/proposedrules/2020-08482.html.*

[7] Bankruptcy Regulations, 85 FR 60110 (September 24, 2020). *https://www.cftc.gov/LawRegulation/FederalRegister/proposedrules/2020-21005.html.*

[1] The bankruptcy trustee is directed to ''return promptly to a customer any specifically identifiable security, property, or commodity contract to which such customer is entitled, or shall transfer, on such

customer assets and positions furthers market stability by reducing the need for customers to rush to liquidate or transfer the positions themselves prior to the bankruptcy to avoid such assets being entangled in the debtor's general assets. I am voting for the final rule because it significantly improves the likelihood of achieving these objectives.

As a general matter, commenters agreed that, overall, the final rule is a significant improvement. As described in the final rule release and my statement on the proposed rule, the revised regulations further solidify and implement important principles such as the preference for public customers, pro rata distributions within account classes, and prompt return of assets. The final rule does this not only through general statements, but also in specific procedures established in the rule.

Commenters raised a number of specific concerns regarding the final rule. As would be expected, these concerns were often (though not always) grouped by the specific interests of different types of market participants in the event of a bankruptcy of an FCM or DCO.

Bankruptcy occurs because there are not enough assets to cover a debtor's liabilities. In resolving the claims on the debtor's assets during a bankruptcy proceeding, the allocation of the shortfall must entail a balancing of equities that, unfortunately, most often leaves one or more creditors and other interested parties (*e.g.,* shareholders) with less than they expected to have if a bankruptcy had not occurred. As such, different creditor groups may have competing interests in the preferences and processes established in the Commission's bankruptcy regulations.

This reality is reflected in the thoughtful comments we received in response to the proposed rule. The final rule release addresses these comments in turn, discussing the pros and cons of the changes requested. In a number of instances, the final rule has been modified to address concerns raised where such modifications better achieve the stated principles of the regulations. For other concerns raised, as explained in the release, the balancing of the equities meant that the overall outcome of the bankruptcy proceeding would be better served by maintaining the rule as proposed. Particularly with respect to the bankruptcy rules, the fact that *nobody* gets *everything* they want likely means that the rule, for the most part, is well-balanced.

I would like to take this opportunity to address two particular areas of comments. Entities that represent certain ''public customers'' expressed concern regarding the greater ''reasonable'' discretion provided to bankruptcy trustees, which is intended to facilitate a speedier resolution and return of value to customers generally. These commenters are concerned that some customers could receive less than they could otherwise if the trustee makes poor choices when exercising its discretion or does not implement specific customer instructions. This concern is partially addressed with the addition of § 190.00(c)(3)(i)(C) to clarify how a trustee shall exercise its discretion to ''best achieve the overarching goal of protecting public customers as a class by enhancing recoveries for, and mitigating disruptions to, public customers as a class.'' Otherwise, as explained in the preamble, the discretion granted to the trustee is appropriate when weighing the benefits of prompt resolution of the bankruptcy with the other goals of the regulations.

The Commission also received numerous comments on the proposed DCO bankruptcy regulations. This is not surprising given that these regulations create, for the first time, a regulatory scheme for DCO bankruptcies. Many commenters expressed concerns regarding the direction in § 190.15 to the trustee to, within reasonable discretion, follow the debtor DCO's recovery and wind-down plans. The final rule, while largely leaving the proposed provision in place, did modify the rule text to emphasize that the trustee must act in a manner ''consistent with the protection of customers.'' In addition, the preamble notes that some of the concerns raised in this context are part of a broader discussion in the derivatives industry regarding the involvement of DCO members and customers in the governance, rulemaking, and structuring of the DCOs, and that the Commission continues to review these matters. I look forward to engaging in further discussions on these issues.

I commend the Commission staff, particularly Bob Wasserman, for the thoughtful effort that has clearly been put into the final rule release. The Commission staff has done an exemplary job of reviewing the comments received, addressing those concerns, and drafting the preamble in very understandable language. I also appreciate Commission staff's engagement with my office on a number of areas in the final rule.

The final rule modernizes the Commission's bankruptcy regulations and furthers the general principles these regulations serve. Public customers and markets will be better protected in the event of an FCM or DCO bankruptcy. For these reasons, I support the final rule.

[FR Doc. 2020–28300 Filed 4–12–21; 8:45 am]

BILLING CODE 6351–01–P

customer's behalf, such security, property, or commodity contract to a commodity broker that is not a debtor'' subject to CFTC regulations. 11 U.S.C. 766(c). Section 764(a) of the Bankruptcy Code provides that ''any transfer by the debtor of property that, but for such transfer, would have been customer property, may be avoided by the [bankruptcy] trustee . . . .'' 11 U.S.C. 764(a).

FEDERAL REGISTER

Vol. 86 Tuesday,

No. 69 April 13, 2021

Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; FY 2022 Inpatient Psychiatric Facilities Prospective Payment System and Quality Reporting Updates for Fiscal Year Beginning October 1, 2021 (FY 2022); Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1750–P]

RIN 0938–AU40

Medicare Program; FY 2022 Inpatient Psychiatric Facilities Prospective Payment System and Quality Reporting Updates for Fiscal Year Beginning October 1, 2021 (FY 2022)

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would update the prospective payment rates, the outlier threshold, and the wage index for Medicare inpatient hospital services provided by Inpatient Psychiatric Facilities (IPF), which include psychiatric hospitals and excluded psychiatric units of an Inpatient Prospective Payment System (IPPS) hospital or critical access hospital. This rule also proposes to update and clarify the IPF teaching policy with respect to IPF hospital closures and displaced residents and proposes a technical change to the 2016-based IPF market basket price proxies. In addition, this proposed rule would update quality measures and reporting requirements under the Inpatient Psychiatric Facilities Quality Reporting (IPFQR) Program. These changes would be effective for IPF discharges occurring during the Fiscal Year (FY) beginning October 1, 2021 through September 30, 2022 (FY 2022).

DATES: To be assured consideration, comments must be received at one of the addresses provided below by June 7, 2021.

ADDRESSES: In commenting, please refer to file code CMS–1750–P.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1750–P, P.O. Box 8010, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1750–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: The IPF Payment Policy mailbox at *IPFPaymentPolicy@cms.hhs.gov* for general information.

Mollie Knight (410) 786–7948 or Eric Laib (410) 786–9759, for information regarding the market basket update or the labor related share.

Nick Brock (410) 786–5148 or Theresa Bean (410) 786–2287, for information regarding the regulatory impact analysis.

Lauren Lowenstein, (410) 786–4507, for information regarding the inpatient psychiatric facilities quality reporting program.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that website to view public comments.

Availability of Certain Tables Exclusively Through the Internet on the CMS Website

Addendum A to this proposed rule summarizes the FY 2022 IPF PPS payment rates, outlier threshold, cost of living adjustment factors (COLA) for Alaska and Hawaii, national and upper limit cost-to-charge ratios, and adjustment factors. In addition, the B Addenda to this proposed rule shows the complete listing of ICD–10 Clinical Modification (CM) and Procedure Coding System codes underlying the Code First table, the FY 2022 IPF PPS comorbidity adjustment, and electroconvulsive therapy (ECT) procedure codes. The A and B Addenda are available online at: *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

Tables setting forth the FY 2022 Wage Index for Urban Areas Based on Core-Based Statistical Area (CBSA) Labor Market Areas and the FY 2022 Wage Index Based on CBSA Labor Market Areas for Rural Areas are available exclusively through the internet, on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/IPFPPS/WageIndex.html.*

I. Executive Summary

A. Purpose

This proposed rule would update the prospective payment rates, the outlier threshold, and the wage index for Medicare inpatient hospital services provided by Inpatient Psychiatric Facilities (IPFs) for discharges occurring during the FY 2022 beginning October 1, 2021 through September 30, 2022. This rule also proposes to update and clarify the IPF teaching policy with respect to IPF hospital closures and displaced residents and proposes a technical change to the 2016-based IPF market basket price proxies. In addition, the proposed rule would update quality measures and reporting requirements under the Inpatient Psychiatric Facilities Quality Reporting (IPFQR) Program.

B. Summary of the Major Provisions

1. Inpatient Psychiatric Facilities Prospective Payment System (IPF PPS)

For the IPF PPS, we are proposing to—

- Update IPF PPS teaching policy with respect to IPF hospital closures and displaced residents.
- Replace one of the price proxies currently used for the For-profit Interest cost category in the 2016-based IPF market basket with a similar price proxy.
- Adjust the 2016-based IPF market basket update (2.3 percent) for economy-wide productivity (0.2 percentage point) as required by section 1886(s)(2)(A)(i) of the Social Security Act (the Act), resulting in a proposed IPF payment rate update of 2.1 percent for FY 2022.
- *Make technical rate setting changes:* The IPF PPS payment rates would be adjusted annually for inflation, as well as statutory and other policy factors. This rule proposes to update:

++ The IPF PPS Federal per diem base rate from $815.22 to $833.50.

++ The IPF PPS Federal per diem base rate for providers who failed to report quality data to $817.18.

++ The Electroconvulsive therapy (ECT) payment per treatment from $350.97 to $358.84.

++ The ECT payment per treatment for providers who failed to report quality data to $351.81.

++ The labor-related share from 77.3 percent to 77.1 percent.

++ The wage index budget-neutrality factor to 1.0014.

++ The fixed dollar loss threshold amount from $14,630 to $14,030 to maintain estimated outlier payments at 2 percent of total estimated aggregate IPF PPS payments.

2. Inpatient Psychiatric Facilities Quality Reporting (IPFQR) Program

In this proposed rule, we are proposing to:

• Adopt voluntary patient-level data reporting for data submitted for FY 2023 payment determination and mandatory patient-level data reporting for FY 2024 payment determination and subsequent years;

• Adopt the Coronavirus disease 2019 (COVID–19) Healthcare Personnel (HCP) Vaccination measure for the FY 2023 payment determination and subsequent years;

• Adopt the Follow-up After Psychiatric Hospitalization (FAPH) measure for the FY 2024 payment determination and subsequent years; and

• Remove the following four measures for FY 2024 payment determination and subsequent years:

++ Alcohol Use Brief Intervention Provided or Offered and Alcohol Use Brief Intervention Provided (SUB–2/2a) measure;

++ Tobacco Use Brief Intervention Provided or Offered and Tobacco Use Brief Intervention Provided (TOB–2/2a) measure;

++ Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure; and

++ Follow-up After Hospitalization for Mental Illness (FUH) measure.

C. Summary of Impacts

Provision description	Total transfers & cost reductions
FY 2022 IPF PPS payment update	The overall economic impact of this proposed rule is an estimated $90 million in increased payments to IPFs during FY 2022.
FY2023 IPFQR Program update	The overall economic impact of the IPFQR Program provisions of this proposed rule is an estimated $20,911,738 reduction in information collection burden.

II. Background

A. Overview of the Legislative Requirements of the IPF PPS

Section 124 of the Medicare, Medicaid, and State Children's Health Insurance Program Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113) required the establishment and implementation of an IPF PPS. Specifically, section 124 of the BBRA mandated that the Secretary of the Department of Health and Human Services (the Secretary) develop a per diem Prospective Payment System (PPS) for inpatient hospital services furnished in psychiatric hospitals and excluded psychiatric units including an adequate patient classification system that reflects the differences in patient resource use and costs among psychiatric hospitals and excluded psychiatric units. ''Excluded psychiatric unit'' means a psychiatric unit in an inpatient prospective payment system (IPPS) hospital that is excluded from the IPPS, or a psychiatric unit in a Critical Access Hospital (CAH) that is excluded from the CAH payment system. These excluded psychiatric units would be paid under the IPF PPS.

Section 405(g)(2) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) extended the IPF PPS to psychiatric distinct part units of CAHs.

Sections 3401(f) and 10322 of the Patient Protection and Affordable Care Act (Pub. L. 111–148) as amended by section 10319(e) of that Act and by section 1105(d) of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) (hereafter referred to jointly as ''the Affordable Care Act'') added subsection (s) to section 1886 of the Act.

Section 1886(s)(1) of the Act titled ''Reference to Establishment and Implementation of System,'' refers to section 124 of the BBRA, which relates to the establishment of the IPF PPS.

Section 1886(s)(2)(A)(i) of the Act requires the application of the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act to the IPF PPS for the rate year (RY) beginning in 2012 (that is, a RY that coincides with a FY) and each subsequent RY. As noted in our FY 2020 IPF PPS final rule with comment period, published in the **Federal Register** on August 6, 2019 (84 FR 38424 through 38482), for the RY beginning in 2019, the productivity adjustment currently in place was equal to 0.4 percentage point.

Section 1886(s)(2)(A)(ii) of the Act required the application of an ''other adjustment'' that reduced any update to an IPF PPS base rate by a percentage point amount specified in section 1886(s)(3) of the Act for the RY beginning in 2010 through the RY beginning in 2019. As noted in the FY 2020 IPF PPS final rule, for the RY beginning in 2019, section 1886(s)(3)(E) of the Act required that the other adjustment reduction be equal to 0.75 percentage point; this was the final year the statute required the application of this adjustment. Because FY 2021, was a RY beginning in 2020, FY 2021 was the first year section 1886(s)(2)(A)(ii) did not apply since its enactment.

Sections 1886(s)(4)(A) through (D) of the Act require that for RY 2014 and each subsequent RY, IPFs that fail to report required quality data with respect to such a RY will have their annual update to a standard Federal rate for discharges reduced by 2.0 percentage points. This may result in an annual update being less than 0.0 for a RY, and may result in payment rates for the upcoming RY being less than such payment rates for the preceding RY. Any reduction for failure to report required quality data will apply only to the RY involved, and the Secretary will not take into account such reduction in computing the payment amount for a subsequent RY. More information about the specifics of the current Inpatient Psychiatric Facilities Quality Reporting (IPFQR) Program is available in the FY 2020 IPF PPS and Quality Reporting Updates for Fiscal Year Beginning October 1, 2019 final rule (84 FR 38459 through 38468).

To implement and periodically update these provisions, we have published various proposed and final rules and notices in the **Federal Register**. For more information regarding these documents, see the Center for Medicare & Medicaid (CMS) website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/index.html?redirect=/InpatientPsychFacilPPS/.*

B. Overview of the IPF PPS

The November 2004 IPF PPS final rule (69 FR 66922) established the IPF PPS, as required by section 124 of the BBRA and codified at 42 CFR part 412, subpart N. The November 2004 IPF PPS final rule set forth the Federal per diem base rate for the implementation year (the 18-month period from January 1, 2005 through June 30, 2006), and provided payment for the inpatient operating and capital costs to IPFs for covered psychiatric services they furnish (that is, routine, ancillary, and capital costs, but not costs of approved educational activities, bad debts, and other services or items that are outside the scope of the IPF PPS). Covered psychiatric services include services for which benefits are provided under the fee-for-service Part A (Hospital Insurance Program) of the Medicare program.

The IPF PPS established the Federal per diem base rate for each patient day in an IPF derived from the national average daily routine operating, ancillary, and capital costs in IPFs in FY 2002. The average per diem cost was updated to the midpoint of the first year under the IPF PPS, standardized to account for the overall positive effects of the IPF PPS payment adjustments, and adjusted for budget-neutrality.

The Federal per diem payment under the IPF PPS is comprised of the Federal per diem base rate described previously and certain patient- and facility-level payment adjustments for characteristics that were found in the regression analysis to be associated with statistically significant per diem cost differences with statistical significance defined as p less than 0.05. A complete discussion of the regression analysis that established the IPF PPS adjustment factors can be found in the November 2004 IPF PPS final rule (69 FR 66933 through 66936).

The patient-level adjustments include age, Diagnosis-Related Group (DRG) assignment, and comorbidities; additionally, there are adjustments to reflect higher per diem costs at the beginning of a patient's IPF stay and lower costs for later days of the stay. Facility-level adjustments include adjustments for the IPF's wage index, rural location, teaching status, a cost-of-living adjustment for IPFs located in Alaska and Hawaii, and an adjustment for the presence of a qualifying emergency department (ED).

The IPF PPS provides additional payment policies for outlier cases, interrupted stays, and a per treatment payment for patients who undergo electroconvulsive therapy (ECT). During the IPF PPS mandatory 3-year transition period, stop-loss payments were also provided; however, since the transition ended as of January 1, 2008, these payments are no longer available.

C. Annual Requirements for Updating the IPF PPS

Section 124 of the BBRA did not specify an annual rate update strategy for the IPF PPS and was broadly written to give the Secretary discretion in establishing an update methodology. Therefore, in the November 2004 IPF PPS final rule, we implemented the IPF PPS using the following update strategy:

- Calculate the final Federal per diem base rate to be budget-neutral for the 18-month period of January 1, 2005 through June 30, 2006.
- Use a July 1 through June 30 annual update cycle.
- Allow the IPF PPS first update to be effective for discharges on or after July 1, 2006 through June 30, 2007.

In November 2004, we implemented the IPF PPS in a final rule that published on November 15, 2004 in the **Federal Register** (69 FR 66922). In developing the IPF PPS, and to ensure that the IPF PPS is able to account adequately for each IPF's case-mix, we performed an extensive regression analysis of the relationship between the per diem costs and certain patient and facility characteristics to determine those characteristics associated with statistically significant cost differences on a per diem basis. That regression analysis is described in detail in our November 28, 2003 IPF proposed rule (68 FR 66923; 66928 through 66933) and our November 15, 2004 IPF final rule (69 FR 66933 through 66960). For characteristics with statistically significant cost differences, we used the regression coefficients of those variables to determine the size of the corresponding payment adjustments.

In the November 15, 2004 final rule, we explained the reasons for delaying an update to the adjustment factors, derived from the regression analysis, including waiting until we have IPF PPS data that yields as much information as possible regarding the patient-level characteristics of the population that each IPF serves. We indicated that we did not intend to update the regression analysis and the patient-level and facility-level adjustments until we complete that analysis. Until that analysis is complete, we stated our intention to publish a notice in the **Federal Register** each spring to update the IPF PPS (69 FR 66966).

On May 6, 2011, we published a final rule in the **Federal Register** titled, ''Inpatient Psychiatric Facilities Prospective Payment System—Update for Rate Year Beginning July 1, 2011 (RY 2012)'' (76 FR 26432), which changed the payment rate update period to a RY that coincides with a FY update. Therefore, final rules are now published in the **Federal Register** in the summer to be effective on October 1. When proposing changes in IPF payment policy, a proposed rule would be issued in the spring, and the final rule in the summer to be effective on October 1. For a detailed list of updates to the IPF PPS, we refer readers to our regulations at 42 CFR 412.428.

The most recent IPF PPS annual update was published in a final rule on August 4, 2020 in the **Federal Register** titled, ''Medicare Program; FY 2021 Inpatient Psychiatric Facilities Prospective Payment System and Special Requirements for Psychiatric Hospitals for Fiscal Year Beginning October 1, 2020 (FY 2021)'' (85 FR 47042), which updated the IPF PPS payment rates for FY 2021. That final rule updated the IPF PPS Federal per diem base rates that were published in the FY 2020 IPF PPS Rate Update final rule (84 FR 38424) in accordance with our established policies.

III. Provisions of the FY 2022 IPF PPS Proposed Rule

A. Proposed Update to the FY 2021 Market Basket for the IPF PPS

1. Background

Originally, the input price index that was used to develop the IPF PPS was the ''Excluded Hospital with Capital'' market basket. This market basket was based on 1997 Medicare cost reports for Medicare participating inpatient rehabilitation facilities (IRFs), IPFs, long-term care hospitals (LTCHs), cancer hospitals, and children's hospitals. Although ''market basket'' technically describes the mix of goods and services used in providing health care at a given point in time, this term is also commonly used to denote the input price index (that is, cost category weights and price proxies) derived from that market basket. Accordingly, the term market basket as used in this document, refers to an input price index.

Since the IPF PPS inception, the market basket used to update IPF PPS payments has been rebased and revised to reflect more recent data on IPF cost structures. We last rebased and revised the IPF market basket in the FY 2020 IPF PPS rule, where we adopted a 2016-based IPF market basket, using Medicare cost report data for both Medicare participating freestanding psychiatric hospitals and psychiatric units. We refer

readers to the FY 2020 IPF PPS final rule for a detailed discussion of the 2016-based IPF PPS market basket and its development (84 FR 38426 through 38447). References to the historical market baskets used to update IPF PPS payments are listed in the FY 2016 IPF PPS final rule (80 FR 46656).

2. Proposed FY 2022 IPF Market Basket Update

For FY 2022 (beginning October 1, 2021 and ending September 30, 2022), we are proposing to use an estimate of the 2016-based IPF market basket increase factor to update the IPF PPS base payment rate. Consistent with historical practice, we are proposing to estimate the market basket update for the IPF PPS based on IHS Global Inc.'s (IGI) forecast (see section III.A.3 of this proposed rule for a discussion of a proposed technical update to one price proxy that is part of the 2016-based IPF market basket). IGI is a nationally recognized economic and financial forecasting firm that contracts with the CMS to forecast the components of the market baskets and multifactor productivity (MFP). For the proposed rule, based on IGI's fourth quarter 2020 forecast with historical data through the third quarter of 2020, the 2016-based IPF market basket increase factor for FY 2022 is 2.3 percent. Therefore, we are proposing that the 2016-based IPF market basket update for FY 2022 would be 2.3 percent.

Section 1886(s)(2)(A)(i) of the Act requires the application of the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act to the IPF PPS for the RY beginning in 2012 (a RY that coincides with a FY) and each subsequent RY. For this FY 2022 IPF PPS proposed rule, based on IGI's fourth quarter 2020 forecast, the proposed MFP adjustment for FY 2022 (the 10-year moving average of MFP for the period ending FY 2022) is projected to be 0.2 percent. We are proposing to reduce the proposed 2.3 percent IPF market basket update by this 0.2 percentage point productivity adjustment, as mandated by the Act. This results in a proposed estimated FY 2022 IPF PPS payment rate update of 2.1 percent ($2.3 - 0.2 = 2.1$). We are also proposing that if more recent data become available, we would use such data, if appropriate, to determine the FY 2022 IPF market basket update and MFP adjustment for the final rule. For more information on the productivity adjustment, we refer readers to the discussion in the FY 2016 IPF PPS final rule (80 FR 46675).

3. Proposed Update to IPF Market Basket Price Proxies

As discussed in section III.A.1. of this proposed rule, the IPF market basket is an input price index that consists of cost category weights and price proxies derived from the mix of goods and services used in providing health care. For FY 2022, for the For-profit Interest cost category of the 2016-based IPF market basket, we are proposing to use the iBoxx AAA Corporate Bond Yield index instead of the Moody's AAA Corporate Bond Yield index. Effective for December 2020, the Moody's AAA Corporate Bond series is no longer available for use under license to IGI, which is the nationally-recognized economic and financial forecasting firm with which we contract to forecast the components of the market baskets and MFP.

We compared the iBoxx AAA Corporate Bond Yield index with the Moody's AAA Corporate Bond Yield index and found that the average growth rates in the history of the two series are very similar. Over the historical time period of FY 2001 to FY 2020, the 4-quarter percent change moving average growth in the iBoxx series was approximately 0.1 percentage point higher, on average, than the Moody's series. However, given the relatively small weight for this cost category, replacing the Moody's series with the iBoxx series would not impact the historical top-line market basket increases when rounded to the nearest tenth of a percentage point over the past 10 fiscal years (FY 2011 to FY 2020). Therefore, because the iBoxx AAA Corporate Bond Yield index captures the same technical concept as the current corporate bond proxy and tracks similarly to the current measure that is no longer available, we believe that using the iBoxx AAA Corporate Bond Yield index is technically appropriate to use in the 2016-based IPF market basket.

4. Proposed FY 2022 IPF Labor-Related Share

Due to variations in geographic wage levels and other labor-related costs, we believe that payment rates under the IPF PPS should continue to be adjusted by a geographic wage index, which would apply to the labor-related portion of the Federal per diem base rate (hereafter referred to as the labor-related share).

The labor-related share is determined by identifying the national average proportion of total costs that are related to, influenced by, or vary with the local labor market. We are proposing to continue to classify a cost category as labor-related if the costs are labor-intensive and vary with the local labor market.

Based on our definition of the labor-related share and the cost categories in the 2016-based IPF market basket, we are proposing to continue to include in the labor-related share the sum of the relative importance of Wages and Salaries; Employee Benefits; Professional Fees: Labor-Related; Administrative and Facilities Support Services; Installation, Maintenance, and Repair; All Other: Labor-related Services; and a portion of the Capital-Related cost weight (46 percent) from the 2016-based IPF market basket. The relative importance reflects the different rates of price change for these cost categories between the base year (FY 2016) and FY 2022. Using IGI's fourth quarter 2020 forecast for the 2016-based IPF market basket, the proposed IPF labor-related share for FY 2022 is the sum of the FY 2022 relative importance of each labor-related cost category. For more information on the labor-related share and its calculation, we refer readers to the FY 2020 IPF PPS final rule (84 FR 38445 through 38447). For FY 2022, the proposed labor-related share based on IGI's fourth quarter 2020 forecast of the 2016-based IPF PPS market basket is 77.1 percent. We are also proposing that if more recent data become available, we would use such data, if appropriate, to determine the FY 2022 labor-related share for the final rule.

B. Proposed Updates to the IPF PPS Rates for FY Beginning October 1, 2021

The IPF PPS is based on a standardized Federal per diem base rate calculated from the IPF average per diem costs and adjusted for budget-neutrality in the implementation year. The Federal per diem base rate is used as the standard payment per day under the IPF PPS and is adjusted by the patient-level and facility-level adjustments that are applicable to the IPF stay. A detailed explanation of how we calculated the average per diem cost appears in the November 2004 IPF PPS final rule (69 FR 66926).

1. Determining the Standardized Budget-Neutral Federal per Diem Base Rate

Section 124(a)(1) of the BBRA required that we implement the IPF PPS in a budget-neutral manner. In other words, the amount of total payments under the IPF PPS, including any payment adjustments, must be projected to be equal to the amount of total payments that would have been made if the IPF PPS were not implemented. Therefore, we calculated the budget-

neutrality factor by setting the total estimated IPF PPS payments to be equal to the total estimated payments that would have been made under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (Pub. L. 97–248) methodology had the IPF PPS not been implemented. A step-by-step description of the methodology used to estimate payments under the TEFRA payment system appears in the November 2004 IPF PPS final rule (69 FR 66926).

Under the IPF PPS methodology, we calculated the final Federal per diem base rate to be budget-neutral during the IPF PPS implementation period (that is, the 18-month period from January 1, 2005 through June 30, 2006) using a July 1 update cycle. We updated the average cost per day to the midpoint of the IPF PPS implementation period (October 1, 2005), and this amount was used in the payment model to establish the budget-neutrality adjustment.

Next, we standardized the IPF PPS Federal per diem base rate to account for the overall positive effects of the IPF PPS payment adjustment factors by dividing total estimated payments under the TEFRA payment system by estimated payments under the IPF PPS. In addition, information concerning this standardization can be found in the November 2004 IPF PPS final rule (69 FR 66932) and the RY 2006 IPF PPS final rule (71 FR 27045). We then reduced the standardized Federal per diem base rate to account for the outlier policy, the stop loss provision, and anticipated behavioral changes. A complete discussion of how we calculated each component of the budget-neutrality adjustment appears in the November 2004 IPF PPS final rule (69 FR 66932 through 66933) and in the RY 2007 IPF PPS final rule (71 FR 27044 through 27046). The final standardized budget-neutral Federal per diem base rate established for cost reporting periods beginning on or after January 1, 2005 was calculated to be $575.95.

The Federal per diem base rate has been updated in accordance with applicable statutory requirements and § 412.428 through publication of annual notices or proposed and final rules. A detailed discussion on the standardized budget-neutral Federal per diem base rate and the electroconvulsive therapy (ECT) payment per treatment appears in the FY 2014 IPF PPS update notice (78 FR 46738 through 46740). These documents are available on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/index.html.*

IPFs must include a valid procedure code for ECT services provided to IPF beneficiaries in order to bill for ECT services, as described in our Medicare Claims Processing Manual, Chapter 3, Section 190.7.3 (available at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/clm104c03.pdf.*) There were no changes to the ECT procedure codes used on IPF claims as a result of the proposed update to the ICD–10–PCS code set for FY 2022. Addendum B to this proposed rule shows the ECT procedure codes for FY 2022 and is available on our website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

2. Proposed Update of the Federal per Diem Base Rate and Electroconvulsive Therapy Payment per Treatment

The current (FY 2021) Federal per diem base rate is $815.22 and the ECT payment per treatment is $350.97. For the proposed FY 2022 Federal per diem base rate, we applied the payment rate update of 2.1 percent—that is, the 2016-based IPF market basket increase for FY 2022 of 2.3 percent less the productivity adjustment of 0.2 percentage point—and the wage index budget-neutrality factor of 1.0014 (as discussed in section III.D.1 of this proposed rule) to the FY 2021 Federal per diem base rate of $815.22, yielding a proposed Federal per diem base rate of $833.50 for FY 2022. Similarly, we applied the 2.1 percent payment rate update and the 1.0014 wage index budget-neutrality factor to the FY 2021 ECT payment per treatment of $350.97, yielding a proposed ECT payment per treatment of $358.84 for FY 2022.

Section 1886(s)(4)(A)(i) of the Act requires that for RY 2014 and each subsequent RY, in the case of an IPF that fails to report required quality data with respect to such RY, the Secretary will reduce any annual update to a standard Federal rate for discharges during the RY by 2.0 percentage points. Therefore, we are applying a 2.0 percentage point reduction to the Federal per diem base rate and the ECT payment per treatment as follows:

- For IPFs that fail requirements under the IPFQR Program, we applied a 0.1 percent payment rate update—that is, the IPF market basket increase for FY 2022 of 2.3 percent less the productivity adjustment of 0.2 percentage point for an update of 2.1 percent, and further reduced by 2 percentage points in accordance with section 1886(s)(4)(A)(i) of the Act—and the wage index budget-neutrality factor of 1.0014 to the FY 2021 Federal per diem base rate of $815.22, yielding a Federal per diem base rate of $817.18 for FY 2022.
- For IPFs that fail to meet requirements under the IPFQR Program, we applied the 0.1 percent annual payment rate update and the 1.0014 wage index budget-neutrality factor to the FY 2021 ECT payment per treatment of $350.97, yielding an ECT payment per treatment of $351.81 for FY 2022.

C. Proposed Updates to the IPF PPS Patient-Level Adjustment Factors

1. Overview of the IPF PPS Adjustment Factors

The IPF PPS payment adjustments were derived from a regression analysis of 100 percent of the FY 2002 Medicare Provider and Analysis Review (MedPAR) data file, which contained 483,038 cases. For a more detailed description of the data file used for the regression analysis, see the November 2004 IPF PPS final rule (69 FR 66935 through 66936). We continue to use the existing regression-derived adjustment factors established in 2005 for FY 2022. However, we have used more recent claims data to simulate payments to finalize the outlier fixed dollar loss threshold amount and to assess the impact of the IPF PPS updates.

2. IPF PPS Patient-Level Adjustments

The IPF PPS includes payment adjustments for the following patient-level characteristics: Medicare Severity Diagnosis Related Groups (MS–DRGs) assignment of the patient's principal diagnosis, selected comorbidities, patient age, and the variable per diem adjustments.

a. Proposed Update to MS–DRG Assignment

We believe it is important to maintain for IPFs the same diagnostic coding and Diagnosis Related Group (DRG) classification used under the IPPS for providing psychiatric care. For this reason, when the IPF PPS was implemented for cost reporting periods beginning on or after January 1, 2005, we adopted the same diagnostic code set (ICD–9–CM) and DRG patient classification system (MS–DRGs) that were utilized at the time under the IPPS. In the RY 2009 IPF PPS notice (73 FR 25709), we discussed CMS' effort to better recognize resource use and the severity of illness among patients. CMS adopted the new MS–DRGs for the IPPS in the FY 2008 IPPS final rule with comment period (72 FR 47130). In the RY 2009 IPF PPS notice (73 FR 25716), we provided a crosswalk to reflect changes that were made under the IPF PPS to adopt the new MS–DRGs. For a

detailed description of the mapping changes from the original DRG adjustment categories to the current MS–DRG adjustment categories, we refer readers to the RY 2009 IPF PPS notice (73 FR 25714).

The IPF PPS includes payment adjustments for designated psychiatric DRGs assigned to the claim based on the patient's principal diagnosis. The DRG adjustment factors were expressed relative to the most frequently reported psychiatric DRG in FY 2002, that is, DRG 430 (psychoses). The coefficient values and adjustment factors were derived from the regression analysis discussed in detail in the November 28, 2003 IPF proposed rule (68 FR 66923; 66928 through 66933) and the November 15, 2004 IPF final rule (69 FR 66933 through 66960). Mapping the DRGs to the MS–DRGs resulted in the current 17 IPF MS–DRGs, instead of the original 15 DRGs, for which the IPF PPS provides an adjustment. For FY 2022, we are not proposing any changes to the IPF MS–DRG adjustment factors.

In the FY 2015 IPF PPS final rule published August 6, 2014 in the **Federal Register** titled, ''Inpatient Psychiatric Facilities Prospective Payment System—Update for FY Beginning October 1, 2014 (FY 2015)'' (79 FR 45945 through 45947), we finalized conversions of the ICD–9–CM-based MS–DRGs to ICD–10–CM/PCS-based MS–DRGs, which were implemented on October 1, 2015. Further information on the ICD–10–CM/PCS MS–DRG conversion project can be found on the CMS ICD–10–CM website at *https://www.cms.gov/Medicare/Coding/ICD10/ICD-10-MS-DRG-Conversion-Project.html.*

For FY 2022, we are proposing to continue to make the existing payment adjustment for psychiatric diagnoses that group to one of the existing 17 IPF MS–DRGs listed in Addendum A. Addendum A is available on our website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.* Psychiatric principal diagnoses that do not group to one of the 17 designated MS–DRGs would still receive the Federal per diem base rate and all other applicable adjustments, but the payment would not include an MS–DRG adjustment.

The diagnoses for each IPF MS–DRG would be updated as of October 1, 2021, using the final IPPS FY 2022 ICD–10–CM/PCS code sets. The FY 2022 IPPS proposed rule includes tables of the proposed changes to the ICD–10–CM/PCS code sets, which underlie the FY 2022 IPF MS–DRGs. Both the FY 2022 IPPS proposed rule and the tables of proposed changes to the ICD–10–CM/PCS code sets, which underlie the FY 2022 MS–DRGs are available on the IPPS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/index.html.*

Code First

As discussed in the ICD–10–CM Official Guidelines for Coding and Reporting, certain conditions have both an underlying etiology and multiple body system manifestations due to the underlying etiology. For such conditions, the ICD–10–CM has a coding convention that requires the underlying condition be sequenced first followed by the manifestation. Wherever such a combination exists, there is a ''use additional code'' note at the etiology code, and a ''code first'' note at the manifestation code. These instructional notes indicate the proper sequencing order of the codes (etiology followed by manifestation). In accordance with the ICD–10–CM Official Guidelines for Coding and Reporting, when a primary (psychiatric) diagnosis code has a ''code first'' note, the provider would follow the instructions in the ICD–10–CM text. The submitted claim goes through the CMS processing system, which will identify the primary diagnosis code as non-psychiatric and search the secondary codes for a psychiatric code to assign a DRG code for adjustment. The system will continue to search the secondary codes for those that are appropriate for comorbidity adjustment.

For more information on the code first policy, we refer our readers to the November 2004 IPF PPS final rule (69 FR 66945) and see sections I.A.13 and I.B.7 of the FY 2020 ICD–10–CM Coding Guidelines, available at *https://www.cdc.gov/nchs/data/icd/10cmguidelines-FY2020_final.pdf.* In the FY 2015 IPF PPS final rule, we provided a code first table for reference that highlights the same or similar manifestation codes where the code first instructions apply in ICD–10–CM that were present in ICD–9–CM (79 FR 46009). In FY 2018, FY 2019 and FY 2020, there were no changes to the final ICD–10–CM/PCS codes in the IPF Code First table. For FY 2021, there were 18 ICD–10–PCS codes deleted from the final IPF Code First table. For FY 2022 there are 18 codes proposed for deletion from the ICD–10–CM/PCS codes in the IPF Code First table. The proposed FY 2022 Code First table is shown in Addendum B on our website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

b. Proposed Payment for Comorbid Conditions

The intent of the comorbidity adjustments is to recognize the increased costs associated with comorbid conditions by providing additional payments for certain existing medical or psychiatric conditions that are expensive to treat. In our RY 2012 IPF PPS final rule (76 FR 26451 through 26452), we explained that the IPF PPS includes 17 comorbidity categories and identified the new, revised, and deleted ICD–9–CM diagnosis codes that generate a comorbid condition payment adjustment under the IPF PPS for RY 2012 (76 FR 26451).

Comorbidities are specific patient conditions that are secondary to the patient's principal diagnosis and that require treatment during the stay. Diagnoses that relate to an earlier episode of care and have no bearing on the current hospital stay are excluded and must not be reported on IPF claims. Comorbid conditions must exist at the time of admission or develop subsequently, and affect the treatment received, length of stay (LOS), or both treatment and LOS.

For each claim, an IPF may receive only one comorbidity adjustment within a comorbidity category, but it may receive an adjustment for more than one comorbidity category. Current billing instructions for discharge claims, on or after October 1, 2015, require IPFs to enter the complete ICD–10–CM codes for up to 24 additional diagnoses if they co-exist at the time of admission, or develop subsequently and impact the treatment provided.

The comorbidity adjustments were determined based on the regression analysis using the diagnoses reported by IPFs in FY 2002. The principal diagnoses were used to establish the DRG adjustments and were not accounted for in establishing the comorbidity category adjustments, except where ICD–9–CM code first instructions applied. In a code first situation, the submitted claim goes through the CMS processing system, which will identify the principal diagnosis code as non-psychiatric and search the secondary codes for a psychiatric code to assign an MS–DRG code for adjustment. The system will continue to search the secondary codes for those that are appropriate for comorbidity adjustment.

As noted previously, it is our policy to maintain the same diagnostic coding set for IPFs that is used under the IPPS for providing the same psychiatric care. The 17 comorbidity categories formerly defined using ICD–9–CM codes were

converted to ICD–10–CM/PCS in our FY 2015 IPF PPS final rule (79 FR 45947 through 45955). The goal for converting the comorbidity categories is referred to as replication, meaning that the payment adjustment for a given patient encounter is the same after ICD–10–CM implementation as it would be if the same record had been coded in ICD–9–CM and submitted prior to ICD–10–CM/PCS implementation on October 1, 2015. All conversion efforts were made with the intent of achieving this goal. For FY 2022, we are proposing to continue to use the same comorbidity adjustment factors in effect in FY 2021, which are found in Addendum A, available on our website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

We have updated the ICD–10–CM/PCS codes, which are associated with the existing IPF PPS comorbidity categories, based upon the proposed FY 2022 update to the ICD–10–CM/PCS code set. The proposed FY 2022 ICD–10–CM/PCS updates include: 8 ICD–10–CM diagnosis codes added to the Poisoning comorbidity category, 4 codes deleted, and 4 changes to Poisoning comorbidity long descriptions; 2 ICD–10–CM diagnosis codes added to the Developmental Disabilities comorbidity category and 1 code deleted; and 3 ICD–10–PCS codes added to the Oncology Procedures comorbidity category. In addition, we are proposing to delete 18 ICD–10–PCS codes from the Code First Table. These updates are detailed in Addenda B of this proposed rule, which are available on our website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

In accordance with the policy established in the FY 2015 IPF PPS final rule (79 FR 45949 through 45952), we reviewed all new FY 2022 ICD–10–CM codes to remove codes that were site ''unspecified'' in terms of laterality from the FY 2022 ICD–10–CM/PCS codes in instances where more specific codes are available. As we stated in the FY 2015 IPF PPS final rule, we believe that specific diagnosis codes that narrowly identify anatomical sites where disease, injury, or a condition exists should be used when coding patients' diagnoses whenever these codes are available. We finalized in the FY 2015 IPF PPS rule, that we would remove site ''unspecified'' codes from the IPF PPS ICD–10–CM/PCS codes in instances when laterality codes (site specified codes) are available, as the clinician should be able to identify a more specific diagnosis based on clinical assessment at the medical encounter. None of the proposed additions to the FY 2022 ICD–10–CM/PCS codes were site ''unspecified'' by laterality, therefore, we are not removing any of the new codes.

c. Proposed Patient Age Adjustments

As explained in the November 2004 IPF PPS final rule (69 FR 66922), we analyzed the impact of age on per diem cost by examining the age variable (range of ages) for payment adjustments. In general, we found that the cost per day increases with age. The older age groups are costlier than the under 45 age group, the differences in per diem cost increase for each successive age group, and the differences are statistically significant. For FY 2022, we are proposing to continue to use the patient age adjustments currently in effect in FY 2021, as shown in Addendum A of this rule (see *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html*).

d. Proposed Variable per Diem Adjustments

We explained in the November 2004 IPF PPS final rule (69 FR 66946) that the regression analysis indicated that per diem cost declines as the LOS increases. The variable per diem adjustments to the Federal per diem base rate account for ancillary and administrative costs that occur disproportionately in the first days after admission to an IPF. As discussed in the November 2004 IPF PPS final rule, we used a regression analysis to estimate the average differences in per diem cost among stays of different lengths (69 FR 66947 through 66950). As a result of this analysis, we established variable per diem adjustments that begin on day 1 and decline gradually until day 21 of a patient's stay. For day 22 and thereafter, the variable per diem adjustment remains the same each day for the remainder of the stay. However, the adjustment applied to day 1 depends upon whether the IPF has a qualifying ED. If an IPF has a qualifying ED, it receives a 1.31 adjustment factor for day 1 of each stay. If an IPF does not have a qualifying ED, it receives a 1.19 adjustment factor for day 1 of the stay. The ED adjustment is explained in more detail in section III.D.4 of this rule.

For FY 2022, we are proposing to continue to use the variable per diem adjustment factors currently in effect, as shown in Addendum A of this rule (available at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html*). A complete discussion of the variable per diem adjustments appears in the November 2004 IPF PPS final rule (69 FR 66946).

D. Proposed Updates to the IPF PPS Facility-Level Adjustments

The IPF PPS includes facility-level adjustments for the wage index, IPFs located in rural areas, teaching IPFs, cost of living adjustments for IPFs located in Alaska and Hawaii, and IPFs with a qualifying ED.

1. Wage Index Adjustment

a. Background

As discussed in the RY 2007 IPF PPS final rule (71 FR 27061), RY 2009 IPF PPS (73 FR 25719) and the RY 2010 IPF PPS notices (74 FR 20373), in order to provide an adjustment for geographic wage levels, the labor-related portion of an IPF's payment is adjusted using an appropriate wage index. Currently, an IPF's geographic wage index value is determined based on the actual location of the IPF in an urban or rural area, as defined in § 412.64(b)(1)(ii)(A) and (C).

Due to the variation in costs and because of the differences in geographic wage levels, in the November 15, 2004 IPF PPS final rule, we required that payment rates under the IPF PPS be adjusted by a geographic wage index. We proposed and finalized a policy to use the unadjusted, pre-floor, pre-reclassified IPPS hospital wage index to account for geographic differences in IPF labor costs. We implemented use of the pre-floor, pre-reclassified IPPS hospital wage data to compute the IPF wage index since there was not an IPF-specific wage index available. We believe that IPFs generally compete in the same labor market as IPPS hospitals so the pre-floor, pre-reclassified IPPS hospital wage data should be reflective of labor costs of IPFs. We believe this pre-floor, pre-reclassified IPPS hospital wage index to be the best available data to use as proxy for an IPF specific wage index. As discussed in the RY 2007 IPF PPS final rule (71 FR 27061 through 27067), under the IPF PPS, the wage index is calculated using the IPPS wage index for the labor market area in which the IPF is located, without taking into account geographic reclassifications, floors, and other adjustments made to the wage index under the IPPS. For a complete description of these IPPS wage index adjustments, we refer readers to the FY 2019 IPPS/LTCH PPS final rule (83 FR 41362 through 41390). Our wage index policy at § 412.424(a)(2), requires us to use the best Medicare data available to estimate costs per day, including an appropriate wage index to adjust for wage differences.

When the IPF PPS was implemented in the November 15, 2004 IPF PPS final rule, with an effective date of January 1, 2005, the pre-floor, pre-reclassified IPPS hospital wage index that was available at the time was the FY 2005 pre-floor, pre-reclassified IPPS hospital wage index. Historically, the IPF wage index for a given RY has used the pre-floor, pre-reclassified IPPS hospital wage index from the prior FY as its basis. This has been due in part to the pre-floor, pre-reclassified IPPS hospital wage index data that were available during the IPF rulemaking cycle, where an annual IPF notice or IPF final rule was usually published in early May. This publication timeframe was relatively early compared to other Medicare payment rules because the IPF PPS follows a RY, which was defined in the implementation of the IPF PPS as the 12-month period from July 1 to June 30 (69 FR 66927). Therefore, the best available data at the time the IPF PPS was implemented was the pre-floor, pre-reclassified IPPS hospital wage index from the prior FY (for example, the RY 2006 IPF wage index was based on the FY 2005 pre-floor, pre-reclassified IPPS hospital wage index).

In the RY 2012 IPF PPS final rule, we changed the reporting year timeframe for IPFs from a RY to the FY, which begins October 1 and ends September 30 (76 FR 26434 through 26435). In that FY 2012 IPF PPS final rule, we continued our established policy of using the pre-floor, pre-reclassified IPPS hospital wage index from the prior year (that is, from FY 2011) as the basis for the FY 2012 IPF wage index. This policy of basing a wage index on the prior year's pre-floor, pre-reclassified IPPS hospital wage index has been followed by other Medicare payment systems, such as hospice and inpatient rehabilitation facilities. By continuing with our established policy, we remained consistent with other Medicare payment systems.

In FY 2020 we finalized the IPF wage index methodology to align the IPF PPS wage index with the same wage data timeframe used by the IPPS for FY 2020 and subsequent years. Specifically, we finalized to use the pre-floor, pre-reclassified IPPS hospital wage index from the FY concurrent with the IPF FY as the basis for the IPF wage index. For example, the FY 2020 IPF wage index would be based on the FY 2020 pre-floor, pre-reclassified IPPS hospital wage index rather than on the FY 2019 pre-floor, pre-reclassified IPPS hospital wage index.

We explained in the FY 2020 proposed rule (84 FR 16973), that using the concurrent pre-floor, pre-reclassified IPPS hospital wage index would result in the most up-to-date wage data being the basis for the IPF wage index. It would also result in more consistency and parity in the wage index methodology used by other Medicare payment systems. The Medicare SNF PPS already used the concurrent IPPS hospital wage index data as the basis for the SNF PPS wage index. Thus, the wage adjusted Medicare payments of various provider types would be based upon wage index data from the same timeframe. CMS proposed similar policies to use the concurrent pre-floor, pre-reclassified IPPS hospital wage index data in other Medicare payment systems, such as hospice and inpatient rehabilitation facilities. For FY 2022, we are proposing to continue to use the concurrent pre-floor, pre-reclassified IPPS hospital wage index as the basis for the IPF wage index.

We would apply the IPF wage index adjustment to the labor-related share of the national base rate and ECT payment per treatment. The labor-related share of the national rate and ECT payment per treatment would change from 77.3 percent in FY 2021 to 77.1 percent in FY 2022. This percentage reflects the labor-related share of the 2016-based IPF market basket for FY 2022 (see section III.A.4 of this rule).

b. Office of Management and Budget (OMB) Bulletins

i. Background

The wage index used for the IPF PPS is calculated using the unadjusted, pre-reclassified and pre-floor IPPS wage index data and is assigned to the IPF on the basis of the labor market area in which the IPF is geographically located. IPF labor market areas are delineated based on the Core-Based Statistical Area (CBSAs) established by the OMB.

Generally, OMB issues major revisions to statistical areas every 10 years, based on the results of the decennial census. However, OMB occasionally issues minor updates and revisions to statistical areas in the years between the decennial censuses through OMB Bulletins. These bulletins contain information regarding CBSA changes, including changes to CBSA numbers and titles. OMB bulletins may be accessed online at *https://www.whitehouse.gov/omb/information-for-agencies/bulletins/*. In accordance with our established methodology, the IPF PPS has historically adopted any CBSA changes that are published in the OMB bulletin that corresponds with the IPPS hospital wage index used to determine the IPF wage index.

In the RY 2007 IPF PPS final rule (71 FR 27061 through 27067), we adopted the changes discussed in the OMB Bulletin No. 03–04 (June 6, 2003), which announced revised definitions for MSAs, and the creation of Micropolitan Statistical Areas and Combined Statistical Areas. In adopting the OMB CBSA geographic designations in RY 2007, we did not provide a separate transition for the CBSA-based wage index since the IPF PPS was already in a transition period from TEFRA payments to PPS payments.

In the RY 2009 IPF PPS notice, we incorporated the CBSA nomenclature changes published in the most recent OMB bulletin that applied to the IPPS hospital wage index used to determine the current IPF wage index and stated that we expected to continue to do the same for all the OMB CBSA nomenclature changes in future IPF PPS rules and notices, as necessary (73 FR 25721).

On February 28, 2013, OMB issued OMB Bulletin No. 13–01 which established revised delineations for Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas in the United States (U.S.) and Puerto Rico based on the 2010 Census, and provided guidance on the use of the delineations of these statistical areas using standards published in the June 28, 2010 **Federal Register** (75 FR 37246 through 37252). These OMB Bulletin changes were reflected in the FY 2015 pre-floor, pre-reclassified IPPS hospital wage index, upon which the FY 2016 IPF wage index was based. We adopted these new OMB CBSA delineations in the FY 2016 IPF wage index and subsequent IPF wage indexes. We refer readers to the FY 2016 IPF PPS final rule (80 FR 46682 through 46689) for a full discussion of our implementation of the OMB labor market area delineations beginning with the FY 2016 wage index.

On July 15, 2015, OMB issued OMB Bulletin No. 15–01, which provided updates to and superseded OMB Bulletin No. 13–01 that was issued on February 28, 2013. The attachment to OMB Bulletin No. 15–01 provided detailed information on the update to statistical areas since February 28, 2013. The updates provided in OMB Bulletin No. 15–01 were based on the application of the 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas to Census Bureau population estimates for July 1, 2012 and July 1, 2013. The complete list of statistical areas incorporating these changes is provided in OMB Bulletin No. 15–01. A copy of this bulletin may be obtained at *https://*

www.whitehouse.gov/omb/information-for-agencies/bulletins/.

OMB Bulletin No. 15–01 established revised delineations for the Nation's Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas. The bulletin also provided delineations of Metropolitan Divisions as well as delineations of New England City and Town Areas. As discussed in the FY 2017 IPPS/LTCH PPS final rule (81 FR 56913), the updated labor market area definitions from OMB Bulletin 15–01 were implemented under the IPPS beginning on October 1, 2016 (FY 2017). Therefore, we implemented these revisions for the IPF PPS beginning October 1, 2017 (FY 2018), consistent with our historical practice of modeling IPF PPS adoption of the labor market area delineations after IPPS adoption of these delineations (historically the IPF wage index has been based upon the pre-floor, pre-reclassified IPPS hospital wage index from the prior year).

On August 15, 2017, OMB issued OMB Bulletin No. 17–01, which provided updates to and superseded OMB Bulletin No. 15–01 that was issued on July 15, 2015. The attachments to OMB Bulletin No. 17–01 provide detailed information on the update to statistical areas since July 15, 2015, and are based on the application of the 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas to Census Bureau population estimates for July 1, 2014 and July 1, 2015. In the FY 2020 IPF PPS final rule (84 FR 38453 through 38454), we adopted the updates set forth in OMB Bulletin No. 17–01 effective October 1, 2019, beginning with the FY 2020 IPF wage index. Given that the loss of the rural adjustment was mitigated in part by the increase in wage index value, and that only a single IPF was affected by this change, we did not believe it was necessary to transition this provider from its rural to newly urban status. We refer readers to the FY 2020 IPF PPS final rule (84 FR 38453 through 38454) for a more detailed discussion about the decision to forego a transition plan in FY 2020.

On April 10, 2018, OMB issued OMB Bulletin No. 18–03, which superseded the August 15, 2017 OMB Bulletin No. 17–01, and on September 14, 2018, OMB issued, OMB Bulletin No. 18–04, which superseded the April 10, 2018 OMB Bulletin No. 18–03. These bulletins established revised delineations for Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and provided guidance on the use of the delineations of these statistical areas. A copy of OMB Bulletin No. 18–04 may be obtained at *https://www.whitehouse.gov/wp-content/uploads/2018/09/Bulletin-18-04.pdf.*

In the FY 2021 IPF PPS final rule (85 FR 47051 through 47059), we adopted the updates set forth in OMB Bulletin No. 18–04 effective October 1, 2020, beginning with the FY 2021 IPF wage index. These updates included material changes to the OMB statistical area delineations which included 34 urban counties that became rural, 47 rural counties that became urban, and 19 counties that moved to a new or modified CBSA.

Given the scope of changes involved in adopting the CBSA delineations for FY 2021, we finalized a 2-year transition policy consistent with our past practice of using transition policies to help mitigate negative impacts on hospitals of certain wage index policy changes. We applied a 5-percent cap on wage index decreases to all IPF providers that had any decrease in their wage indexes, regardless of the circumstance causing the decline, so that an IPF's final wage index for FY 2021 would not be less than 95 percent of its final wage index for FY 2020, regardless of whether the IPF was part of an updated CBSA. We refer readers to the FY 2021 IPF PPS final rule (85 FR 47058 through 47059) for a more detailed discussion about the wage index transition policy for FY 2021.

On March 6, 2020 OMB issued OMB Bulletin 20–01 (available on the web at *https://www.whitehouse.gov/wp-content/uploads/2020/03/Bulletin-20-01.pdf*). In considering whether to adopt this bulletin, we analyzed whether the changes in this bulletin would have a material impact on the IPF PPS wage index. This bulletin creates only one Micropolitan statistical area. As discussed in further detail in section III.D.1.b.ii, since Micropolitan areas are considered rural for the IPF PPS wage index, this bulletin has no material impact on the IPF PPS wage index. That is, the constituent county of the new Micropolitan area was considered rural effective as of FY 2021 and would continue to be considered rural if we adopted OMB Bulletin 20–01. Therefore, we are not proposing to adopt OMB Bulletin 20–01.

ii. Micropolitan Statistical Areas

OMB defines a ''Micropolitan Statistical Area'' as a CBSA associated with at least one urban cluster that has a population of at least 10,000, but less than 50,000 (75 FR 37252). We refer to these as Micropolitan Areas. After extensive impact analysis, consistent with the treatment of these areas under the IPPS as discussed in the FY 2005 IPPS final rule (69 FR 49029 through 49032), we determined the best course of action would be to treat Micropolitan Areas as ''rural'' and include them in the calculation of each state's IPF PPS rural wage index. We refer the reader to the FY 2007 IPF PPS final rule (71 FR 27064 through 27065) for a complete discussion regarding treating Micropolitan Areas as rural.

c. Proposed Adjustment for Rural Location

In the November 2004 IPF PPS final rule, (69 FR 66954) we provided a 17 percent payment adjustment for IPFs located in a rural area. This adjustment was based on the regression analysis, which indicated that the per diem cost of rural facilities was 17 percent higher than that of urban facilities after accounting for the influence of the other variables included in the regression. This 17 percent adjustment has been part of the IPF PPS each year since the inception of the IPF PPS. For FY 2022, we are proposing to continue to apply a 17 percent payment adjustment for IPFs located in a rural area as defined at § 412.64(b)(1)(ii)(C) (see 69 FR 66954 for a complete discussion of the adjustment for rural locations).

d. Proposed Budget Neutrality Adjustment

Changes to the wage index are made in a budget-neutral manner so that updates do not increase expenditures. Therefore, for FY 2022, we are proposing to continue to apply a budget-neutrality adjustment in accordance with our existing budget-neutrality policy. This policy requires us to update the wage index in such a way that total estimated payments to IPFs for FY 2022 are the same with or without the changes (that is, in a budget-neutral manner) by applying a budget neutrality factor to the IPF PPS rates. We use the following steps to ensure that the rates reflect the FY 2022 update to the wage indexes (based on the FY 2018 hospital cost report data) and the labor-related share in a budget-neutral manner:

Step 1: Simulate estimated IPF PPS payments, using the FY 2021 IPF wage index values (available on the CMS website) and labor-related share (as published in the FY 2021 IPF PPS final rule (85 FR 47043).

Step 2: Simulate estimated IPF PPS payments using the proposed FY 2022 IPF wage index values (available on the CMS website) and proposed FY 2022 labor-related share (based on the latest available data as discussed previously).

Step 3: Divide the amount calculated in step 1 by the amount calculated in step 2. The resulting quotient is the FY

2022 budget-neutral wage adjustment factor of 1.0014.

Step 4: Apply the FY 2022 budget-neutral wage adjustment factor from step 3 to the FY 2021 IPF PPS Federal per diem base rate after the application of the market basket update described in section III.A of this rule, to determine the FY 2022 IPF PPS Federal per diem base rate.

2. Proposed Teaching Adjustment

a. Background

In the November 2004 IPF PPS final rule, we implemented regulations at § 412.424(d)(1)(iii) to establish a facility-level adjustment for IPFs that are, or are part of, teaching hospitals. The teaching adjustment accounts for the higher indirect operating costs experienced by hospitals that participate in graduate medical education (GME) programs. The payment adjustments are made based on the ratio of the number of full-time equivalent (FTE) interns and residents training in the IPF and the IPF's average daily census (ADC).

Medicare makes direct GME payments (for direct costs such as resident and teaching physician salaries, and other direct teaching costs) to all teaching hospitals including those paid under a PPS, and those paid under the TEFRA rate-of-increase limits. These direct GME payments are made separately from payments for hospital operating costs and are not part of the IPF PPS. The direct GME payments do not address the estimated higher indirect operating costs teaching hospitals may face.

The results of the regression analysis of FY 2002 IPF data established the basis for the payment adjustments included in the November 2004 IPF PPS final rule. The results showed that the indirect teaching cost variable is significant in explaining the higher costs of IPFs that have teaching programs. We calculated the teaching adjustment based on the IPF's ''teaching variable,'' which is (1 + (the number of FTE residents training in the IPF/the IPF's ADC)). The teaching variable is then raised to 0.5150 power to result in the teaching adjustment. This formula is subject to the limitations on the number of FTE residents, which are described in this section of this rule.

We established the teaching adjustment in a manner that limited the incentives for IPFs to add FTE residents for the purpose of increasing their teaching adjustment. We imposed a cap on the number of FTE residents that may be counted for purposes of calculating the teaching adjustment. The cap limits the number of FTE residents that teaching IPFs may count for the purpose of calculating the IPF PPS teaching adjustment, not the number of residents teaching institutions can hire or train. We calculated the number of FTE residents that trained in the IPF during a ''base year'' and used that FTE resident number as the cap. An IPF's FTE resident cap is ultimately determined based on the final settlement of the IPF's most recent cost report filed before November 15, 2004 (publication date of the IPF PPS final rule). A complete discussion of the temporary adjustment to the FTE cap to reflect residents due to hospital closure or residency program closure appears in the RY 2012 IPF PPS proposed rule (76 FR 5018 through 5020) and the RY 2012 IPF PPS final rule (76 FR 26453 through 26456). In section III.D.2.b of this proposed rule, we discuss proposed updates to the IPF policy on temporary adjustment to the FTE cap.

In the regression analysis, the logarithm of the teaching variable had a coefficient value of 0.5150. We converted this cost effect to a teaching payment adjustment by treating the regression coefficient as an exponent and raising the teaching variable to a power equal to the coefficient value. We note that the coefficient value of 0.5150 was based on the regression analysis holding all other components of the payment system constant. A complete discussion of how the teaching adjustment was calculated appears in the November 2004 IPF PPS final rule (69 FR 66954 through 66957) and the RY 2009 IPF PPS notice (73 FR 25721). As with other adjustment factors derived through the regression analysis, we do not plan to rerun the teaching adjustment factors in the regression analysis until we more fully analyze IPF PPS data. Therefore, in this FY 2022 proposed rule, we are proposing to continue to retain the coefficient value of 0.5150 for the teaching adjustment to the Federal per diem base rate.

b. Proposed Update to IPF Teaching Policy on IPF Program Closures and Displaced Residents

For FY 2022, we are proposing to change the IPF policy regarding displaced residents from IPF closures and closures of IPF teaching programs. Specifically, we are proposing to adopt conforming changes to the IPF PPS teaching policy to align with the policy changes that the IPPS finalized in the FY 2021 IPPS final rule (85 FR 58865 through 58870). We believe that the IPF IME policy relating to hospital closure and displaced students is susceptible to the same vulnerabilities as IPPS GME policy. Hence, if an IPF with a large number of residents training in its residency program announces it is closing, these residents will become displaced and will need to find alternative positions at other IPF hospitals or risk being unable to become Board certified. Although we propose to adopt a policy under the IPF PPS that is consistent with an applicable policy under the IPPS, the actual caps under the two payment systems may not be commingled. In other words, the resident cap applicable under the IPPS is separate from the resident cap applicable under the IPF PPS; moreover, a provider cannot add its IPF resident cap to its IPPS resident cap in order to increase the number of residents it receives payment for under either payment system.

Section 124 of the BBRA gives the Secretary broad discretion to determine the appropriate adjustment factors for the IPF PPS. We are proposing to implement the policy discussed in this section to remain consistent with the way that the IPPS teaching policy calculates FTE resident caps in the case of a receiving hospital that obtains a temporary IME and direct GME cap adjustment for assuming the training of displaced residents due to another hospital or residency program's closure. We are also proposing that in the future, we would deviate from IPPS teaching policy as it pertains to counting displaced residents for the purposes of the IPF teaching adjustment only when it is necessary and appropriate for the IPF PPS.

As stated in the November 2004 IPF PPS final rule (69 FR 66922), we implemented regulations at § 412.424(d)(1)(iii) to establish a facility-level adjustment for IPFs that are, or are part of, teaching hospitals. The facility-level adjustment we are providing for teaching hospitals under IPF PPS parallels the IME payments paid under the IPPS. Both payments are add on adjustments to the amount per case and both are based in part on the number of full-time equivalent (FTE) residents training at the facility.

The regulation at 42 CFR 412.424(d)(1)(iii)(F) permits an IPF to temporarily adjust its FTE cap to reflect residents added because of another hospital or program's closure. We first implemented regulations regarding residents displaced by teaching hospital and program closures in the May 6, 2011 IPF PPS final rule (76 FR 26431). In that final rule, we adopted the IPPS definition of ''closure of a hospital'' at 42 CFR 413.79(h)(1)(i) to apply to IPF closures as well, and to mean that the IPF terminates its Medicare provider agreement as specified in 42 CFR

489.52. In this proposed rule, we are proposing to codify this definition, as well as the definition of an IPF program closure, at § 412.402.

Although not explicitly stated in regulations text, our current policy is that a displaced resident is one that is physically present at the hospital training on the day prior to or the day of hospital or program closure. This longstanding policy derived from the fact that in the regulations text, there are requirements that the receiving hospital identifies the residents' ''who have come from the closed IPF'' (§ 412.424(d)(1)(iii)(F)(*1*)(*ii*)) or 'identifies the residents ''who have come from another IPF's closed program'' (§ 412.424(d)(1)(iii)(F)(*2*)(*i*)), and that the IPF that closed its program identifies '' the residents who were in training at the time of the program's closure'' (§ 412.424(d)(1)(iii)(F)(*2*)(*ii*)). We considered the residents who were physically present at the IPF to be those residents who were ''training at the time of the program's closure,'' thereby granting them the status of ''displaced residents.'' Although we did not want to limit the ''displaced residents'' to only those physically present at the time of closure, it becomes much more administratively challenging for the following groups of residents at closing IPFs/programs to continue their training: (1) Residents who leave the program after the closure is publicly announced to continue training at another IPF, but before the actual closure; (2) residents assigned to and training at planned rotations at other IPFs who will be unable to return to their rotations at the closing IPF or program; and (3) individuals (such as medical students or would-be fellows) who matched into resident programs at the closing IPF or program but have not yet started training at the closing IPF or program. Other groups of residents who, under current policy, are already considered ''displaced residents'' include—(1) residents who are physically training in the IPF on the day prior to or day of program or IPF closure; and (2) residents who would have been at the closing IPF or IPF program on the day prior to or of closure but were on approved leave at that time, and are unable to return to their training at the closing IPF or IPF program.

We are proposing to amend the IPF policy with regard to closing teaching IPFs and closing residency programs to address the needs of residents attempting to find alternative IPFs in which to complete their training. Additionally, this proposal addresses the incentives of originating and receiving IPFs with regard to ensuring we appropriately account for their indirect teaching costs by way of an appropriate IPF teaching adjustment based on each program's resident FTEs. We are proposing to change two aspects of the current IPF policy, which are discussed in the following section.

First, rather than link the status of displaced residents for the purpose of the receiving IPF's request to increase their FTE cap to the resident's presence at the closing IPF or program on the day prior to or the day of program or IPF closure, we propose that the ideal day would be the day that the closure was publicly announced, (for example, via a press release or a formal notice to the Accreditation Council on Graduate Medical Education (ACGME)). This would provide greater flexibility for the residents to transfer while the IPF operations or residency programs were winding down, rather than waiting until the last day of IPF or program operation. This would address the needs of the first group of residents as previously described: Residents who would leave the IPF program after the closure was publicly announced to continue training at another IPF, but before the day of actual closure.

Second, by removing the link between the status of displaced residents and their presence at the closing IPF or program on the day prior to or the day of program or IPF closure, we propose to also allow the second and third group of residents who are not physically at the closing IPF/closing program, but had intended to train at (or return to training at, in the case of residents on rotation) to be considered a displaced resident. Thus, we are proposing to revise our teaching policy with regard to which residents can be considered ''displaced'' for the purpose of the receiving IPF's request to increase their FTE cap in the situation where an IPF announces publicly that it is closing, and/or that it is closing an IPF residency program(s). Specifically, we are proposing to adopt the definitions of ''closure of a hospital'', ''closure of a hospital residency training program'', and ''displaced resident'' as defined at 42 CFR 413.79(h) but with respect to IPFs and for the purposes of accounting for indirect teaching costs.

In addition, we are proposing to change another detail of the IPF teaching policy specific to the requirements for the receiving IPF. To apply for the temporary increase in the FTE resident cap, the receiving IPF would have to submit a letter to its Medicare Administrative Contractor (MAC) within 60 days of beginning the training of the displaced residents. As established under existing regulation at § 412.424(d)(1)(iii)(F)(*1*)(*ii*) and § 412.424(d)(1)(iii)(F)(*2*)(*i*), this letter must identify the residents who have come from the closed IPF or program and have caused the receiving IPF to exceed its cap, and must specify the length of time the adjustment is needed. Moreover, we want to propose clarifications on how the information would be delivered in this letter. Consistent with IPPS teaching policy, we are proposing that the letter from the receiving IPF would have to include: (1) The name of each displaced resident; (2) the last four digits of each displaced resident's social security number; (3) the IPF and program in which each resident was training previously; and (4) the amount of the cap increase needed for each resident (based on how much the receiving IPF is in excess of its cap and the length of time for which the adjustments are needed). We are proposing to require the receiving hospital to only supply the last four digits of each displaced resident's social security number to reduce the amount of personally identifiable information (PII) included in these agreements.

We are also clarifying that, as we previously discussed in the May 6, 2011 IPF PPS final rule (76 FR 26455), the maximum number of FTE resident cap slots that could be transferred to all receiving IPFs is the number of FTE resident cap slots belonging to the IPF that has the closed program or that is closing. Therefore, if the originating IPF is training residents in excess of its cap, then being a displaced resident does not guarantee that a cap slot will be transferred along with that resident. Therefore, we are proposing that if there are more IPF displaced residents than available cap slots, the slots may be apportioned according to the closing IPF's discretion. The decision to transfer a cap slot if one is available would be voluntary and made at the sole discretion of the originating IPF. However, if the originating IPF decides to do so, then it would be the originating IPF's responsibility to determine how much of an available cap slot would go with a particular resident (if any). We also note that, as we previously discussed in the May 6, 2011 IPF PPS final rule (76 FR 25455), only to the extent a receiving IPF would exceed its FTE cap by training displaced residents would it be eligible for a temporary adjustment to its resident FTE cap. Displaced residents are factored into the receiving IPF's ratio of resident FTEs to the facility's average daily census.

3. Proposed Cost of Living Adjustment for IPFs Located in Alaska and Hawaii

The IPF PPS includes a payment adjustment for IPFs located in Alaska and Hawaii based upon the area in which the IPF is located. As we explained in the November 2004 IPF PPS final rule, the FY 2002 data demonstrated that IPFs in Alaska and Hawaii had per diem costs that were disproportionately higher than other IPFs. Other Medicare prospective payment systems (for example: The IPPS and LTCH PPS) adopted a COLA to account for the cost differential of care furnished in Alaska and Hawaii.

We analyzed the effect of applying a COLA to payments for IPFs located in Alaska and Hawaii. The results of our analysis demonstrated that a COLA for IPFs located in Alaska and Hawaii would improve payment equity for these facilities. As a result of this analysis, we provided a COLA in the November 2004 IPF PPS final rule.

A COLA for IPFs located in Alaska and Hawaii is made by multiplying the non-labor-related portion of the Federal per diem base rate by the applicable COLA factor based on the COLA area in which the IPF is located.

The COLA factors through 2009 were published by the Office of Personnel Management (OPM), and the OPM memo showing the 2009 COLA factors is available at *https://www.chcoc.gov/content/nonforeign-area-retirement-equity-assurance-act.*

We note that the COLA areas for Alaska are not defined by county as are the COLA areas for Hawaii. In 5 CFR 591.207, the OPM established the following COLA areas:

- City of Anchorage, and 80-kilometer (50-mile) radius by road, as measured from the Federal courthouse.
- City of Fairbanks, and 80-kilometer (50-mile) radius by road, as measured from the Federal courthouse.
- City of Juneau, and 80-kilometer (50-mile) radius by road, as measured from the Federal courthouse.
- Rest of the state of Alaska.

As stated in the November 2004 IPF PPS final rule, we update the COLA factors according to updates established by the OPM. However, sections 1911 through 1919 of the Non-foreign Area Retirement Equity Assurance Act, as contained in subtitle B of title XIX of the National Defense Authorization Act (NDAA) for FY 2010 (Pub. L. 111–84, October 28, 2009), transitions the Alaska and Hawaii COLAs to locality pay. Under section 1914 of NDAA, locality pay was phased in over a 3-year period beginning in January 2010, with COLA rates frozen as of the date of enactment, October 28, 2009, and then proportionately reduced to reflect the phase-in of locality pay.

When we published the proposed COLA factors in the RY 2012 IPF PPS proposed rule (76 FR 4998), we inadvertently selected the FY 2010 COLA rates, which had been reduced to account for the phase-in of locality pay. We did not intend to propose the reduced COLA rates because that would have understated the adjustment. Since the 2009 COLA rates did not reflect the phase-in of locality pay, we finalized the FY 2009 COLA rates for RY 2010 through RY 2014.

In the FY 2013 IPPS/LTCH final rule (77 FR 53700 through 53701), we established a new methodology to update the COLA factors for Alaska and Hawaii, and adopted this methodology for the IPF PPS in the FY 2015 IPF final rule (79 FR 45958 through 45960). We adopted this new COLA methodology for the IPF PPS because IPFs are hospitals with a similar mix of commodities and services. We think it is appropriate to have a consistent policy approach with that of other hospitals in Alaska and Hawaii. Therefore, the IPF COLAs for FY 2015 through FY 2017 were the same as those applied under the IPPS in those years. As finalized in the FY 2013 IPPS/LTCH PPS final rule (77 FR 53700 and 53701), the COLA updates are determined every 4 years, when the IPPS market basket labor-related share is updated. Because the labor-related share of the IPPS market basket was updated for FY 2018, the COLA factors were updated in FY 2018 IPPS/LTCH rulemaking (82 FR 38529). As such, we also updated the IPF PPS COLA factors for FY 2018 (82 FR 36780 through 36782) to reflect the updated COLA factors finalized in the FY 2018 IPPS/LTCH rulemaking.

For FY 2022, we are proposing to update the COLA factors published by OPM for 2009 (as these are the last COLA factors OPM published prior to transitioning from COLAs to locality pay) using the methodology that we finalized in the FY 2013 IPPS/LTCH PPS final rule and adopted for the IPF PPS in the FY 2015 IPF final rule. Specifically, we are proposing to update the 2009 OPM COLA factors by a comparison of the growth in the Consumer Price Indices (CPIs) for the areas of Urban Alaska and Urban Hawaii, relative to the growth in the CPI for the average U.S. city as published by the Bureau of Labor Statistics (BLS). We note that for the prior update to the COLA factors, we used the growth in the CPI for Anchorage and the CPI for Honolulu. Beginning in 2018, these indexes were renamed to the CPI for Urban Alaska and the CPI for Urban Hawaii due to the BLS updating its sample to reflect the data from the 2010 Decennial Census on the distribution of the urban population (*https://www.bls.gov/regions/west/factsheet/2018cpirevisionwest.pdf,* accessed January 22, 2021). The CPI for Urban Alaska area covers Anchorage and Matanuska-Susitna Borough in the State of Alaska and the CPI for Urban Hawaii covers Honolulu in the State of Hawaii. BLS notes that the indexes are considered continuous over time, regardless of name or composition changes.

Because BLS publishes CPI data for only Urban Alaska and Urban Hawaii, using the methodology we finalized in the FY 2013 IPPS/LTCH PPS final rule and adopted for the IPF PPS in the FY 2015 IPF final rule, we are proposing to use the comparison of the growth in the overall CPI relative to the growth in the CPI for those areas to update the COLA factors for all areas in Alaska and Hawaii, respectively. We believe that the relative price differences between these urban areas and the U.S. (as measured by the CPIs mentioned above) are appropriate proxies for the relative price differences between the ''other areas'' of Alaska and Hawaii and the U.S.

BLS publishes the CPI for All Items for Urban Alaska, Urban Hawaii, and for the average U.S. city. However, consistent with our methodology finalized in the FY 2013 IPPS/LTCH PPS final rule and adopted for the IPF PPS in the FY 2015 IPF final rule, we are proposing to create reweighted CPIs for each of the respective areas to reflect the underlying composition of the IPPS market basket nonlabor-related share. The current composition of the CPI for All Items for all of the respective areas is approximately 40 percent commodities and 60 percent services. However, the IPPS nonlabor-related share is comprised of a different mix of commodities and services. Therefore, we are proposing to create reweighted indexes for Urban Alaska, Urban Hawaii, and the average U.S. city using the respective CPI commodities index and CPI services index and proposed shares of 57 percent commodities/43 percent. We created reweighted indexes using BLS data for 2009 through 2020—the most recent data available at the time of this proposed rulemaking. In the FY 2018 IPPS/LTCH PPS final rule (82 FR 38530), we created reweighted indexes based on the 2014-based IPPS market basket (which was adopted for the FY 2018 IPPS update) and BLS data for 2009 through 2016 (the most recent BLS data at the time of the FY 2018

IPPS/LTCH PPS rulemaking), and we updated the IPF PPS COLA factors accordingly for FY 2018.

We continue to believe this methodology is appropriate because we continue to make a COLA for hospitals located in Alaska and Hawaii by multiplying the nonlabor-related portion of the standardized amount by a COLA factor. We note that OPM's COLA factors were calculated with a statutorily mandated cap of 25 percent. As stated in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38530), under the COLA update methodology we finalized in the FY 2013 IPPS/LTCH PPS final rule, we exercised our discretionary authority to adjust payments to hospitals in Alaska and Hawaii by incorporating this cap. In applying this finalized methodology for updating the COLA factors, for FY 2022, we are proposing to continue to use such a cap, as our policy is based on OPM's COLA factors (updated by the methodology described above).

Applying this methodology, the COLA factors that we are proposing to establish for FY 2022 to adjust the nonlabor-related portion of the standardized amount for IPFs located in Alaska and Hawaii are shown in the Table 1 below. For comparison purposes, we also are showing the COLA factors effective for FY 2018 through FY 2021.

TABLE 1—COMPARISON OF IPF PPS COST-OF-LIVING ADJUSTMENT FACTORS: IPFS LOCATED IN ALASKA AND HAWAII

Area	FY 2018 through FY 2021	FY 2022 through FY 2025 (proposed)
Alaska:		
City of Anchorage and 80-kilometer (50-mile) radius by road	1.25	1.22
City of Fairbanks and 80-kilometer (50-mile) radius by road	1.25	1.22
City of Juneau and 80-kilometer (50-mile) radius by road	1.25	1.22
Rest of Alaska	1.25	1.24
Hawaii:		
City and County of Honolulu	1.25	1.25
County of Hawaii	1.21	1.22
County of Kauai	1.25	1.25
County of Maui and County of Kalawao	1.25	1.25

The proposed IPF PPS COLA factors for FY 2022 are also shown in Addendum A to this proposed rule, and is available at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

4. Proposed Adjustment for IPFs With a Qualifying Emergency Department (ED)

The IPF PPS includes a facility-level adjustment for IPFs with qualifying EDs. We provide an adjustment to the Federal per diem base rate to account for the costs associated with maintaining a full-service ED. The adjustment is intended to account for ED costs incurred by a psychiatric hospital with a qualifying ED or an excluded psychiatric unit of an IPPS hospital or a CAH, for preadmission services otherwise payable under the Medicare Hospital Outpatient Prospective Payment System (OPPS), furnished to a beneficiary on the date of the beneficiary's admission to the hospital and during the day immediately preceding the date of admission to the IPF (see § 413.40(c)(2)), and the overhead cost of maintaining the ED. This payment is a facility-level adjustment that applies to all IPF admissions (with one exception which we described), regardless of whether a particular patient receives preadmission services in the hospital's ED.

The ED adjustment is incorporated into the variable per diem adjustment for the first day of each stay for IPFs with a qualifying ED. Those IPFs with a qualifying ED receive an adjustment factor of 1.31 as the variable per diem adjustment for day 1 of each patient stay. If an IPF does not have a qualifying ED, it receives an adjustment factor of 1.19 as the variable per diem adjustment for day 1 of each patient stay.

The ED adjustment is made on every qualifying claim except as described in this section of the proposed rule. As specified in § 412.424(d)(1)(v)(B), the ED adjustment is not made when a patient is discharged from an IPPS hospital or CAH and admitted to the same IPPS hospital's or CAH's excluded psychiatric unit. We clarified in the November 2004 IPF PPS final rule (69 FR 66960) that an ED adjustment is not made in this case because the costs associated with ED services are reflected in the DRG payment to the IPPS hospital or through the reasonable cost payment made to the CAH.

Therefore, when patients are discharged from an IPPS hospital or CAH and admitted to the same hospital's or CAH's excluded psychiatric unit, the IPF receives the 1.19 adjustment factor as the variable per diem adjustment for the first day of the patient's stay in the IPF. For FY 2022, we are proposing to continue to retain the 1.31 adjustment factor for IPFs with qualifying EDs. A complete discussion of the steps involved in the calculation of the ED adjustment factors are in the November 2004 IPF PPS final rule (69 FR 66959 through 66960) and the RY 2007 IPF PPS final rule (71 FR 27070 through 27072).

F. Other Proposed Payment Adjustments and Policies

1. Outlier Payment Overview

The IPF PPS includes an outlier adjustment to promote access to IPF care for those patients who require expensive care and to limit the financial risk of IPFs treating unusually costly patients. In the November 2004 IPF PPS final rule, we implemented regulations at § 412.424(d)(3)(i) to provide a per-case payment for IPF stays that are extraordinarily costly. Providing additional payments to IPFs for extremely costly cases strongly improves the accuracy of the IPF PPS in determining resource costs at the patient and facility level. These additional payments reduce the financial losses that would otherwise be incurred in treating patients who require costlier care, and therefore, reduce the incentives for IPFs to under-serve these patients. We make outlier payments for discharges in which an IPF's estimated total cost for a case exceeds a fixed dollar loss threshold amount (multiplied by the IPF's facility-level adjustments) plus the Federal per diem payment amount for the case.

In instances when the case qualifies for an outlier payment, we pay 80 percent of the difference between the

estimated cost for the case and the adjusted threshold amount for days 1 through 9 of the stay (consistent with the median LOS for IPFs in FY 2002), and 60 percent of the difference for day 10 and thereafter. The adjusted threshold amount is equal to the outlier threshold amount adjusted for wage area, teaching status, rural area, and the COLA adjustment (if applicable), plus the amount of the Medicare IPF payment for the case. We established the 80 percent and 60 percent loss sharing ratios because we were concerned that a single ratio established at 80 percent (like other Medicare PPSs) might provide an incentive under the IPF per diem payment system to increase LOS in order to receive additional payments.

After establishing the loss sharing ratios, we determined the current fixed dollar loss threshold amount through payment simulations designed to compute a dollar loss beyond which payments are estimated to meet the 2 percent outlier spending target. Each year when we update the IPF PPS, we simulate payments using the latest available data to compute the fixed dollar loss threshold so that outlier payments represent 2 percent of total estimated IPF PPS payments.

2. Proposed Update to the Outlier Fixed Dollar Loss Threshold Amount

In accordance with the update methodology described in § 412.428(d), we are proposing to update the fixed dollar loss threshold amount used under the IPF PPS outlier policy. Based on the regression analysis and payment simulations used to develop the IPF PPS, we established a 2 percent outlier policy, which strikes an appropriate balance between protecting IPFs from extraordinarily costly cases while ensuring the adequacy of the Federal per diem base rate for all other cases that are not outlier cases.

Our longstanding methodology for updating the outlier fixed dollar loss threshold involves using the best available data, which is typically the most recent available data. For this proposed rulemaking, the most recent available data would be the FY 2020 claims. However, during FY 2020, the U.S. healthcare system undertook an unprecedented response to the Public Health Emergency (PHE) declared by the Health and Human Services Secretary on January 31, 2020 in response to the outbreak of respiratory disease caused by a novel (new) coronavirus that has been named ''SARS CoV 2'' and the disease it causes, which has been named ''coronavirus disease 2019'' (abbreviated ''COVID–19''). Therefore, as discussed in section VI.C.3 of this proposed rule, we considered whether the most recent available year of claims, FY 2020, or the prior year, FY 2019, would be the best for estimating IPF PPS payments in FY 2021 and FY 2022. We compared the two years' claims distributions as well as the impact results, and based on that analysis determined that the FY 2019 claims appear to be the best available data at this time. We refer the reader to section VI.C.3 of this proposed rule for a detailed discussion of that analysis.

Based on an analysis of the June 2020 update of FY 2019 IPF claims and the FY 2021 rate increases, we believe it is necessary to update the fixed dollar loss threshold amount to maintain an outlier percentage that equals 2 percent of total estimated IPF PPS payments. We are proposing to update the IPF outlier threshold amount for FY 2022 using FY 2019 claims data and the same methodology that we used to set the initial outlier threshold amount in the RY 2007 IPF PPS final rule (71 FR 27072 and 27073), which is also the same methodology that we used to update the outlier threshold amounts for years 2008 through 2021. Based on an analysis of these updated data, we estimate that IPF outlier payments as a percentage of total estimated payments are approximately 1.8 percent in FY 2021. Therefore, we are proposing to update the outlier threshold amount to $14,030 to maintain estimated outlier payments at 2 percent of total estimated aggregate IPF payments for FY 2022. This proposed update is a decrease from the FY 2021 threshold of $14,630. In contrast, using the FY 2020 claims to estimate payments, the proposed outlier fixed dollar loss threshold for FY 2022 would be $19,840, an increase from the FY 2021 threshold of $14,630. We refer the reader to section VI.C.3 of this proposed rule for a detailed discussion of the estimated impacts of the proposed update to the outlier fixed dollar loss threshold, and we invite comments on this analysis.

We note that our proposed use of the FY 2019 claims to set the proposed outlier fixed dollar loss threshold for FY 2022 would deviate from what has been our longstanding practice of using the most recent available year of claims, which is FY 2020 data. However, this proposal remains consistent with the established outlier update methodology. As discussed in this section and in section VI.C.3 of this proposed rule, we are proposing to update the outlier fixed dollar loss threshold based on FY 2019 IPF claims in order to maintain the appropriate outlier percentage in FY 2022. We are proposing to deviate from our longstanding practice of using the most recent available year of claims only because and only to the extent that the COVID–19 PHE appears to have significantly impacted the FY 2020 IPF claims. As we are able to analyze more recent available IPF claims data and better understand both the short-term and long-term effects of the COVID–19 PHE on IPFs, we intend to re-assess the appropriateness of using FY 2019 IPF claims rather than FY 2020 IPF claims for the FY 2022 update.

3. Proposed Update to IPF Cost-to-Charge Ratio Ceilings

Under the IPF PPS, an outlier payment is made if an IPF's cost for a stay exceeds a fixed dollar loss threshold amount plus the IPF PPS amount. In order to establish an IPF's cost for a particular case, we multiply the IPF's reported charges on the discharge bill by its overall cost-to-charge ratio (CCR). This approach to determining an IPF's cost is consistent with the approach used under the IPPS and other PPSs. In the FY 2004 IPPS final rule (68 FR 34494), we implemented changes to the IPPS policy used to determine CCRs for IPPS hospitals, because we became aware that payment vulnerabilities resulted in inappropriate outlier payments. Under the IPPS, we established a statistical measure of accuracy for CCRs to ensure that aberrant CCR data did not result in inappropriate outlier payments.

As we indicated in the November 2004 IPF PPS final rule (69 FR 66961), we believe that the IPF outlier policy is susceptible to the same payment vulnerabilities as the IPPS; therefore, we adopted a method to ensure the statistical accuracy of CCRs under the IPF PPS. Specifically, we adopted the following procedure in the November 2004 IPF PPS final rule:

- Calculated two national ceilings, one for IPFs located in rural areas and one for IPFs located in urban areas.
- Computed the ceilings by first calculating the national average and the standard deviation of the CCR for both urban and rural IPFs using the most recent CCRs entered in the most recent Provider Specific File (PSF) available.

For FY 2022, we are proposing to continue to follow this methodology.

To determine the rural and urban ceilings, we multiplied each of the standard deviations by 3 and added the result to the appropriate national CCR average (either rural or urban). The upper threshold CCR for IPFs in FY 2022 is 2.0398 for rural IPFs, and 1.6126 for urban IPFs, based on CBSA-based geographic designations. If an IPF's CCR is above the applicable ceiling, the ratio is considered statistically inaccurate,

and we assign the appropriate national (either rural or urban) median CCR to the IPF.

We apply the national median CCRs to the following situations:

- New IPFs that have not yet submitted their first Medicare cost report. We continue to use these national median CCRs until the facility's actual CCR can be computed using the first tentatively or final settled cost report.
- IPFs whose overall CCR is in excess of three standard deviations above the corresponding national geometric mean (that is, above the ceiling).
- Other IPFs for which the MAC obtains inaccurate or incomplete data with which to calculate a CCR.

We are proposing to continue to update the FY 2022 national median and ceiling CCRs for urban and rural IPFs based on the CCRs entered in the latest available IPF PPS PSF. Specifically, for FY 2022, to be used in each of the three situations listed previously, using the most recent CCRs entered in the CY 2021 PSF, we provide an estimated national median CCR of 0.5720 for rural IPFs and a national median CCR of 0.4200 for urban IPFs. These calculations are based on the IPF's location (either urban or rural) using the CBSA-based geographic designations. A complete discussion regarding the national median CCRs appears in the November 2004 IPF PPS final rule (69 FR 66961 through 66964).

IV. Inpatient Psychiatric Facilities Quality Reporting (IPFQR) Program

A. Background and Statutory Authority

We refer readers to the FY 2019 IPF PPS final rule (83 FR 38589) for a discussion of the background and statutory authority [1] of the IPFQR Program.

[1] We note that the statute uses the term ''rate year'' (RY). However, beginning with the annual update of the inpatient psychiatric facility prospective payment system (IPF PPS) that took effect on July 1, 2011 (RY 2012), we aligned the IPF PPS update with the annual update of the ICD codes, effective on October 1 of each year. This change allowed for annual payment updates and the ICD coding update to occur on the same schedule and appear in the same **Federal Register** document, promoting administrative efficiency. To reflect the change to the annual payment rate update cycle, we revised the regulations at 42 CFR 412.402 to specify that, beginning October 1, 2012, the RY update period would be the 12-month period from October 1 through September 30, which we refer to as a ''fiscal year'' (FY) (76 FR 26435). Therefore, with respect to the IPFQR Program, the terms ''rate year,'' as used in the statute, and ''fiscal year'' as used in the regulation, both refer to the period from October 1 through September 30. For more information regarding this terminology change, we refer readers to section III. of the RY 2012 IPF PPS final rule (76 FR 26434 through 26435).

B. Covered Entities

In the FY 2013 IPPS/LTCH PPS final rule (77 FR 53645), we established that the IPFQR Program's quality reporting requirements cover those psychiatric hospitals and psychiatric units paid under Medicare's IPF PPS (§ 412.404(b)). Generally, psychiatric hospitals and psychiatric units within acute care and critical access hospitals that treat Medicare patients are paid under the IPF PPS. Consistent with previous regulations, we continue to use the terms ''facility'' or IPF to refer to both inpatient psychiatric hospitals and psychiatric units. This usage follows the terminology in our IPF PPS regulations at § 412.402. For more information on covered entities, we refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53645).

C. Previously Finalized Measures and Administrative Procedures

The current IPFQR Program includes 14 measures. For more information on these measures, we refer readers to Table 4 of this proposed rule and the following final rules:

- The FY 2013 IPPS/LTCH PPS final rule (77 FR 53646 through 53652);
- The FY 2014 IPPS/LTCH PPS final rule (78 FR 50889 through 50897);
- The FY 2015 IPF PPS final rule (79 FR 45963 through 45975);
- The FY 2016 IPF PPS final rule (80 FR 46695 through 46714);
- The FY 2017 IPPS/LTCH PPS final rule (81 FR 57238 through 57247);
- The FY 2019 IPF PPS final rule (83 FR 38590 through 38606); and
- The FY 2020 IPF PPS final rule (84 FR 38459 through 38467).

For more information on previously adopted procedural requirements, we refer readers to the following rules:

- The FY 2013 IPPS/LTCH PPS final rule (77 FR 53653 through 53660);
- The FY 2014 IPPS/LTCH PPS final rule (78 FR 50897 through 50903);
- The FY 2015 IPF PPS final rule (79 FR 45975 through 45978);
- The FY 2016 IPF PPS final rule (80 FR 46715 through 46719);
- The FY 2017 IPPS/LTCH PPS final rule (81 FR 57248 through 57249);
- The FY 2018 IPPS/LTCH PPS final rule (82 FR 38471 through 38474);
- The FY 2019 IPF PPS final rule (83 FR 38606 through 38608); and
- The FY 2020 IPF PPS final rule (84 FR 38467 through 38468).

D. Closing the Health Equity Gap in CMS Quality Programs—Request for Information (RFI)

Persistent inequities in health care outcomes exist in the U.S., including among Medicare patients. In recognition of persistent health disparities and the importance of closing the health equity gap, we request information on revising several CMS programs to make reporting of health disparities based on social risk factors and race and ethnicity more comprehensive and actionable for facilities, providers, and patients. The following is part of an ongoing effort across CMS to evaluate appropriate initiatives to reduce health disparities. Feedback will be used to inform the creation of a future, comprehensive, RFI focused on closing the health equity gap in CMS programs and policies.

This RFI contains four parts:

- *Background:* This section provides information describing our commitment to health equity, and existing initiatives with an emphasis on reducing health disparities.
- *Current CMS Disparity Methods:* This section describes the methods, measures, and indicators of social risk currently used with the CMS Disparity Methods.
- *Future potential stratification of quality measure results:* This section describes four potential future expansions of the CMS Disparity Methods, including (1) Stratification of Quality Measure Results—Dual Eligibility; (2) Stratification of Quality Measure Results—Race and Ethnicity; (3) Improving Demographic Data Collection; and (4) Potential Creation of a Facility Equity Score to Synthesize Results Across Multiple Social Risk Factors.
- *Solicitation of public comment:* This section specifies 12 requests for feedback on the above topics. We look forward to receiving feedback on these topics, and note our intention for an additional RFI or rulemaking on this topic in the future.

1. Background

Significant and persistent inequities in health care outcomes exist in the U.S. Belonging to a racial or ethnic minority group; living with a disability; being a member of the lesbian, gay, bisexual, transgender, and queer (LGBTQ+) community; living in a rural area; or being near or below the poverty level, is often associated with worse health outcomes.[2] [3] [4] [5] [6] [7] [8] [9] Such disparities in

[2] Joynt KE, Orav E, Jha AK. Thirty-Day Readmission Rates for Medicare Beneficiaries by Race and Site of Care. JAMA. 2011;305(7):675–681.

[3] Lindenauer PK, Lagu T, Rothberg MB, et al. Income Inequality and 30 Day Outcomes After Acute Myocardial Infarction, Heart Failure, and Pneumonia: Retrospective Cohort Study. British Medical Journal. 2013;346.

[4] Trivedi AN, Nsa W, Hausmann LRM, et al. Quality and Equity of Care in U.S. Hospitals. New

health outcomes are the result of number of factors, but importantly for CMS programs, although not the sole determinant, poor access and provision of lower quality health care contribute to health disparities. For instance, numerous studies have shown that among Medicare beneficiaries, racial and ethnic minority individuals often receive lower quality of care, report lower experiences of care, and experience more frequent hospital readmissions and operative complications.[10 11 12 13 14 15] Readmission rates for common conditions in the Hospital Readmissions Reduction Program are higher for Black Medicare beneficiaries and higher for Hispanic Medicare beneficiaries with Congestive Heart Failure and Acute Myocardial Infarction.[16 17 18 19 20] Studies have also shown that African Americans are significantly more likely than white Americans to die prematurely from heart disease and stroke.[21] The COVID–19 pandemic has further illustrated many of these longstanding health inequities with higher rates of infection, hospitalization, and mortality among Black, Latino, and Indigenous and Native American persons relative to White persons.[22 23] As noted by the Centers for Disease Control ''long-standing systemic health and social inequities have put many people from racial and ethnic minority groups at increased risk of getting sick and dying from COVID–19.'' [24] One important strategy for addressing these important inequities is improving data collection to allow for better measurement and reporting on equity across our programs and policies.

We are committed to achieving equity in health care outcomes for our beneficiaries by supporting providers in quality improvement activities to reduce health inequities, enabling them to make more informed decisions, and promoting provider accountability for health care disparities.[25] For the purposes of this proposed rule, we are using a definition of equity established in Executive Order 13985, as ''the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.'' [26] We note that this definition was recently established by the current administration, and provides a useful, common definition for equity across different areas of government, although numerous other definitions of equity exist.

Our ongoing commitment to closing the equity gap in CMS quality programs is demonstrated by a portfolio of programs aimed at making information on the quality of health care providers and services, including disparities, more transparent to consumers and providers. The CMS Equity Plan for Improving Quality in Medicare outlines a path to equity which aims to support Quality Improvement Networks and Quality Improvement Organizations (QIN–QIOs); Federal, state, local, and tribal organizations; providers; researchers; policymakers; beneficiaries and their families; and other stakeholders in activities to achieve health equity.[27] The CMS Equity Plan for Improving Quality in Medicare focuses on three core priority areas which inform our policies and programs: (1) Increasing understanding and awareness of health disparities; (2) developing and disseminating solutions to achieve health equity; and (3) implementing sustainable actions to achieve health equity.[28] The CMS Quality Strategy [29] and Meaningful Measures Framework [30] include elimination of racial and ethnic disparities as a central principle. Our efforts aimed at closing the health equity gap to date have included both providing transparency about health disparities, supporting providers with evidence-informed solutions to achieve health equity, and reporting to providers

England Journal of Medicine. 2014;371(24):2298–2308.

[5] Polyakova, M., et al. Racial Disparities In Excess All-Cause Mortality During The Early COVID–19 Pandemic Varied Substantially Across States. Health Affairs. 2021; 40(2): 307–316.

[6] Rural Health Research Gateway. Rural Communities: Age, Income, and Health Status. Rural Health Research Recap. November 2018.

[7] *https://www.minorityhealth.hhs.gov/assets/PDF/Update_HHS_Disparities_Dept-FY2020.pdf.*

[8] *www.cdc.gov/mmwr/volumes/70/wr/mm7005a1.htm.*

[9] Poteat TC, Reisner SL, Miller M, Wirtz AL. COVID–19 Vulnerability of Transgender Women With and Without HIV Infection in the Eastern and Southern U.S. Preprint. *medRxiv.* 2020;2020.07.21.20159327. Published 2020 Jul 24. doi:10.1101/2020.07.21.20159327.

[10] Martino, SC, Elliott, MN, Dembosky, JW, Hambarsoomian, K, Burkhart, Q, Klein, DJ, Gildner, J, and Haviland, AM. Racial, Ethnic, and Gender Disparities in Health Care in Medicare Advantage. Baltimore, MD: CMS Office of Minority Health. 2020.

[11] Guide to Reducing Disparities in Readmissions. CMS Office of Minority Health. Revised August 2018. Available at: *https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/OMH_Readmissions_Guide.pdf.*

[12] Singh JA, Lu X, Rosenthal GE, Ibrahim S, Cram P. Racial disparities in knee and hip total joint arthroplasty: An 18-year analysis of national Medicare data. Ann Rheum Dis. 2014 Dec;73(12):2107–15.

[13] Rivera-Hernandez M, Rahman M, Mor V, Trivedi AN. Racial Disparities in Readmission Rates among Patients Discharged to Skilled Nursing Facilities. J Am Geriatr Soc. 2019 Aug;67(8):1672–1679.

[14] Joynt KE, Orav E, Jha AK. Thirty-Day Readmission Rates for Medicare Beneficiaries by Race and Site of Care. JAMA. 2011;305(7):675–681.

[15] Tsai TC, Orav EJ, Joynt KE. Disparities in surgical 30-day readmission rates for Medicare beneficiaries by race and site of care. Ann Surg. Jun 2014;259(6):1086–1090.

[16] Rodriguez F, Joynt KE, Lopez L, Saldana F, Jha AK. Readmission rates for Hispanic Medicare beneficiaries with heart failure and acute myocardial infarction. Am Heart J. Aug 2011;162(2):254–261 e253.

[17] Centers for Medicare and Medicaid Services. Medicare Hospital Quality Chartbook: Performance Report on Outcome Measures; 2014.

[18] Guide to Reducing Disparities in Readmissions. CMS Office of Minority Health. Revised August 2018. Available at: *https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/OMH_Readmissions_Guide.pdf.*

[19] Prieto-Centurion V, Gussin HA, Rolle AJ, Krishnan JA. Chronic obstructive pulmonary disease readmissions at minority-serving institutions. Ann Am Thorac Soc. Dec 2013;10(6):680–684.

[20] Joynt KE, Orav E, Jha AK. Thirty-Day Readmission Rates for Medicare Beneficiaries by Race and Site of Care. JAMA. 2011;305(7):675–681.

[21] HHS. Heart disease and African Americans. (March 29, 2021). *https://www.minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=19.*

[22] *https://www.cms.gov/files/document/medicare-covid-19-data-snapshot-fact-sheet.pdf.*

[23] Ochieng N, Cubanski J, Neuman T, Artiga S, and Damico A. Racial and Ethnic Health Inequities and Medicare. Kaiser Family Foundation. Februray 2021. Available at: *https://www.kff.org/medicare/report/racial-and-ethnic-health-inequities-and-medicare/.*

[24] *https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.*

[25] *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/Downloads/CMS-Quality-Strategy.pdf.*

[26] *https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-Federal-government.*

[27] Centers for Medicare and Medicaid Services Office of Minority Health. The CMS Equity Plan for Improving Quality in Medicare. 2015. *https://www.cms.gov/About-CMS/Agency-Information/OMH/OMH_Dwnld-CMS_EquityPlanforMedicare_090615.pdf.*

[28] Centers for Medicare and Medicaid Services Office of Minority Health. The CMS Equity Plan for Improving Quality in Medicare. 2015. *https://www.cms.gov/About-CMS/Agency-Information/OMH/OMH_Dwnld-CMS_EquityPlanforMedicare_090615.pdf.*

[29] Centers for Medicare Services. CMS Quality Strategy. 2016. *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/Downloads/CMS-Quality-Strategy.pdf.*

[30] *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/MMF/General-info-Sub-Page.*

on gaps in quality through the following reports and programs:

- The *CMS Mapping Medicare Disparities Tool,* which is an interactive map that identifies areas of disparities and a starting point to understand and investigate geographical, racial and ethnic differences in health outcomes for Medicare patients.[31]
- The *Racial, Ethnic, and Gender Disparities in Health Care in Medicare Advantage Stratified Report,* which highlights racial and ethnic differences in health care experiences and clinical care, compares quality of care for women and men, and looks at racial and ethnic differences in quality of care among women and men separately for Medicare Advantage plans.[32]
- *The Rural-Urban Disparities in Health Care in Medicare Report,* which details rural-urban differences in health care experiences and clinical care.[33]
- The *Standardized Patient Assessment Data Elements* for certain post-acute care Quality Reporting Programs, which now includes data reporting for race and ethnicity and preferred language, in addition to screening questions for social needs (84 FR 42536 through 42588).
- The *CMS Innovation Center's Accountable Health Communities Model,* which include standardized data collection of health-related social needs data.
- The *Guide to Reducing Disparities* which provides an overview of key issues related to disparities in readmissions and reviews sets of activities that can help hospital leaders reduce readmissions in diverse populations.[34]
- The *CMS Disparity Methods,* which provide hospital-level confidential results stratified by dual eligibility for condition-specific readmission measures currently included in the Hospital Readmission Reduction Program (84 FR 42496 through 42500).

These programs are informed by reports by the National Academies of Science, Engineering and Medicine (NASEM)[35] and the Office of the Assistant Secretary for Planning and Evaluation (ASPE)[36] which have examined the influence of social risk factors on several of our quality programs. In this RFI, we address only the sixth initiative listed, the CMS Disparity Methods, which we have implemented for measures in the Hospital Readmissions Reduction Program and are considering in other programs, including the IPFQR Program. We discuss the implementation of these methods to date and present considerations for continuing to improve and expand these methods to provide providers and ultimately consumers with actionable information on disparities in health care quality to support efforts at closing the equity gap.

2. Current CMS Disparity Methods

We first sought public comment on potential confidential and public reporting of IPFQR program measure data stratified by social risk factors in the FY 2018 IPPS/LTCH PPS proposed rule (82 FR 20121). We initially focused on stratification by dual eligibility, which is consistent with recommendations from ASPE's First Report to Congress which was required by the Improving Medicare Post-Acute Care Transformation (IMPACT) Act of 2014 (Pub. L. 113–185).[37] This report found that in the context of value-based purchasing (VBP) programs, dual eligibility was among the most powerful predictors of poor health outcomes among those social risk factors that ASPE examined and tested.

In the FY 2018 IPPS/LTCH PPS final rule we also solicited feedback on two potential methods for illuminating differences in outcomes rates among patient groups within a provider's patient population that would also allow for a comparison of those differences, or disparities, across providers for the Hospital IQR Program (82 FR 38403 through 38409). The first method (the Within-Hospital disparity method) promotes quality improvement by calculating differences in outcome rates among patient groups within a hospital while accounting for their clinical risk factors. This method also allows for a comparison of the magnitude of disparity across hospitals, permitting hospitals to assess how well they are closing disparity gaps compared to other hospitals. The second methodological approach (the Across-Hospital method) is complementary and assesses hospitals' outcome rates for dual-eligible patients only, across hospitals, allowing for a comparison among hospitals on their performance caring for their patients with social risk factors. In the FY 2018 IPPS/LTCH PPS proposed rule under the IPFQR Program (82 FR 20121), we also specifically solicited feedback on which social risk factors provide the most valuable information to stakeholders. Overall, comments supported the use of dual eligibility as a proxy for social risk, although commenters also suggested investigation of additional social risk factors, and we continue to consider which risk factors provide the most valuable information to stakeholders.

Concurrent with our comment solicitation on stratification in the IPFQR Program, we have considered methods for stratifying measure results for other quality reporting programs. For example, FY 2019 IPPS/LTCH PPS final rule (82 FR 41597 through 41601), we finalized plans to provide confidential hospital-specific reports (HSRs) containing stratified results of the Pneumonia Readmission (NQF #0506) and Pneumonia Mortality (NQF #0468) measures including both the Across-Hospital Disparity Method and the Within-Hospital Disparity Method (disparity methods), stratified by dual eligibility. In the FY 2019 IPPS/LTCH PPS final rule (83 FR 41554 through 41556), we also removed six condition/procedure specific readmissions measures, including the Pneumonia Readmission measure (NQF #0506) and five mortality measures, including the Pneumonia Mortality measure (NQF #0468) (83 FR 41556 through 41558) from the Hospital IQR Program. However, the Pneumonia Readmission (NQF #0506) and the other condition/procedure measures remained in the Hospital Readmissions Reduction Program. In 2019, we provided hospitals with results of the Pneumonia Readmission measure (NQF #0506) stratified using dual eligibility. We provided this information in annual confidential HSRs for claims-based measures.

We then, in the FY 2020 IPPS/LTCH PPS Final Rule (84 FR 42388 through 42390), finalized the proposal to provide confidential hospital specific reports (HSRs) containing data stratified by dual-eligible status for all six readmission measures included in the

[31] *https://www.cms.gov/About-CMS/Agency-Information/OMH/OMH-Mapping-Medicare-Disparities.*

[32] *https://www.cms.gov/About-CMS/Agency-Information/OMH/research-and-data/statistics-and-data/stratified-reporting.*

[33] Centers for Medicare and Medicaid Services. Rural-Urban Disparities in Health Care in Medicare. 2019. *https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/Rural-Urban-Disparities-in-Health-Care-in-Medicare-Report.pdf.*

[34] Guide to Reducing Disparities in Readmissions. CMS Office of Minority Health. Revised August 2018. Available at: *https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/OMH_Readmissions_Guide.pdf.*

[35] National Academies of Sciences, Engineering, and Medicine. 2016. Accounting for Social Risk Factors in Medicare Payment: Identifying Social Risk Factors. Washington, DC: The National Academies Press. *https://doi.org/10.17226/21858.*

[36] *https://aspe.hhs.gov/pdf-report/report-congress-social-risk-factors-and-performance-under-medicares-value-based-purchasing-programs.*

[37] *https://aspe.hhs.gov/pdf-report/report-congress-social-risk-factors-and-performance-under-medicares-value-based-purchasing-programs.*

Hospital Readmission Reduction Program.

3. Potential Expansion of the CMS Disparity Methods

We are committed to advancing health equity by improving data collection to better measure and analyze disparities across programs and policies.[38] As we previously noted, we have been considering, among other things, expanding our efforts to provide stratified data for additional social risk factors and measures, optimizing the ease-of-use of the results, enhancing public transparency of equity results, and building towards provider accountability for health equity. We are seeking public comment on the potential stratification of quality measures in the IPFQR Program across two social risk factors: Dual eligibility and race/ethnicity.

a. Stratification of Quality Measure Results—Dual Eligibility

As described above, landmark reports by the National Academies of Science, Engineering and Medicine (NASEM)[39] and the Office of the Assistant Secretary for Planning and Evaluation (ASPE),[40] which have examined the influence of social risk factors on several of our quality programs, have shown that in the context of value-based purchasing (VBP) programs, dual eligibility, as an indicator of social risk, is a powerful predictor of poor health outcomes. We note that the patient population of IPFs has a higher percentage of dually eligible patients than the general Medicare population. Specifically, over half (56 percent) of Medicare patients in IPFs are dually eligible[41] while approximately 20 percent of all Medicare patients are dually eligible.[42] We are considering stratification of quality measure results in the IPFQR Program and are considering which measures would be most appropriate for stratification and if dual eligibility would be a meaningful social risk factor for stratification.

For the IPFQR Program, we would consider disparity reporting using two disparity methods derived from the Within-Hospital and Across-Hospital methods, described above. The first method (based on the Within-Facility disparity method) would aim to promote quality improvement by calculating differences in outcome rates between dual and non-dual eligible patient groups within a facility while accounting for their clinical risk factors. This method would allow for a comparison of those differences, or disparities, across facilities, so facilities could assess how well they are closing disparity gaps compared to other facilities. The second approach (based the Across-Facility method) would be complementary and assesses facilities' outcome rates for subgroups of patients, such as dual eligible patients, across facilities, allowing for a comparison among facilities on their performance caring for their patients with social risk factors.

b. Stratification of Quality Measure Results—Race and Ethnicity

The Administration's *Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* directs agencies to assess potential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal Programs. As summarized above, studies have shown that among Medicare beneficiaries, racial and ethnic minority persons often experience worse health outcomes, including more frequent hospital readmissions and operative complications. An important part of identifying and addressing inequities in health care is improving data collection to allow us to better measure and report on equity across our programs and policies. We are considering stratification of quality measure results in the IPFQR Program by race and ethnicity and are considering which measures would be most appropriate for stratification.

As outlined in the 1997 Office of Management and Budget (OMB) Revisions to the Standards for the Collection of Federal Data on Race and Ethnicity, the racial and ethnic categories, which may be used for reporting the disparity methods are considered to be social and cultural, not biological or genetic.[43] The 1997 OMB Standard lists five minimum categories of race: (1) American Indian or Alaska Native; (2) Asian; (3) Black or African American; (4) Native Hawaiian or Other Pacific Islander; (5) and White. In the OMB standards, Hispanic or Latino is the only ethnicity category included, and since race and ethnicity are two separate and distinct concepts, persons who report themselves as Hispanic or Latino can be of any race.[44] Another example, the ''Race & Ethnicity—CDC'' code system in Public Health Information Network (PHIN) Vocabulary Access and Distribution System (VADS)[45] permits a much more granular structured recording of a patient's race and ethnicity with its inclusion of over 900 concepts for race and ethnicity. The recording and exchange of patient race and ethnicity at such a granular level can facilitate the accurate identification and analysis of health disparities based on race and ethnicity. Further, the ''Race & Ethnicity—CDC'' code system has a hierarchy that rolls up to the OMB minimum categories for race and ethnicity and, thus, supports aggregation and reporting using the OMB standard. ONC includes both the CDC and OMB standards in its criterion for certified health IT products.[46] For race and ethnicity, a certified health IT product must be able to express both detailed races and ethnicities using *any* of the 900 plus concepts in the ''Race & Ethnicity—CDC'' code system in the PHIN VADS, as well as aggregate each one of a patient's races and ethnicities to the categories in the OMB standard for race and ethnicity. This approach can reduce burden on providers recording demographics using certified products.

Self-reported race and ethnicity data remain the gold standard for classifying an individual according to race or ethnicity. However, CMS does not consistently collect self-reported race and ethnicity for the Medicare program, but instead gets the data from the Social Security Administration (SSA) and the data accuracy and comprehensiveness have proven challenging despite capabilities in the marketplace via

[38] Centers for Medicare Services. CMS Quality Strategy. 2016. *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/Downloads/CMS-Quality-Strategy.pdf.*

[39] National Academies of Sciences, Engineering, and Medicine. 2016. Accounting for Social Risk Factors in Medicare Payment: Identifying Social Risk Factors. Washington, DC: The National Academies Press. *https://doi.org/10.17226/21858.*

[40] *https://aspe.hhs.gov/pdf-report/report-congress-social-risk-factors-and-performance-under-medicares-value-based-purchasing-programs.*

[41] *https://aspe.hhs.gov/basic-report/transitions-care-and-service-use-among-medicare-beneficiaries-inpatient-psychiatric-facilities-issue-brief.*

[42] *https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/DataStatisticalResources/Downloads/MedicareMedicaidDualEnrollmentEverEnrolledTrendsDataBrief2006-2018.pdf.*

[43] Executive Office of the President Office of Management and Budget, Office of Information and Regulatory Affairs. Revisions to the standards for the classification of Federal data on race and ethnicity. Vol 62. **Federal Register**. 1997:58782–58790.

[44] *https://www.census.gov/topics/population/hispanic-origin/about.html.*

[45] *https://phinvads.cdc.gov/vads/ViewValueSet.action?id=67D34BBC-617F-DD11-B38D-00188B398520.*

[46] ONC criteria for certified health IT products: *https://www.healthit.gov/isa/representing-patient-race-and-ethnicity.*

certified health IT products. Historical inaccuracies in Federal data systems and limited collection classifications have contributed to the limited quality of race and ethnicity information in Medicare's administrative data systems.[47] In recent decades, to address these data quality issues, we have undertaken numerous initiatives, including updating to data taxonomies and conducting direct mailings to some beneficiaries to enable more comprehensive race and ethnic identification.[48] [49] Despite those efforts, studies reveal varying data accuracy in identification of racial and ethnic groups in Medicare administrative data, with higher sensitivity for correctly identifying White and Black individuals, and lower sensitivity for correctly identifying individuals of Hispanic ethnicity or of Asian/Pacific Islander and American Indian/Alaskan Native race.[50] Incorrectly classified race or ethnicity may result in overestimation or underestimation in the quality of care received by certain groups of beneficiaries.

We continue to work with Federal and private partners to better collect and leverage data on social risk to improve our understanding of how these factors can be better measured in order to close the health equity gap. Among other things, we have developed an Inventory of Resources for Standardized Demographic and Language Data Collection [51] and supported collection of specialized International Classification of Disease, 10th Edition, Clinical Modification (ICD–10–CM) codes for describing the socioeconomic, cultural, and environmental determinants of health, and sponsored several initiatives to statistically estimate race and ethnicity information when it is absent.[52] The Office of the National Coordinator for Health Information Technology (ONC) included social, psychological, and behavioral standards in the 2015 Edition health information technology (IT) certification criteria (2015 Edition), providing interoperability standards (LOINC (Logical Observation Identifiers Names and Codes) and SNOMED CT (Systematized Nomenclature of Medicine—Clinical Terms)) for financial strain, education, social connection and isolation, and others. Additional stakeholder efforts underway to expand capabilities to capture additional social determinants of health data elements include the Gravity Project to identify and harmonize social risk factor data for interoperable electronic health information exchange for EHR fields, as well as proposals to expand the ICD–10 (International Classification of Diseases, Tenth Revision) z-codes, the alphanumeric codes used worldwide to represent diagnoses.[53]

While development of sustainable and consistent programs to collect data on social determinants of health can be considerable undertakings, we recognize that another method to identify better race and ethnicity data is needed in the short term to address the need for reporting on health equity. In working with our contractors, two algorithms have been developed to *indirectly estimate* the race and ethnicity of Medicare beneficiaries (as described further in the following paragraphs). We feel that using indirect estimation can help to overcome the current limitations of demographic information and enable timelier reporting of equity results until longer term collaborations to improve demographic data quality across the health care sector materialize. The use of indirectly estimated race and ethnicity for conducting stratified reporting does not place any additional collection or reporting burdens on facilities as these data are derived using existing administrative and census-linked data.

Indirect estimation relies on a statistical imputation method for inferring a missing variable or improving an imperfect administrative variable using a related set of information that is more readily available.[54] Indirectly estimated data are most commonly used at the population level (such as the facility or health plan-level), where aggregated results form a more accurate description of the population than existing, imperfect data sets. These methods often estimate race and ethnicity using a combination of other data sources which are predictive of self-identified race and ethnicity, such as language preference, information about race and ethnicity in our administrative records, first and last names matched to validated lists of names correlated to specific national origin groups, and the racial and ethnic composition of the surrounding neighborhood. Indirect estimation has been used in other settings to support population-based equity measurement when self-identified data are not available.[55]

As described above, we have previously supported the development of two such methods of indirect estimation of race and ethnicity of Medicare beneficiaries. One indirect estimation approach, developed by our contractor, uses Medicare administrative data, first name and surname matching, derived from the U.S. Census and other sources, with beneficiary language preference, state of residence, and the source of the race and ethnicity code in Medicare administrative data to reclassify some beneficiaries as Hispanic or Asian/Pacific Islander (API).[56] In recent years, we have also worked with another contractor to develop a new approach, the Medicare Bayesian Improved Surname Geocoding (MBISG), which combines Medicare administrative data, first and surname matching, geocoded residential address linked to the 2010 U.S. Census, and uses both Bayesian updating and multinomial logistic regression to estimate the probability of belonging to each of six racial/ethnic groups.[57]

[47] Eicheldinger, C., & Bonito, A. (2008). More accurate racial and ethnic codes for Medicare administrative data. *Health Care Financing Review, 29*(3), 27–42.

[48] Filice CE, Joynt KE. Examining Race and Ethnicity Information in Medicare Administrative Data. Med Care. 2017;55(12):e170-e176. doi:10.1097/MLR.0000000000000608.

[49] Eicheldinger, C., & Bonito, A. (2008). More accurate racial and ethnic codes for Medicare administrative data. Health Care Financing Review, 29(3), 27–42.

[50] Centers for Medicare and Medicaid Services. Building an Organizational Response to Health Disparities Inventory of Resources for Standardized Demographic and Language Data Collection. 2020. *https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/Data-Collection-Resources.pdf.*

[51] Centers for Medicare and Medicaid Services. Building an Organizational Response to Health Disparities Inventory of Resources for Standardized Demographic and Language Data Collection. 2020. *https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/Data-Collection-Resources.pdf.*

[52] *https://pubmed.ncbi.nlm.nih.gov/18567241/, https://pubmed.ncbi.nlm.nih.gov/30506674/,* Eicheldinger C, Bonito A. More accurate racial and ethnic codes for Medicare administrative data. *Health Care Finance Rev.* 2008;29(3):27–42. Haas A, Elliott MN, Dembosky JW, et al. Imputation of race/ethnicity to enable measurement of HEDIS performance by race/ethnicity. *Health Serv Res.* 2019;54(1):13–23. doi:10.1111/1475–6773.13099.

[53] *https://aspe.hhs.gov/pdf-report/second-impact-report-to-congress.*

[54] IOM. 2009. Race, Ethnicity, and Language Data: Standardization for Health Care Quality Improvement. Washington, DC: The National Academies Press.

[55] IOM. 2009. Race, Ethnicity, and Language Data: Standardization for Health Care Quality Improvement. Washington, DC: The National Academies Press.

[56] Bonito AJ, Bann C, Eicheldinger C, Carpenter L. Creation of New Race-Ethnicity Codes and Socioeconomic Status (SES) Indicators for Medicare Beneficiaries. Final Report, Sub-Task 2. (Prepared by RTI International for the Centers for Medicare and Medicaid Services through an interagency agreement with the Agency for Healthcare Research and Policy, under Contract No. 500–00–0024, Task No. 21) AHRQ Publication No. 08–0029–EF. Rockville, MD, Agency for Healthcare Research and Quality. January 2008.

[57] Haas, A., Elliott, M. et al (2018). Imputation of race/ethnicity to enable measurement of HEDIS

The MBISG model is currently used to conduct the national, contract-level, stratified reporting of Medicare Part C & D performance data for Medicare Advantage Plans by race and ethnicity.[58] Validation testing reveals concordances of 0.88 through 0.95 between indirectly estimated and self-report among individuals who identify as White, Black, Hispanic and API for the MIBSG version 2.0 and concordances with self-reported race and ethnicity of 0.96 through 0.99 for these same groups for MBISG version 2.1.[59] [60] The algorithms under consideration are considerably less accurate for individuals who self-identify as American Indian/Alaskan Native or multiracial.[61] Indirect estimation can be a statistically reliable approach for calculating population-level equity results for groups of individuals (such as the facility-level) and is not intended, nor being considered, as an approach for inferring the race and ethnicity of an individual.

However, despite the high degree of statistical accuracy of the indirect estimation algorithms under consideration there remains the small risk of unintentionally introducing bias. For example, if the indirect estimation is not as accurate in correctly estimating race and ethnicity in certain geographies or populations it could lead to some bias in the method results. Such bias might result in slight overestimation or underestimation of the quality of care received by a given group. We feel this amount of bias is considerably less than would be expected if stratified reporting was conducted using the race and ethnicity currently contained in our administrative data. Indirect estimation of race and ethnicity is envisioned as an intermediate step, filling the pressing need for more accurate demographic information for the purposes of exploring inequities in service delivery, while allowing newer approaches, as described in the next section, for improving demographic data collection to progress. We are interested in learning more about, and soliciting comments about, the potential benefits and challenges associated with measuring facility equity using an imputation algorithm to enhance existing administrative data quality for race and ethnicity until self-reported information is sufficiently available.

c. Improving Demographic Data Collection

Stratified facility-level reporting using dual eligibility and indirectly estimated race and ethnicity would represent an important advance in our ability to provide equity reports to facilities. However, self-reported race and ethnicity data remain the gold standard for classifying an individual according to race or ethnicity. The CMS Quality Strategy outlines our commitment to strengthening infrastructure and data systems by ensuring that standardized demographic information is collected to identify disparities in health care delivery outcomes.[62] Collection and sharing of a standardized set of social, psychological, and behavioral data by facilities, including race and ethnicity, using electronic data definitions which permit nationwide, interoperable health information exchange, can significantly enhance the accuracy and robustness of our equity reporting.[63] This could potentially include expansion to additional social risk factors, such as disability status, where accuracy of administrative data is currently limited. We are mindful that additional resources, including data collection and staff training may be necessary to ensure that conditions are created whereby all patients are comfortable answering all demographic questions, and that individual preferences for non-response are maintained.

We are also interested in learning about and are soliciting comments on current data collection practices by facilities to capture demographic data elements (such as race, ethnicity, sex, sexual orientation and gender identity (SOGI), primary language, and disability status). Further, we are interested in potential challenges facing facility collection, at the time of admission, of a minimum set of demographic data elements in alignment with national data collection standards (such as the standards finalized by the Affordable Care Act)[64] and standards for interoperable exchange (such as the U.S. Core Data for Interoperability incorporated into certified health IT products as part of the 2015 Edition of health IT certification criteria).[65] Advancing data interoperability through collection of a minimum set of demographic data collection, and incorporation of this demographic information into quality measure specifications, has the potential for improving the robustness of the disparity method results, potentially permitting reporting using more accurate, self-reported information, such as race and ethnicity, and expanding reporting to additional dimensions of equity, including stratified reporting by disability status.

d. Potential Creation of a Facility Equity Score To Synthesize Results Across Multiple Social Risk Factors

As we describe in section IV.D.3.a of this proposed rule, we are considering expanding the disparity methods to IPFs and to include two social risk factors (dual eligibility and race/ethnicity). This approach would improve the comprehensiveness of health equity information provided to facilities. Aggregated results from multiple measures and multiple social risk factors, from the CMS Disparity Methods, in the format of a summary score, can improve the usefulness of the equity results. In working with our contractors, we recently developed an equity summary score for Medicare Advantage contract/plans, the Health Equity Summary Score (HESS), with application to stratified reporting using two social risk factors: dual eligibility and race and as described in *Incentivizing Excellent Care to At-Risk Groups with a Health Equity Summary Score*.[66]

performance by race/ethnicity. *Health Services Research,* 54:13–23.

[58] The Office of Minority Health (2020). Racial, Ethnic, and Gender Disparities in Health Care in Medicare Advantage, The Centers for Medicare and Medicaid Services, (pg vii). *https://www.cms.gov/About-CMS/Agency-Information/OMH/research-and-data/statistics-and-data/stratified-reporting.*

[59] Haas, A., Elliott, M. et al (2018). Imputation of race/ethnicity to enable measurement of HEDIS performance by race/ethnicity. Health Services Research, 54:13–23.

[60] MBISG 2.1 validation results performed under contract #GS–10F–0012Y/HHSM–500–2016–00097G). Pending public release of the 2021 Part C and D Performance Data Stratified by Race, Ethnicity, and Gender Report, available at: *https://www.cms.gov/About-CMS/Agency-Information/OMH/research-and-data/statistics-and-data/stratified-reporting.*

[61] Haas, A., Elliott, M. et al (2018). Imputation of race/ethnicity to enable measurement of HEDIS performance by race/ethnicity. *Health Services Research,* 54:13–23 and Bonito AJ, Bann C, Eicheldinger C, Carpenter L. Creation of New Race-Ethnicity Codes and Socioeconomic Status (SES) Indicators for Medicare Beneficiaries. Final Report, Sub-Task 2. (Prepared by RTI International for the Centers for Medicare and Medicaid Services through an interagency agreement with the Agency for Healthcare Research and Policy, under Contract No. 500–00–0024, Task No. 21) AHRQ Publication No. 08–0029–EF. Rockville, MD, Agency for Healthcare Research and Quality. January 2008.

[62] The Centers for Medicare & Medicaid Services. CMS Quality Strategy. 2016. *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/Downloads/CMS-Quality-Strategy.pdf.*

[63] The Office of the National Coordinator for Health Information Technology. United State Core Data for Interoperability Draft Version 2. 2021. *https://www.healthit.gov/isa/sites/isa/files/2021-01/Draft-USCDI-Version-2-January-2021-Final.pdf.*

[64] *https://minorityhealth.hhs.gov/assets/pdf/checked/1/Fact_Sheet_Section_4302.pdf.*

[65] *https://www.healthit.gov/sites/default/files/2020-08/2015EdCures_Update_CCG_USCDI.pdf.*

[66] Agniel D, Martino SC, Burkhart Q, et al. Incentivizing Excellent Care to At-Risk Groups with

Continued

The HESS calculates standardized and combined performance scores blended across the two social risk factors. The HESS also combines results of the within-plan (similar to the Within-Facility method) and across-plan method (similar to the Across-Facility method) across multiple performance measures.

We are considering building a ''Facility Equity Score,'' not yet developed, which would be modeled off the HESS but adapted to the context of risk-adjusted facility outcome measures and potentially other IPF quality measures. We envision that the Facility Equity Score would synthesize results for a range of measures and using multiple social risk factors, using measures and social risk factors, which would be reported to facilities as part of the CMS Disparity Methods. We believe that creation of the Facility Equity Score has the potential to supplement the overall measure data already reported on the *Care Compare* or successor website, by providing easy to interpret information regarding disparities measured within individual facilities and across facilities nationally. A summary score would decrease burden by minimizing the number of measure results provided and providing an overall indicator of equity.

The Facility Equity Score under consideration would potentially:

- Summarize facility performance across multiple social risk factors (initially dual eligibility and indirectly estimated race and ethnicity, as described above); and
- Summarize facility performance across the two disparity methods (that is, the Within-Facility Disparity Method and the Across-Facility Disparity Method) and potentially for multiple measures.

Prior to any future public reporting, if we determine that a Facility Equity Score can be feasibly and accurately calculated, we would provide results of the Facility Equity Score, in confidential facility specific reports, which facilities and their QIN–QIOs would be able to download. Any potential future proposal to display the Facility Equity Score on the Care Compare or successor website would be made through future RFI or rulemaking.

c. Solicitation of Public Comment

We are soliciting public comments on the possibility of stratifying IPFQR Program measures by dual eligibility and race and ethnicity. We are also soliciting public comments on mechanisms of incorporating co-occurring disability status into such stratification as well. We are soliciting public comments on the application of the within-facility or across-facility disparities methods IPFQR Program measures if we were to stratify IPFQR Program measures. We are also seeking comment on the possibility of facility collection of standardized demographic information for the purposes of potential future quality reporting and measure stratification. In addition, we are soliciting public comments on the potential design of a facility equity score for calculating results across multiple social risk factors and measures, including race and disability. Any data pertaining to these areas that are recommended for collection for measure reporting for a CMS program and any potential public disclosure on *Care Compare* or successor website would be addressed through a separate and future notice- and-comment rulemaking. We plan to continue working with ASPE, facilities, the public, and other key stakeholders on this important issue to identify policy solutions that achieve the goals of attaining health equity for all patients and minimizing unintended consequences. We look forward to receiving feedback on these topics. We also note our intention for additional RFIs or rulemaking on this topic in the future.

Specifically, we are soliciting public comment on the following:

Future Potential Stratification of Quality Measure Results

- The possible stratification of facility-specific reports for IPFQR program measure data by dual-eligibility status given that over half of the patient population in IPFs are dually eligible, including, which measures would be most appropriate for stratification;
- The potential future application of indirect estimation of race and ethnicity to permit stratification of measure data for reporting facility-level disparity results until more accurate forms of self-identified demographic information are available;
- Appropriate privacy safeguards with respect to data produced from the indirect estimation of race and ethnicity to ensure that such data are properly identified if/when it is shared with providers.
- Ways to address the challenges of defining and collecting accurate and standardized self-identified demographic information, including information on race and ethnicity and disability, for the purposes of reporting, measure stratification and other data collection efforts relating to quality.
- Recommendations for other types of readily available data elements for measuring disadvantage and discrimination for the purposes of reporting, measure stratification and other data collection efforts relating to quality, in addition, or in combination with race and ethnicity.
- Recommendations for types of quality measures or measurement domains to prioritize for stratified reporting by dual eligibility, race and ethnicity, and disability.
- Examples of approaches, methods, research, and/or considerations for use of data-driven technologies that do not facilitate exacerbation of health inequities, recognizing that biases may occur in methodology or be encoded in datasets.

Improving Demographic Data Collection

- Experiences of users of certified health IT regarding local adoption of practices for collection of social, psychological, and behavioral data elements, the perceived value of using these data for improving decision-making and care delivery, and the potential challenges and benefits of collecting more granular, structured demographic information, such as the ''Race & Ethnicity—CDC'' code system.
- The possible collection of a minimum set of social, psychological, and behavioral data elements by hospitals at the time of admission using structured, interoperable data standards, for the purposes of reporting, measure stratification and other data collection efforts relating to quality.

Potential Creation of a Facility Equity Score To Synthesize Results Across Multiple Social Risk Factors

- The possible creation and confidential reporting of a Facility Equity Score to synthesize results across multiple social risk factors and disparity measures.
- Interventions facilities could institute to improve a low facility equity score and how improved demographic data could assist with these efforts.

E. Measure Adoption

We strive to put consumers and caregivers first, ensuring they are empowered to make decisions about their own healthcare along with their clinicians using information from data-driven insights that are increasingly aligned with meaningful quality measures. We support technology that reduces burden and allows clinicians to focus on providing high-quality healthcare for their patients. We also

a Health Equity Summary Score. J Gen Intern Med. Published online November 11, 2019 Nov 11. doi: 10.1007/s11606–019–05473–x.

support innovative approaches to improve quality, accessibility, and affordability of care while paying particular attention to improving clinicians' and beneficiaries' experiences when interacting with our programs. In combination with other efforts across the Department of Health and Human Services (HHS), we believe the IPFQR Program helps to incentivize facilities to improve healthcare quality and value while giving patients and providers the tools and information needed to make the best decisions for them. Consistent with these goals, our objective in selecting quality measures is to balance the need for information on the full spectrum of care delivery and the need to minimize the burden of data collection and reporting. We have primarily focused on measures that evaluate critical processes of care that have significant impact on patient outcomes and support CMS and HHS priorities for improved quality and efficiency of care provided by IPFs. When possible, we also propose to incorporate measures that directly evaluate patient outcomes and experience. We refer readers to section VIII.F.4.a. of the FY 2013 IPPS/LTCH PPS final rule (77 FR 53645 through 53646) for a detailed discussion of the considerations taken into account in selecting quality measures.

1. Measure Selection Process

Before being proposed for inclusion in the IPFQR Program, measures are placed on a list of measures under consideration (MUC), which is published annually on behalf of CMS by the National Quality Forum (NQF). Following publication on the MUC list, the Measure Applications Partnership (MAP), a multi-stakeholder group convened by the NQF, reviews the measures under consideration for the IPFQR Program, among other Federal programs, and provides input on those measures to the Secretary. We consider the input and recommendations provided by the MAP in selecting all measures for the IPFQR Program. In our evaluation of the IPFQR Program measure set, we identified two measures that we believe are appropriate to propose for the IPFQR Program.

2. Proposed Adoption of COVID–19 Vaccination Coverage Among Health Care Personnel (HCP) [67] Measure for the FY2023 Payment Determination and Subsequent Years

a. Background

On January 31, 2020, the Secretary declared a public health emergency (PHE) for the U.S. in response to the global outbreak of SARS–CoV–2, a novel (new) coronavirus that causes a disease named ''coronavirus disease 2019'' (COVID–19).[68] COVID–19 is a contagious respiratory illness [69] that can cause serious illness and death. Older individuals and those with underlying medical conditions are considered to be at higher risk for more serious complications from COVID–19.[70]

As of April 2, 2021, the U.S. has reported over 30 million cases of COVID–19 and over 550,000 COVID–19 deaths.[71] Hospitals and health systems saw significant surges of COVID–19 patients as community infection levels increased.[72] From December 2, 2020 through January 30, 2021, more than 100,000 Americans were in the hospital with COVID–19 at the same time.[73]

Evidence indicates that COVID–19 primarily spreads when individuals are in close contact with one another.[74] The virus is typically transmitted through respiratory droplets or small particles created when someone who is infected with the virus coughs, sneezes, sings, talks, or breathes.[75] Thus, the CDC advises that infections mainly occur through exposure to respiratory droplets when a person is in close contact with someone who has COVID–19.[76] Experts believe that COVID–19 spreads less commonly through contact with a contaminated surface (although that is not thought to be a common way that COVID–19 spreads),[77] and that in certain circumstances, infection can occur through airborne transmission.[78] According to the CDC, those at greatest risk of infection are persons who have had prolonged, unprotected close contact (that is, within 6 feet for 15 minutes or longer) with an individual with confirmed SARS–CoV–2 infection, regardless of whether the individual has symptoms.[79] Although personal protective equipment (PPE) and other infection-control precautions can reduce the likelihood of transmission in health care settings, COVID–19 can spread between health care personnel (HCP) and patients, or from patient to patient given the close contact that may occur during the provision of care.[80] The CDC has emphasized that health care settings, including long-term care settings, can be high-risk places for COVID–19 exposure and transmission.[81]

Vaccination is a critical part of the nation's strategy to effectively counter the spread of COVID–19 and ultimately help restore societal functioning.[82] On

[67] This measure was previously titled, ''SARS–CoV–2 Vaccination Coverage among Healthcare Personnel.''.

[68] U.S. Dept of Health and Human Services, Office of the Assistant Secretary for Preparedness and Response. (2020). Determination that a Public Health Emergency Exists. Available at: *https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.*

[69] Centers for Disease Control and Prevention. (2020). Your Health: Symptoms of Coronavirus. Available at: *https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html.*

[70] Centers for Disease Control and Prevention. (2020). Your Health: Symptoms of Coronavirus. Available at *https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html.*

[71] Centers for Disease Control and Prevention. (2020). CDC COVID Data Tracker. Accessed on April 3, 2021 at: *https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.*

[72] Associated Press. Tired to the Bone. Hospitals Overwhelmed with Virus Cases. November 18, 2020. Accessed on December 16, 2020, at *https://apnews.com/article/hospitals-overwhelmed-coronavirus-cases-74a1f0dc3634917a5dc13408455cd895.* Also see: New York Times. Just how full are U.S. intensive care units? New data paints an alarming picture. November 18, 2020. Accessed on December 16, 2020, at: *https://www.nytimes.com/2020/12/09/world/just-how-full-are-us-intensive-care-units-new-data-paints-an-alarming-picture.html.*

[73] U.S. Currently Hospitalized | The COVID Tracking Project *https://covidtracking.com/data/charts/us-currently-hospitalized.*

[74] Centers for Disease Control and Prevention. (2021). How COVID–19 Spreads. Accessed on April 3, 2021 at: *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.*

[75] Centers for Disease Control and Prevention. (2021). How COVID–19 Spreads. Accessed on April 3, 2021 at: *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.*

[76] Centers for Disease Control and Prevention. (2021). How COVID–19 Spreads. Accessed on April 3, 2021 at: *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.*

[77] Centers for Disease Control and Prevention. (2021). How COVID–19 Spreads. Accessed on April 3, 2021 at: *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.*

[78] Centers for Disease Control and Prevention. (2021). How COVID–19 Spreads. Accessed on April 3, 2021 at: *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.*

[79] Centers for Disease Control and Prevention. (2021). When to Quarantine. Accessed on April 3, 2021 at: *https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html.*

[80] Centers for Disease Control and Prevention. (2020). Interim U.S. Guidance for Risk Assessment and Work Restrictions for Healthcare Personnel with Potential Exposure to COVID–19. Accessed on April 2, 2021 at: *https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Transmission.*

[81] Dooling, K, McClung, M, et al. ''The Advisory Committee on Immunization Practices' Interim Recommendations for Allocating Initial Supplies of COVID–19 Vaccine—United States, 2020.'' Morb Mortal Wkly Rep. 2020; 69(49): 1857–1859.

[82] Centers for Disease Control and Prevention. (2020). COVID–19 Vaccination Program Interim Playbook for Jurisdiction Operations. Accessed on April 3, 2021 at: *https://www.cdc.gov/vaccines/imz-*

Continued

December 11, 2020, the FDA issued the first Emergency Use Authorization (EUA) for a COVID–19 vaccine in the U.S.[83] Subsequently, the FDA issued EUAs for additional COVID–19 vaccines.[84]

The FDA determined that it was reasonable to conclude that the known and potential benefits of each vaccine, when used as authorized to prevent COVID–19, outweighed its known and potential risks.[85]

As part of its national strategy to address COVID–19, the Biden Administration stated that it would work with states and the private sector to execute an aggressive vaccination strategy and has outlined a goal of administering 200 million shots in 100 days,[86] Although the goal of the U.S. government is to ensure that every American who wants to receive a COVID–19 vaccine can receive one, Federal agencies recommended that early vaccination efforts focus on those critical to the PHE response, including HCP providing direct care to patients with COVID–19, and individuals at highest risk for developing severe illness from COVID–19.[87] For example, the CDC's Advisory Committee on Immunization Practices (ACIP) recommended that HCP should be among those individuals prioritized to receive the initial, limited supply of the COVID–19 vaccination given the potential for transmission in health care settings and the need to preserve health care system capacity.[88] Research suggests most states followed this recommendation,[89] and HCP began receiving the vaccine in mid-December of 2020.[90]

There are approximately 18 million healthcare workers in the U.S.[91] As of April 3, 2021 the CDC reported that over 162 million doses of COVID–19 vaccine had been administered, and approximately 60 million people had received a complete vaccination course as described in IV.1.b.i of this proposed rule.[92] President Biden indicated on March 2, 2021 that the U.S. is on track to have sufficient vaccine supply for every adult by the end of May 2021.[93]

We believe it is important to require that IPFs report HCP vaccination in their facilities in order to assess whether they are taking steps to protect health care workers and to help sustain the ability of IPFs to continue serving their communities throughout the PHE and beyond. Therefore, we are proposing a new measure, COVID–19 Vaccination Coverage Among HCP, beginning with the FY 2023 program year. For that program year, IPFs would be required to report data on the measure for the fourth quarter of 2021 (October 1, 2021 through December 31, 2021). For more information about the proposed reporting period, see section V.E.2.c of this proposed rule. The measure would assess the proportion of an IPF's health care workforce that has been vaccinated against COVID–19.

Although at this time data to show the effectiveness of COVID–19 vaccines to prevent asymptomatic infection or transmission of SARS–CoV–2 are limited, we believe IPFs should report the level of vaccination among their HCP as part of their efforts to assess and reduce the risk of transmission of COVID–19 within their facilities. HCP vaccination can potentially reduce illness that leads to work absence and limit disruptions to care.[94] Data from influenza vaccination demonstrates that provider uptake of the vaccine is associated with that provider recommending vaccination to patients,[95] and we believe HCP COVID–19 vaccination in IPFs could similarly increase uptake among that patient population. We also believe that publishing the HCP vaccination rates will be helpful to many patients, including those who are at high-risk for developing serious complications from COVID–19, as they choose facilities from which to seek treatment. Under CMS' Meaningful Measures Framework, the COVID–19 measure addresses the quality priority of ''Promote Effective Prevention and Treatment of Chronic Disease'' through the Meaningful Measure Area of ''Preventive Care.''

b. Overview of Measure

The COVID–19 Vaccination Coverage Among HCP measure (''COVID–19 HCP vaccination measure'') is a process measure developed by the CDC to track COVID–19 vaccination coverage among HCP in facilities such as IPFs.

(1). Measure Specifications

The denominator is the number of HCP eligible to work in the IPF for at least 1 day during the reporting period, excluding persons with contraindications to COVID–19 vaccination that are described by the CDC.[96]

The numerator is the cumulative number of HCP eligible to work in the health care facility for at least 1 day

managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf.

[83] U.S. Food and Drug Administration. (2020). Pfizer-BioNTech COVID–19 Vaccine EUA Letter of Authorization. Available at *https://www.fda.gov/media/144412/download.*

[84] U.S. Food and Drug Administration. (2020). Moderna COVID–19 Vaccine EUA Letter of Authorization. Available at *https://www.fda.gov/media/144636/download;* U.S. Food and Drug Administration. (2021). Janssen COVID–19 Vaccine EUA Letter of Authorization. Available at *https://www.fda.gov/media/146303/download.*

[85] U.S. Food and Drug Administration. (2020). Pfizer-BioNTech COVID–19 Vaccine EUA Letter of Authorization. Available at *https://www.fda.gov/media/144412/download* and .S. Food and Drug Administration. (2020). Moderna COVID–19 Vaccine EUA Letter of Authorization. *Available* at *https://www.fda.gov/media/144636/download;* U.S. Food and Drug Administration. (2021). Janssen COVID–19 Vaccine EUA Letter of Authorization. Available at *https://www.fda.gov/media/146303/download.*

[86] *https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/29/remarks-by-president-biden-on-the-covid-19-response-and-the-state-of-vaccinations/.*

[87] Health and Human Services, Department of Defense. (2020) From the Factory to the Frontlines: The Operation Warp Speed Strategy for Distributing a COVID–19 Vaccine. Accessed December 18 at: *https://www.hhs.gov/sites/default/files/strategy-for-distributing-covid-19-vaccine.pdf;* Centers for Disease Control (2020). COVID–19 Vaccination Program Interim Playbook for Jurisdiction Operations. Accessed December 18 at: *https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf.*

[88] Dooling, K, McClung, M, et al. ''The Advisory Committee on Immunization Practices' Interim Recommendations for Allocating Initial Supplies of COVID–19 Vaccine—United States, 2020.'' Morb. Mortal Wkly Rep. 2020; 69(49): 1857–1859. ACIP also recommended that long-term care residents be prioritized to receive the vaccine, given their age, high levels of underlying medical conditions, and congregate living situations make them high risk for severe illness from COVID–19.

[89] Kates, J, Michaud, J, Tolbert, J. ''How Are States Prioritizing Who Will Get the COVID–19 Vaccine First?'' Kaiser Family Foundation. December 14, 2020. Accessed on December 16 at *https://www.kff.org/policy-watch/how-are-states-prioritizing-who-will-get-the-covid-19-vaccine-first/.*

[90] Associated Press. 'Healing is Coming:' U.S. Health Workers Start Getting Vaccine. December 15, 2020. Accessed on December 16 at: *https://apnews.com/article/us-health-workers-coronavirus-vaccine-56df745388a9fc12ae93c6f9a0d0e81f.*

[91] *https://www.cdc.gov/niosh/topics/healthcare/default.html#:~:text=HEALTHCARE%20WORKERS,-Related%20Pages&text=Healthcare%20is%20the%20fastest%2Dgrowing,of%20the%20healthcare%20work%20force.*

[92] CDC. COVID Data Tracker. COVID–19 Vaccinations in the United States. Accessed on 2/18/21 at: *https://covid.cdc.gov/covid-data-tracker/#vaccinations.*

[93] The White House. Remarks by President Biden on the Administration's COVID–19 Vaccination Efforts. Accessed March 18, 2021 at: *https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/02/remarks-by-president-biden-on-the-administrations-covid-19-vaccination-efforts/.*

[94] Centers for Disease Control and Prevention. Overview of Influenza Vaccination among Health Care Personnel. October 2020. (2020) Accessed March 16, 2021 at: *https://www.cdc.gov/flu/toolkit/long-term-care/why.htm.*

[95] Measure Application Committee Coordinating Committee Meeting Presentation. March 15, 2021. (2021) Accessed March 16, 2021 at: *http://www.qualityforum.org/Project_Pages/MAP_Coordinating_Committee.aspx.*

[96] Centers for Disease Control and Prevention. Contraindications and precautions. *https://www.cdc.gov/vaccines/covid-19/info-by-product/clinical-considerations.html#Contraindications.*

during the reporting period and who received a completed vaccination course against COVID–19 since the vaccine was first available or on a repeated interval if revaccination on a regular basis is needed.[97] Vaccination coverage for the purposes of this measure is defined as the estimated percentage of HCP eligible to work at the IPF for at least 1 day who received a completed vaccination course. A completed vaccination course may require one or more doses depending on the EUA for the specific vaccine used.

The finalized specifications for this measure will be available at *https://www.cdc.gov/nhsn/nqf/index.html.*

(2). Review by the Measure Applications Partnership

The COVID–19 HCP vaccination measure was included on the publicly available ''List of Measures under Consideration for December 21, 2020,'' [98] a list of measures under consideration for use in various Medicare programs. When the Measure Applications Partnership (MAP) Hospital Workgroup convened on January 11, 2021, it reviewed the MUC List and the COVID–19 HCP vaccination measure. The MAP recognized that the proposed measure represents a promising effort to advance measurement for an evolving national pandemic and that it would bring value to the IPFQR Program measure set by providing transparency about an important COVID–19 intervention to help prevent infections in HCP and patients.[99] The MAP also stated that collecting information on COVID–19 vaccination coverage among HCP and providing feedback to facilities will allow facilities to benchmark coverage rates and improve coverage in their facility, and that reducing rates of COVID–19 in HCP may reduce transmission among patients and reduce instances of staff shortages due to illness.[100]

In its preliminary recommendations, the MAP Hospital Workgroup did not support this measure for rulemaking, subject to potential for mitigation.[101] To mitigate its concerns, the MAP believed that the measure needed well-documented evidence, finalized specifications, testing, and NQF endorsement prior to implementation.[102] Subsequently, the MAP Coordinating Committee met on January 25, 2021, and reviewed the COVID–19 Vaccination Coverage Among HCP measure. In the 2020–2021 MAP Final Recommendations, the MAP offered conditional support for rulemaking contingent on CMS bringing the measures back to MAP once the specifications are further refined.[103] The MAP specifically stated, ''the incomplete specifications require immediate mitigation and further development should continue.'' [104] The spreadsheet of final recommendations no longer cited concerns regarding evidence, testing, or NQF endorsement.[105] In response to the MAP final recommendation request that CMS bring the measure back to the MAP once the specifications are further refined, CMS and the CDC met with MAP Coordinating committee on March 15th. Additional information was provided to address vaccine availability, alignment of the COVID–19 Vaccination Coverage Among HCP as closely as possible with the data collection for the Influenza HCP vaccination measure (NQF 0431) and clarification related to how HCP are defined. At this meeting, CMS and the CDC presented preliminary findings from the testing of the numerator of COVID–19 Vaccination Coverage Among HCP, which is currently in process. These preliminary findings show numerator data should be feasible and reliable. Testing of the numerator of the number of healthcare personnel vaccinated involves a comparison of the data collected through NHSN and independently reported through the Federal pharmacy partnership program for delivering vaccination to LTC facilities. These are two completely independent data collection systems. In initial analyses of the first month of vaccination, the number of healthcare workers vaccinated in approximately 1,200 facilities, which had data from both systems the number of healthcare personnel vaccinated was highly correlated between these 2 systems with a correlation coefficient of nearly 90 percent in the second two weeks of reporting.[106] The MAP further noted that the measure would add value to the program measure set by providing visibility into an important intervention to limit COVID–19 infections in healthcare personnel and the patients for whom they provide care.[107]

We value the recommendations of the MAP and considered these recommendations carefully. Section 1890A(a)(4) of the Act requires the Secretary to take into consideration input from multi-stakeholder groups in selecting certain quality and efficiency measures. While we value input from the MAP, we believe it is important to propose the measure as quickly as possible to address the urgency of the COVID–19 PHE and its impact on vulnerable populations, including IPFs. CMS continues to engage with the MAP to mitigate concerns and appreciates the MAP's conditional support for the measure.

(3). NQF Endorsement

Under section 1886(s)(4)(D)(i) of the Act, unless the exception of clause (ii) applies, measures selected for the quality reporting program must have been endorsed by the entity with a contract under section 1890(a) of the Act. The NQF currently holds this contract. Section 1886(s)(4)(D)(ii) of the Act provides an exception to the requirement for NQF endorsement of measures: In the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the entity with a contract under section 1890(a) of the Act, the Secretary may specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization identified by the Secretary.

This measure is not NQF endorsed and has not been submitted to NQF for

[97] Measure Application Partnership Coordinating Committee Meeting Presentation. March 15, 2021. (2021) Accessed March 16, 2021 at: *http://www.qualityforum.org/Project_Pages/MAP_Coordinating_Committee.aspx.*

[98] *https://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=94212.*

[99] Measure Applications Partnership. MAP Preliminary Recommendations 2020–2021. Accessed on January 24, 2021 at: *http://www.qualityforum.org/Project_Pages/MAP_Hospital_Workgroup.aspx.*

[100] Measure Applications Partnership. MAP Preliminary Recommendations 2020–2021. Accessed on January 24, 2021 at: *http://www.qualityforum.org/Project_Pages/MAP_Hospital_Workgroup.aspx.*

[101] Measure Applications Partnership. MAP Preliminary Recommendations 2020–2021. Accessed on January 24, 2021 at: *http://www.qualityforum.org/Project_Pages/MAP_Hospital_Workgroup.aspx.*

[102] Measure Applications Partnership. MAP Preliminary Recommendations 2020–2021. Accessed on January 24, 2021 at: *http://www.qualityforum.org/Project_Pages/MAP_Hospital_Workgroup.aspx.*

[103] Measure Applications Partnership. 2020–2021 MAP Final Recommendations. Accessed on February 3, 2021 at: *http://www.qualityforum.org/Setting_Priorities/Partnership/Measure_Applications_Partnership.aspx.*

[104] Measure Applications Partnership. 2020–2021 MAP Final Recommendations. Accessed on February 23, 2021 at: *http://www.qualityforum.org/Project_Pages/MAP_Hospital_Workgroup.aspx.*

[105] *Ibid.*

[106] For more information on testing results and other measure updates, please see the Meeting Materials (including Agenda, Recording, Presentation Slides, Summary, and Transcript) of the March 15, 2021 meeting available at *https://www.qualityforum.org/ProjectMaterials.aspx?projectID=75367.*

[107] Measure Applications Partnership. 2020–2021 MAP Final Recommendations. Accessed on February 23, 2021 at: *http://www.qualityforum.org/Project_Pages/MAP_Hospital_Workgroup.aspx.*

endorsement consideration. CMS will consider the potential for future NQF endorsement as part of its ongoing work with the MAP.

Because this measure is not NQF-endorsed, we considered other available measures. We found no other feasible and practical measures on the topic of COVID–19 vaccination among HCP, therefore, we believe the exception in Section 1186(s)(4)(D)(ii) of the Act applies.

c. Data Collection, Submission and Reporting

Given the time-sensitive nature of this measure considering the PHE, we are proposing that IPFs would be required to begin reporting data on the proposed COVID–19 Vaccination Coverage Among HCP measure beginning October 1, 2021 for the FY 2023 IPFQR Program year. Thereafter, we propose annual reporting periods.

To report this measure facilities would report COVID–19 vaccination data to the NHSN for at least one week each month, beginning in October 2021 for the October 1, 2021 through December 31, 2021 reporting period affecting FY 2023 payment determination and continuing for each quarter in subsequent years. For more details on data submission, we refer readers to section V.J.2.a of this proposed rule.

If our proposal to adopt this measure is finalized, IPFs would report the measure through the CDC National Healthcare Safety Network (NHSN) web-based surveillance system.[108] While the IPFQR Program does not currently require use of the NHSN web-based surveillance system, we have previously required use of this system. We refer readers to the FY 2015 IPF PPS final rule in which we adopted the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure for additional information on reporting through the NHSN web-based surveillance system (79 FR 45968 through 45970).

IPFs would report COVID–19 vaccination data in the NHSN Healthcare Personnel Safety (HPS) Component by reporting the number of HCP eligible to have worked at the facility that week (denominator) and the number of those HCP who have received a completed vaccination course of a COVID–19 vaccination (numerator). For additional information about the data reporting requirements, see V.J.4. of this proposed rule.

We invite public comment on our proposal to add a new measure, COVID–19 Vaccination Coverage Among HCP, to the IPFQR Program for the FY 2023 payment determination and subsequent years.

3. Proposed Adoption of the Follow-Up After Psychiatric Hospitalization (FAPH) Measure for the FY 2024 Payment Determination and Subsequent Years

a. Background

We are proposing one new measure, Follow-Up After Psychiatric Hospitalization (FAPH), for the FY 2024 payment determination and subsequent years. The FAPH measure would use Medicare fee-for-service (FFS) claims to determine the percentage of inpatient discharges from an inpatient psychiatric facility (IPF) stay with a principal diagnosis of select mental illness or substance use disorders (SUDs) for which the patient received a follow-up visit for treatment of mental illness or SUD. Two rates would be calculated for this measure: (1) The percentage of discharges for which the patient received follow-up within 7 days of discharge, and; (2) the percentage of discharges for which the patient received follow-up within 30 days of discharge.

The proposed FAPH measure is an expanded and enhanced version of the Follow-Up After Hospitalization for Mental Illness (FUH, NQF #0576) measure currently in the IPFQR Program. We are proposing to adopt the FAPH measure and replace the FUH measure and refer readers to section IV.F.2.d of this proposed rule for our proposal to remove the FUH measure contingent on adoption of the FAPH measure. The FUH (NQF #0576) measure uses Medicare FFS claims to determine the percentage of inpatient discharges from an IPF stay with a principal diagnosis of select mental illness diagnoses for which the patient received a follow-up visit for treatment of mental illness, and it excludes patients with primary substance use diagnoses. During the 2017 comprehensive review of NQF #0576, the NQF Behavioral Health Standing Committee (BHSC) recommended expanding the measure population to include patients hospitalized for drug and alcohol disorders, because these patients also require follow-up care after they are discharged. In 2018, CMS began development of a measure to expand the IPFQR FUH population to include patients with principal SUD diagnoses to address the NQF BHSC recommendation and the CMS Meaningful Measures priority to promote treatment of SUDs. The FAPH measure would expand the number of discharges in the denominator by about 35 percent over the current FUH measure by adding patients with SUD or dementia, populations that also benefit from timely follow-up care.

Furthermore, compared to the criteria for provider type in the current FUH measure, the FAPH measure does not limit the provider type for the follow-up visit if it is billed with a diagnosis of mental illness or SUD. During the measure's testing, the most frequent provider types for the FAPH measure were family or general practice physicians, internal medicine physicians, nurse practitioners, and physician assistants. The technical expert panel (TEP) convened by our contractor agreed that these provider types should be credited by the measure for treating mental illness and SUD and confirmed that this is aligned with integrated care models that aim to treat the whole patient. The TEP further noted that in areas where there are shortages of mental health or SUD clinicians, other types of providers are often the only choice for follow-up treatment. Allowing visits to these types of providers to count towards the numerator allows the measure to capture the rates of appropriate follow-up care more accurately in areas with provider shortages.

Performance on the FAPH measure indicates that follow-up rates for patients hospitalized with mental illness or SUD are less than optimal and that room for improvement is ample. The clinical benefits of timely follow-up care after hospitalization, including reduced risk of readmission and improved adherence to medication, are well-documented in the published literature.[109 110 111 112 113 114 115]

[108] Centers for Disease Control and Prevention. Surveillance for Weekly HCP COVID–19 Vaccination. Accessed at: *https://www.cdc.gov/nhsn/hps/weekly-covid-vac/index.html.* on February 10, 2021.

[109] Tong, L., Arnold, T., Yang, J., Tian, X., Erdmann, C., & Esposito, T. (2018). The association between outpatient follow-up visits and all-cause non-elective 30-day readmissions: A retrospective observational cohort study. *PloS one, 13*(7), e0200691. *https://doi.org/10.1371/journal.pone.0200691.*

[110] Terman, S.W., Reeves, M.J., Skolarus, L.E., & Burke, J.F. (2018). Association Between Early Outpatient Visits and Readmissions After Ischemic Stroke. *Circulation. Cardiovascular quality and outcomes, 11*(4), e004024. *https://doi.org/10.1161/CIRCOUTCOMES.117.004024.*

[111] First Outpatient Follow-Up After Psychiatric Hospitalization: Does One Size Fit All? (2014). *Psychiatric Services,* 66(6), 364–372. *https://doi.org/10.1176/appi.ps.201400081.*

[112] Terman, S.W., Reeves, M.J., Skolarus, L.E., & Burke, J.F. (2018). Association Between Early Outpatient Visits and Readmissions After Ischemic Stroke. *Circulation. Cardiovascular quality and*

Behavioral health patients in particular have a number of risk factors that underscore the need for timely follow-up and continuity of care: Behavioral health patients have higher baseline hospitalization rates, higher hospital readmission rates, and higher health care costs as compared with the general population of patients.[116] [117] Among patients with serious mental illness, 90 percent have comorbid clinical conditions such as hypertension, cardiovascular disease, hyperlipidemia, or diabetes.[118] Among patients hospitalized for general medical conditions, those who also have a mental illness are 28 percent more likely to be readmitted within 30 days than their counterparts without a psychiatric comorbidity.[119] The high prevalence of clinical comorbidities among behavioral health patients, combined with the compounding effect of mental illness on patients with general medical conditions, suggests that behavioral health patients are uniquely vulnerable and supports the intent of the measure to increase follow-up after hospitalization.

In addition, clinical practice guidelines stress the importance of continuity of care between settings for patients with mental illness and SUD. For the treatment of SUD patients, the 2010 guidelines of the American Psychiatric Association (APA) state: ''It is important to intensify the monitoring for substance use during periods when the patient is at a high risk of relapsing, including during the early stages of treatment, times of transition to less intensive levels of care, and the first year after active treatment has ceased.'' [120] This statement is accompanied by a grade of [I], which indicates the highest level of APA endorsement: ''recommended with substantial clinical evidence.''

Evidence supports that outpatient follow-up care and interventions after hospital discharges are associated with a decreased risk of readmissions for patients with mental illness.[121] [122] IPFs can influence rates of follow-up care for patients hospitalized for mental illness or SUD. Three studies reported that with certain interventions—such as pre-discharge transition interviews, appointment reminder letters or reminder phone calls, meetings with outpatient clinicians before discharge, and meetings with inpatient staff familiar to patients at the first post-discharge appointment—facilities achieved 30-day follow-up rates of 88 percent or more.[123] [124] [125] This is substantially higher than the national rate of about 52 percent observed in the current FUH measure for Medicare FFS discharges between July 1, 2016, and June 30, 2017.[126] Medicare FFS data from July 1, 2016, to June 30, 2017, show the national 7-day follow-up rate to be 35.5 percent and the 30-day rate to be 61.0 percent. These data reveal wide variation in follow-up rates across facilities, with a 16.9 percent absolute difference between the 25th and 75th percentiles for the 7-day rate and a 17.4 percent absolute difference for the 30-day rate. If all facilities achieved the benchmark follow-up rates for their Medicare FFS patients (as calculated using the AHRQ Achievable Benchmarks of Care method),[127] 53,841 additional discharges would have a 7-day follow-up visit, and 47,552 would have a 30-day follow-up visit.[128]

During the development process, we used the CMS Quality Measures Public Comment Page to ask for public comments on the measure.[129] We accepted public comments from Friday, January 25, 2019, to Wednesday, February 13, 2019. During this period, we received comments from 29 organizations or individuals. Many commenters acknowledged the importance of developing a measure that assesses acute care providers for follow-up post-hospitalization. Some commenters expressed skepticism about the measure's appropriateness as a tool for evaluating the performance of discharging IPFs due to factors beyond the IPFs' control that can affect whether a patient receives timely post-discharge follow-up care. Ten stakeholders expressed support for the measure based on the expanded list of qualifying diagnoses in the denominator and the inclusion of more patients who could benefit from post-discharge follow-up visits.[130]

We reviewed the comments we received with the TEP, whose members shared similar feedback regarding the importance of follow-up for patients with both mental health diagnoses and substance use disorders, as well as concerns about the ability of IPFs to influence follow-up care. We agree with commenters that some factors that influence follow-up are outside of a facility's control. However, as described, in section IV.E.3.a, we believe that there are interventions (such as pre-discharge transition interviews, appointment reminder letters or reminder phone calls, meetings with outpatient

outcomes, 11(4), e004024. *https://doi.org/10.1161/CIRCOUTCOMES.117.004024.*

[113] Jackson, C., Shahsahebi, M., Wedlake, T., & DuBard, C.A. (2015). Timeliness of outpatient follow-up: An evidence-based approach for planning after hospital discharge. *Annals of family medicine, 13*(2), 115–122. *https://doi.org/10.1370/afm.1753.*

[114] Hernandez, A.F., Greiner, M.A., Fonarow, G.C., Hammill, B.G., Heidenreich, P.A., Yancy, C.W., Peterson, E.D., & Curtis, L.H. (2010). Relationship between early physician follow-up and 30-day readmission among Medicare beneficiaries hospitalized for heart failure. *JAMA, 303*(17), 1716–1722. *https://doi.org/10.1001/jama.2010.533.*

[115] Nadereh Pourat, Xiao Chen, Shang-Hua Wu and Anna C. Davis. Timely Outpatient Follow-up Is Associated with Fewer Hospital Readmissions among Patients with Behavioral Health Conditions. *The Journal of the American Board of Family Medicine.* May 2019, 32 (3) 353–361; DOI: *https://doi.org/10.3122/jabfm.2019.03.180244.*

[116] Germack, H.D., et al. (2019, January). Association of comorbid serious mental illness diagnosis with 30-day medical and surgical readmissions. JAMA Psychiatry.

[117] First Outpatient Follow-Up After Psychiatric Hospitalization: Does One Size Fit All? (2014). *Psychiatric Services,* 66(6), 364–372. *https://doi.org/10.1176/appi.ps.201400081.*

[118] First Outpatient Follow-Up After Psychiatric Hospitalization: Does One Size Fit All? (2014). *Psychiatric Services,* 66(6), 364–372. *https://doi.org/10.1176/appi.ps.201400081.*

[119] Benjenk, I., & Chen, J. (2018). Effective mental health interventions to reduce hospital readmission rates: A systematic review. Journal of hospital management and health policy, 2, 45. *https://doi.org/10.21037/jhmhp.2018.08.05.*

[120] American Psychiatric Association. Practice guideline for the treatment of patients with substance use disorders. 2010. *http://psychiatryonline.org/pb/assets/raw/sitewide/practice_guidelines/guidelines/substanceuse.pdf.*

[121] Kurdyak P, Vigod SN, Newman A, Giannakeas V, Mulsant BH, Stukel T. Impact of Physician Follow-Up Care on Psychiatric Readmission Rates in a Population-Based Sample of Patients With Schizophrenia. Psychiatr Serv. 2018;69(1):61–68. doi: 10.1176/appi.ps.201600507.

[122] Marcus SC, Chuang CC, Ng-Mak DS, Olfson M. Outpatient follow-up care and risk of hospital readmission in schizophrenia and bipolar disorder. Psychiatr Serv. 2017;68(12):1239–1246. doi: 10.1176/appi.ps.201600498.

[123] Batscha C, McDevitt J, Weiden P, Dancy B. The effect of an inpatient transition intervention on attendance at the first appointment post discharge from a psychiatric hospitalization. J Am Psychiatr Nurses Assoc. 2011;17(5):330–338. doi: 10.1177/1078390311417307.

[124] Agarin T, Okorafor E, Kailasam V, et al. Comparing kept appointment rates when calls are made by physicians versus behavior health technicians in inner city hospital: Literature review and cost considerations. Community Ment Health J. 2015;51(3):300–304. doi: 10.1007/s10597–014–9812–x.

[125] Olfson M, Mechanic D, Boyer CA, Hansell S. Linking inpatients with schizophrenia to outpatient care. Psychiatr Serv. 1998;49(7):911–917. doi: 10.1176/ps.49.7.911. Quality AFHRA. 2017 National Healthcare Quality and Disparities Report. Rockville, MD: Services USDoHaH; 2018.

[126] *https://data.cms.gov/provider-data/archived-data/hospitals*''.

[127] *https://nhqrnet.ahrq.gov/inhqrdr/resources/methods#Benchmarks.*

[128] Quality AfHRa. 2017 National Healthcare Quality and Disparities Report. Rockville, MD: Services USDoHaH; 2018.

[129] *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/MMS/Downloads/IPF_-Follow-Up-After-Psychiatric-Hospitalization_Public-Comment-Summary.pdf.*

[130] Mathematica. FAPH public comment summary. April 2019.

clinicians before discharge, and meetings with inpatient staff familiar to patients at the first post-discharge appointment) that allow facilities to improve their follow-up adherence. We remain committed to monitoring follow-up to improve health outcomes and view this measure as an expansion of our ability to measure appropriate follow-up care established by FUH.

b. Overview of Measure

(1). Measure Calculation

The FAPH measure would be calculated by dividing the number of discharges that meet the numerator criteria by the number that meet the denominator criteria. Two rates are reported for this measure: The 7-day rate and the 30-day rate.

(a) Numerator

The first rate that would be reported for this measure includes discharges from a psychiatric facility that are followed by an outpatient visit for treatment of mental illness or SUD within 7 days. The second rate reported for this measure would include discharges from a psychiatric facility that are followed by an outpatient visit for treatment of mental illness or SUD within 30 days. Outpatient visits are defined as outpatient visits, intensive outpatient encounters, or partial hospitalization and are defined by the Current Procedural Terminology (CPT), Healthcare Common Procedure Coding System (HCPCS), and Uniform Billing (UB) Revenue codes. Claims with codes for emergency room visits do not count toward the numerator.

(b) Denominator

The denominator includes discharges paid under the IPF prospective payment system during the performance period for Medicare FFS patients with a principal diagnosis of mental illness or SUD. Specifically, the measure includes IPF discharges for which the patient was:

- Discharged with a principal diagnosis of mental illness or SUD that would necessitate outpatient follow-up care,
- Alive at the time of discharge,
- Enrolled in Medicare Parts A and B during the month of the discharge date and at least one month after the discharge date to ensure that data are available to capture the index admission and follow-up visits, and
- Age 6 or older on the date of discharge, because follow-up treatment for mental illness or SUD might not always be recommended for younger children.

The denominator excludes IPF discharges for patients who:

- Were admitted or transferred to acute and non-acute inpatient facilities within the 30-day follow-up period, because admission or transfer to other institutions could prevent an outpatient follow-up visit from taking place,
- Were discharged against medical advice, because the IPF could have limited opportunity to complete treatment and prepare for discharge,
- Died during the 30-day follow-up period, or
- Use hospice services or elect to use a hospice benefit at any time during the measurement year regardless of when the services began, because hospice patients could require different follow-up services.

The FAPH measure differs from FUH mostly in the expansion of the measure population to include SUD and other mental health diagnoses in the measure's denominator, but it includes some additional differences:

- The FAPH measure simplifies the exclusion of admission or transfer to acute or non-acute inpatient facilities within 30 days after discharge by aligning with the HEDIS® Inpatient Stay Value Set used in both the HEDIS® FUH and the HEDIS® Follow-Up After Emergency Department Visit for Alcohol and Other Drug Abuse or Dependence (FUA) measures to identify acute and non-acute inpatient stays. A discharge is excluded from the FAPH measure if it is followed by an admission or a transfer with one of the codes in the value set.
- The FAPH measure uses Medicare UB Revenue codes (rather than inpatient discharge status code, which the FUH measure uses) to identify discharge or transfer to other health care institutions. This is to align better with the intent of the HEDIS® FUH and HEDIS® FUA measures.
- The FAPH measure allows mental illness or SUD diagnoses in any position on the follow-up visit claim to count toward the numerator and does not require that it be in the primary position as the FUH measure does.

(2) Measure Reliability and Validity

In 2019, CMS used the final measure specifications to complete reliability and validity testing, which revealed that the FAPH measure provides reliable and valid facility-level rates of follow-up after psychiatric hospitalization. We evaluated measure reliability based on a signal-to-noise analysis,[131] in which a score of 0.0 implies that all variation is attributed to measurement error (noise), and a score of 1.0 implies that all measure score variation is caused by a real difference in performance across IPFs. Using that approach, we established a minimum denominator size of 40 discharges to attain an overall reliability score of 0.7 for both the 7-day and the 30-day rate. These analyses revealed that the measure can reliably distinguish differences in performance between IPFs with adequate denominator size.

We evaluated the validity of the measure based on its correlation to two conceptually related measures in the IPFQR Program: The 30-Day All-Cause Unplanned Readmission After Psychiatric Discharge from an IPF (IPF Readmission) measure, and the Medication Continuation Following Inpatient Psychiatric Discharge (Medication Continuation) measure. We observed a weak negative correlation between FAPH and the IPF Readmission measure for both 7-day (−0.11) and 30-day (−0.18) measure rates. This negative correlation is expected because a higher score is indicative of better quality of care for the FAPH, while a lower score is indicative of better quality of care for the IPF readmission measure (that is, a lower rate of unplanned readmissions). High rates of follow-up after visits after discharge and low rates of unplanned readmissions both indicate good care coordination during the discharge process. We observed a weak positive correlation between the 7-day FAPH measure rate and the Medication Continuation measure (0.32), and between the 30-day FAPH measure rate and the Medication Continuation measure (0.42). This result is expected because for both the FAPH and the Medication Continuation measures higher scores are indicative of better-quality care. Follow-up visits after discharge and continuation of medication after discharge both indicate good care coordination during the discharge process. After reviewing these results and the proposed measure specifications, all 13 TEP members who were present agreed that the measure had face validity.[132]

[131] For additional information on reliability tests see *http://www.qualityforum.org/Measuring_Performance/Improving_NQF_Process/Measure_Testing_Task_Force_Final_Report.aspx.*

[132] Face validity is defined as a subjective determination by experts that the measure appears to reflect quality of care, done through a systematic and transparent process, that explicitly addresses whether performance scores resulting from the measure as specified can be used to distinguish good from poor quality, with degree of consensus and any areas of disagreement provided/discussed: *https://www.qualityforum.org/Measuring_Performance/Scientific_Methods_Panel/Docs/Evaluation_Guidance.aspx.*

(3) Review by the Measure Applications Partnership and NQF

Under section 1890A(a)(2) of the Act, this measure was included in a publicly available document: ''List of Measures Under Consideration for December 1, 2019,'' available at: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityMeasures/Downloads/Measures-under-Consideration-List-for-2018.pdf.*

On January 15, 2020, the MAP Coordinating Committee rated the measure as ''Conditional Support for Rulemaking'' contingent upon NQF endorsement. We submitted the measure to the NQF for endorsement in the spring 2020 cycle. However, some members of the NQF Behavioral Health and Substance Use Standing Committee were concerned about the measure's exclusions for patients who died during the 30-day follow-up period or who were transferred. In addition, some members objected to combining persons with a diagnosis of SUD and those with a diagnosis for a mental health disorder into a single measure of follow-up care. Therefore, the NQF declined to endorse this measure. We noted that the exclusions for patients who died or who were admitted or transferred to an acute or non-acute inpatient facility during the 30-day follow up period align with the FUH measure currently in the IPFQR Program.

Section 1886(s)(4)(D)(ii) of the Act authorizes the Secretary to specify a measure for the IPFQR Program that is not endorsed by NQF. The exception to the requirement to specify an endorsed measure states that in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the entity with a contract under section 1890(a) of the Act, the Secretary may specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization.

The FAPH measure is not NQF endorsed. We have reviewed NQF-endorsed and other consensus-endorsed measures related to follow-up care and identified the FUH measure (NQF #0576) currently in the IPFQR Program and Continuity of Care after Inpatient or |Residential Treatment for SUD (NQF #3453). We believe that the FAPH measure is an improvement over the current FUH measure and over the Continuity of Care after Inpatient or Residential Treatment of Substance Use Disorder because we believe that it is important to ensure appropriate access to follow-up treatment for the largest patient population possible and the FAPH measure applies to a larger patient population than either of the measures we considered. Therefore, we propose to adopt the FAPH measure described in this section for the FY 2024 payment determination and subsequent years.

c. Data Collection, Submission and Reporting

FAPH uses Medicare FFS Part A and Part B claims that are received by Medicare for payment purposes. The measure links Medicare FFS claims submitted by IPFs and subsequent outpatient providers for Medicare FFS IPF discharges. Therefore, no additional data collection would be required from IPFs. For additional information on data submission for this measure, see section IV.J.2.b of this proposed rule. The performance period used to identify cases in the denominator is 12 months. Data from this period and 30 days afterward are used to identify follow-up visits in the numerator. Consistent with other claims-based measures in the IPFQR Program, the performance period for this measure is July 1 through June 30. For example, for the FY 2024 payment determination, the performance period will include discharges between July 1, 2021 and June 30, 2022.[133]

We invite public comment on our proposal to add a new measure, Follow-Up After Psychiatric Hospitalization, to the IPFQR Program, beginning with the FY 2024 payment determination and subsequent years.

F. Removal or Retention of IPFQR Program Measures

1. Background

In the FY 2018 IPPS/LTCH PPS final rule (82 FR 38463 through 38465), we adopted considerations for removing or retaining measures within the IPFQR Program and criteria for determining when a measure is ''topped out.'' In the FY 2019 IPF PPS final rule (83 FR 38591 through 38593), we adopted one additional measure removal factor. We are not proposing any changes to these removal factors, topped-out criteria, or retention factors and refer readers to the FY 2018 IPPS/LTCH PPS final rule (82 FR 38463 through 38465) and the FY 2019 IPF PPS final rule (83 FR 38591 through 38593) for more information. We will continue to retain measures from each previous year's IPFQR Program measure set for subsequent years' measure sets, except when we specifically propose to remove or replace a measure. We will continue to use the notice-and-comment rulemaking process to propose measures for removal or replacement, as we described upon adopting these factors in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38464 through 38465).

In our continual evaluation of the IPFQR Program measure set under our Meaningful Measures Framework and according to our measure removal and retention factors, we identified four measures that we believe are appropriate to propose removing from the IPFQR Program for the FY 2024 payment determination and subsequent years. Our discussion of these measures follows.

2. Measures for Removal

a. Proposal To Remove Alcohol Use Brief Intervention Provided or Offered and Alcohol Use Brief Intervention (SUB–2/2a) Beginning With FY 2024 Payment Determination

We are proposing to remove the Alcohol Use Brief Intervention Provided or Offered and Alcohol Use Brief Intervention (SUB–2/2a) measure from the IPFQR Program beginning with the FY 2024 payment determination under our measure removal Factor 8, ''The costs associated with a measure outweigh the benefit of its continued use in the program.'' We adopted the Alcohol Use Brief Intervention Provided or Offered and Alcohol Use Brief Intervention (SUB–2/2a) measure in the FY 2016 IPF PPS final rule (80 FR 46699 through 46701) because we believe it is important to address the common comorbidity of alcohol use among IPF patients. This measure requires facilities to chart-abstract measure data on a sample of IPF patient records, in accordance with established sampling policies (80 FR 46717 through 46719).

We have previously stated our intent to move away from chart-abstracted measures to reduce information collection burden in this and other CMS quality programs (78 FR 50808; 79 FR 50242; 80 FR 49693). When we adopted the SUB–2/2a measure to the IPFQR Program, the benefits of this measure were high because facility performance was not consistent. Therefore, the measure provided a means of distinguishing facility performance and incentivized facilities to improve rates of treatment for this common comorbidity. Between the FY 2018

[133] If data availability or operational issues prevent use of this performance period, we would announce the updated performance period through subregulatory communications including announcement on a CMS website and/or on our applicable listservs.

payment determination (the first year that SUB–2/2a was included in the IPFQR Program measure set) and the FY 2019 payment determination, we saw substantial performance improvement on the SUB–2 measure (which is the portion of the SUB–2/2a measure that assess whether the facility provided or offered a brief intervention for alcohol use). However, for the FY 2019 and FY 2020 payment determinations, that improvement has leveled off to consistently high performance, as indicated in Table 2. These data further show that at this time there is little room for improvement in the SUB 2 measure, and that the quality improvement benefits from the measure have greatly diminished. We continue to believe that alcohol use is an important comorbidity to address in the IPF setting, and that brief interventions are a key component of addressing this comorbidity. However, based on these data, we believe that most IPFs routinely offer alcohol use brief interventions, and that IPFs will continue to offer these interventions to patients, regardless of whether the SUB–2/2a measure is in the IPFQR Program measure set, because it has become an embedded part of their clinical workflows.

TABLE 2—PERFORMANCE ANALYSIS FOR ALCOHOL USE BRIEF INTERVENTION PROVIDED OR OFFERED (SUB–2)

Year	Mean	Median	75th percentile	90th percentile	Truncated coefficient of variation (TCV)
2016 (2018 Payment Determination)	66.96	77	96	100	0.49
2017 (2019 Payment Determination)	77.11	88	99	100	0.28
2018 (2020 Payment Determination)	79.49	91	100	100	0.25

While the measure does not meet our criteria for ''topped-out'' status because of the TCV higher than 0.1, we believe that this measure no longer meaningfully supports the program objectives of informing beneficiary choice and driving improvement in IPF interventions for alcohol use because it is no longer showing significant improvement in facility performance (that is, in providing or offering alcohol use brief interventions). Furthermore, as we stated in the FY 2019 IPF PPS final rule, costs are multi-faceted and include not only the burden associated with reporting, but also the costs associated with implementing and maintaining the program (83 FR 38592). For example, it may be costly for health care providers to maintain general administrative knowledge to report this measure. Additionally, CMS must expend resources in maintaining information collection systems, analyzing reported data, and providing public reporting of the collected information.

Here, IPF information collection burden and related costs associated with reporting the SUB 2/2a measure to CMS are high because it is a chart-abstracted measure. Furthermore, CMS incurs costs associated with the program oversight of the measure for public display. As a result, we believe that the costs and burdens associated with this chart-abstracted measure outweigh the benefit of its continued use in the program.

Therefore, we are proposing to remove the Alcohol Use Brief Intervention Provided or Offered and Alcohol Use Brief Intervention (SUB–2/2a) measure from the IPFQR Program beginning with the FY 2024 payment determination. We welcome public comments on our proposal to remove the SUB–2/2a measure from the IPFQR Program.

b. Proposal To Remove Tobacco Use Brief Intervention Provided or Offered and Tobacco Use Brief Intervention (TOB–2/2a) Beginning With FY 2024 Payment Determination

We are proposing to remove the Tobacco Use Brief Intervention Provided or Offered and Tobacco Use Brief Intervention (TOB–2/2a) measure from the IPFQR Program beginning with the FY 2024 payment determination under our measure removal Factor 8, ''The costs associated with a measure outweigh the benefit of its continued use in the program.'' We adopted the Tobacco Use Brief Intervention Provided or Offered and Tobacco Use Brief Intervention (TOB–2/2a) measure in the FY 2015 IPF PPS final rule (79 FR 45971 through 45972) because we believe it is important to address the common comorbidity of tobacco use among IPF patients. Like SUB–2/2a described in the previous subsection, this measure requires facilities to chart-abstract measure data on a sample of IPF patient records, in accordance with established sampling policies (80 FR 46717 through 46719). When we introduced the TOB–2/2a measure to the IPFQR Program, the benefits of this measure were high, because facility performance was not consistent and therefore the measure provided a means of distinguishing facility performance and incentivized facilities to improve rates of treatment for this common comorbidity. Between the FY 2017 payment determination (the first year that TOB–2/2a was included in the IPFQR Program's measure set) and the FY 2019 payment determination we saw substantial performance improvement on TOB–2. However, between the FY 2019 and FY 2020 payment determinations, that improvement has leveled off to consistently high performance, as indicated in Table 3. These data further show that currently there is little room for improvement in the TOB–2 measure, and that the quality improvement benefits from the measure have greatly diminished. We continue to believe that tobacco use is an important comorbidity to address in the IPF setting, and that brief interventions are a key component of addressing this comorbidity. However, based on these data, we believe that most IPFs routinely offer tobacco use brief interventions, and that IPFs will continue to offer these interventions to patients, regardless of whether the TOB–2/2a measure is in the IPFQR Program measure set, because it has become an embedded part of their clinical workflows.

TABLE 3—PERFORMANCE ANALYSIS FOR TOBACCO USE BRIEF INTERVENTION PROVIDED OR OFFERED (TOB–2)

Year	Mean	Median	75th percentile	90th percentile	Truncated coefficient of variation (TCV)
2015 (2017 Payment Determination)	63.83	71.5	91	99	0.49
2016 (2018 Payment Determination)	74.72	84	95	100	0.28
2017 (2019 Payment Determination)	79.04	88	97	100	0.22
2018 (2020 Payment Determination)	79.08	88	98	100	0.22

While the measure does not meet our criteria for ''topped-out'' status because of the TCV higher than 0.1, we believe that this measure no longer meaningfully supports the program objectives of informing beneficiary choice and driving improvement in IPF interventions for tobacco use because it is no longer showing significant improvement in facility performance (that is, in providing or offering tobacco use brief interventions). Furthermore, as we stated in the FY 2019 IPF PPS final rule, costs are multi-faceted and include not only the burden associated with reporting, but also the costs associated with implementing and maintaining the program (83 FR 38592). For example, it may be costly for health care providers to maintain general administrative knowledge to report this measure. Additionally, CMS must expend resources in maintaining information collection systems, analyzing reported data, and providing public reporting of the collected information. Here, IPF information collection burden and related costs associated with reporting this measure to CMS are high because the measure is a chart-abstracted measure. Furthermore, CMS incurs costs associated with the program oversight of the measure for public display. As a result, we believe that the costs and burdens associated with this chart-abstracted measure outweigh the benefit of its continued use in the program.

Therefore, we are proposing to remove the Tobacco Use Brief Intervention Provided or Offered and Tobacco Use Brief Intervention (TOB–2/2a) measure from the IPFQR Program beginning with the FY 2024 payment determination. We welcome public comments on our proposal to remove the TOB–2/2a measure from the IPFQR Program.

c. Proposal To Remove Timely Transmission of Transition Record (Discharges From an Inpatient Facility to Home/Self Care or Any Other Site of Care) Beginning With FY 2024 Payment Determination

We are proposing to remove the Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure from the IPFQR Program beginning with the FY 2024 payment determination under our measure removal Factor 8, ''The costs associated with a measure outweigh the benefit of its continued use in the program.''

We adopted the Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure in the FY 2016 IPF PPS final rule (80 FR 46706 through 46709) because more timely communication of vital information regarding the inpatient hospitalization results in better care, reduction of systemic medical errors, and improved patient outcomes. The Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure builds on the Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure, which requires facilities to provide a discharge record with 11 specified elements to patients at discharge.

We continue to believe that the 11 elements required by the Transition Record with Specified Elements measure provide meaningful information about the quality of care provided by IPFs, and we are therefore not proposing to remove that measure from the IPFQR Program. However, we believe that the benefits of requiring facilities to transmit the discharge record with 11 specified elements to the next level care provided within 24 hours, as required by the Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure, have been reduced. Reporting this measure requires facilities to chart-abstract measure data on a sample of IPF patient records, in accordance with established sampling policies (80 FR 46717 through 46719). On May 1, 2020, we updated the Conditions of Participation (CoPs) for IPFs participating in the Medicare program in the Medicare and Medicaid Programs; Patient Protection and Affordable Care Act; Interoperability and Patient Access for Medicare Advantage Organization and Medicaid Managed Care Plans, State Medicaid Agencies, CHIP Agencies and CHIP Managed Care Entities, Issuers of Qualified Health Plans on the Federally Facilitated Exchanges, and Health Care Providers final rule (85 FR 25588).

In the May 1, 2020 update to the CoPs, we adopted a requirement for psychiatric hospitals that possess EHR systems with the technical capacity to generate information for electronic patient event notifications to send electronic patient event notifications of a patient's admission, discharge, and/or transfer to another health care facility or to another community provider at the time of a patient's discharge or transfer. Because these updated CoP requirements overlap with, but are not the same as, the requirements for the Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure (which requires transmission of a discharge record with 11 specified elements to the next level care provider within 24 hours of the patient's discharge rather that requiring notification regarding the patient's inpatient stay to be transmitted at discharge), we believe that the adoption of these updated CoPs increases the costs of the Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure while decreasing its benefit. Specifically, we believe that the costs of this measure are increased because facilities to which the new CoPs apply (that is, facilities that possess EHR or other administrative systems with the technical capacity to generate information for electronic patient event notifications) could bear increased cost if they separately implement the patient event notifications meeting both the criteria for the updated CoPs and the capacity to share a transition record that meets the requirements of our measure. We

note that the updated CoPs do not include the level of detail regarding data to be transferred at discharge that our Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure requires. While the set of information in the CoP notification policy is a minimal set of information, we believe that it would continue to be appropriate for providers to transmit the transition record that they will continue to be providing to patients under our Transition Record Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure.

We believe the different requirements regarding both timeliness of notification and contents of notification could lead some providers to send two separate discharge notifications to meet the separate requirements. Further, we believe that the benefits of the measure are reduced because all facilities to which the new CoPs apply will be sending patient discharge information to the next level of care provider as required by the CoPs. Therefore, the benefits of this measure are reduced because it is less likely to ensure that these facilities provide patient discharge information to the next level care provider, and it is less likely to provide information to help consumers differentiate quality between facilities. While these updated CoPs do not directly address transmission of patient event notifications for facilities that do not possess EHR systems with patient event notification capabilities, such facilities should continue to transmit data using their existing infrastructure and timelines.

Because we believe that the costs are now increased and the benefits are now reduced, we believe that the costs and burdens associated with this chart-abstracted measure outweigh the benefit of its continued use in the IPFQR Program.

Therefore, we are proposing to remove the Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure from the IPFQR Program beginning with the FY 2024 payment determination. We welcome public comments on our proposal to remove the Timely Transmission of Transition Record measure from the IPFQR Program.

d. Proposal To Remove Follow-Up After Hospitalization for Mental Illness (FUH, NQF #0576) Beginning With FY 2024 Payment Determination

If we finalize adoption of the Follow-Up After Psychiatric Hospitalization measure described in Section IV.E.3, we believe that our current measure removal Factor 3 would apply to the existing Follow-Up After Hospitalization for Mental Illness (FUH, NQF #0576) measure. Measure removal Factor 3 applies when a ''measure can be replaced by a more broadly applicable measure (across settings or populations) or a measure that is more proximal in time to desired patient outcomes for the particular topics.'' We adopted removal factor 3 in the FY 2017 IPPS/LTCH PPS final rule (82 FR 38463 through 38465). The proposed FAPH measure expands the patient population from patients with mental illness to also include patients with primary SUD diagnoses while addressing the same important aspect of care transitions. Because this FAPH measure uses the same methodology to address the same element of care for a broader patient population than the FUH measure, we believe that it is more broadly applicable across populations.

Therefore, we are proposing to remove the FUH measure under measure removal Factor 3 only if we finalize our proposal to adopt of the FAPH measure. We note that if we do not adopt the FAPH measure, we will retain the FUH measure because we believe this measure addresses an important clinical topic. We welcome public comments on our proposal to remove FUH if we adopt FAPH.

G. Summary of Previously Finalized and Newly Proposed Measures

1. Previously Finalized and Newly Proposed Measures for the FY 2023 Payment Determination and Subsequent Years

There are 14 previously finalized measures for the FY 2023 payment determination and subsequent years. In this proposed rule, we are proposing to adopt one measure for the FY 2023 payment determination and subsequent years. The 15 measures which would be in the program if this proposal is finalized are shown in Table 4.

TABLE 4—IPFQR PROGRAM MEASURE SET FOR THE FY 2023 PAYMENT DETERMINATION AND SUBSEQUENT YEARS IF MEASURE ADOPTION IS FINALIZED AS PROPOSED

NQF #	Measure ID	Measure
0640	HBIPS–2	Hours of Physical Restraint Use.
0641	HBIPS–3	Hours of Seclusion Use.
0560	HBIPS–5	Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification.
0576	FUH	Follow-Up After Hospitalization for Mental Illness.
N/A *	SUB–2 and SUB–2a	Alcohol Use Brief Intervention Provided or Offered and SUB–2a Alcohol Use Brief Intervention.
N/A *	SUB–3 and SUB–3a	Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and SUB–3a Alcohol and Other Drug Use Disorder Treatment at Discharge.
N/A *	TOB–2 and TOB–2a	Tobacco Use Treatment Provided or Offered and TOB–2a Tobacco Use Treatment.
N/A *	TOB–3 and TOB–3a	Tobacco Use Treatment Provided or Offered at Discharge and TOB–3a Tobacco Use Treatment at Discharge.
1659	IMM–2	Influenza Immunization.
N/A *	N/A	Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).
N/A *	N/A	Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or any Other Site of Care).
N/A	N/A	Screening for Metabolic Disorders.
2860	N/A	Thirty-Day All-Cause Unplanned Readmission Following Psychiatric Hospitalization in an Inpatient Psychiatric Facility.
3205	Med Cont	Medication Continuation Following Inpatient Psychiatric Discharge.

TABLE 4—IPFQR PROGRAM MEASURE SET FOR THE FY 2023 PAYMENT DETERMINATION AND SUBSEQUENT YEARS IF MEASURE ADOPTION IS FINALIZED AS PROPOSED—Continued

NQF #	Measure ID	Measure
TBD	COVID HCP	COVID–19 Healthcare Personnel (HCP) Vaccination Measure.

*Measure is no longer endorsed by the NQF but was endorsed at time of adoption. Section 1886(s)(4)(D)(ii) of the Act authorizes the Secretary to specify a measure that is not endorsed by the NQF as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization identified by the Secretary. We attempted to find available measures for each of these clinical topics that have been endorsed or adopted by a consensus organization and found no other feasible and practical measures on the topics for the IPF setting.

2. Previously Finalized and Newly Proposed Measures for the FY 2024 Payment Determination and Subsequent Years

There are 14 previously finalized measures for the FY 2024 payment determination and subsequent years. In this proposed rule, we are proposing to adopt one measure for the FY 2023 payment determination and subsequent years. Additionally, we are proposing to remove three measures and replace one measure for the FY 2024 payment determination and subsequent years. The 12 measures which would be in the program for FY 2024 payment determination and subsequent years if these proposals are finalized are shown in Table 5.

TABLE 5—IPFQR PROGRAM MEASURE SET FOR THE FY 2024 PAYMENT DETERMINATION AND SUBSEQUENT YEARS IF ADOPTIONS AND REMOVALS ARE FINALIZED AS PROPOSED

NQF #	Measure ID	Measure
0640	HBIPS–2	Hours of Physical Restraint Use.
0641	HBIPS–3	Hours of Seclusion Use.
0560	HBIPS–5	Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification.
N/A	FAPH	Follow-Up After Psychiatric Hospitalization.
1659	IMM–2	Influenza Immunization.
N/A*	SUB–3 and SUB–3a	Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and SUB–3a Alcohol and Other Drug Use Disorder Treatment at Discharge.
N/A*	TOB–3 and TOB–3a	Tobacco Use Treatment Provided or Offered at Discharge and TOB–3a Tobacco Use Treatment at Discharge.
N/A*	N/A	Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).
N/A	N/A	Screening for Metabolic Disorders.
2860	N/A	Thirty-Day All-Cause Unplanned Readmission Following Psychiatric Hospitalization in an Inpatient Psychiatric Facility.
3205	Med Cont	Medication Continuation Following Inpatient Psychiatric Discharge.
TBD	COVID HCP	COVID–19 Healthcare Personnel (HCP) Vaccination Measure.

*Measure is no longer endorsed by the NQF but was endorsed at time of adoption. Section 1886(s)(4)(D)(ii) of the Act authorizes the Secretary to specify a measure that is not endorsed by the NQF as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization identified by the Secretary. We attempted to find available measures for each of these clinical topics that have been endorsed or adopted by a consensus organization and found no other feasible and practical measures on the topics for the IPF setting.

H. Considerations for Future Measure Topics

As we have previously indicated, we seek to develop a comprehensive set of quality measures to be available for widespread use for informed decision-making and quality improvement in the IPF setting (79 FR 45974 through 45975). Therefore, through future rulemaking, we intend to propose new measures for development or adoption that will help further our goals of achieving better healthcare and improved health for individuals who obtain inpatient psychiatric services through the widespread dissemination and use of quality information. In 2017, we introduced the Meaningful Measures Framework as a tool to foster operational efficiencies and reduce costs including collection and reporting burden while producing quality measurement that is more focused on meaningful outcomes (83 FR 38591). As we continue to evolve the Meaningful Measures Framework, we have stated that we intend to better address health care priorities and gaps, emphasize digital quality measurement, and promote patient perspectives.[134] As we work to align the IPFQR Program's measure set with these priorities, we have identified the following areas that we believe are important to stakeholders, but which are not covered in the current IPFQR Program measure set: Patient Experience of Care, Functional Outcomes Measurement, and digital measures. As described in the following subsections, we are seeking public comment on each of these topics and other future measure considerations which stakeholders believe are important.

1. Patient Experience of Care Data Collection Instrument

When we finalized removal of the Assessment of Patient Experience of Care attestation measure in the FY 2019 IPF PPS final rule (83 FR 38596) we stated that we believed we had collected sufficient information to inform development of a patient experience of care measure that would capture data on the results of such a survey. In the FY 2020 IPF PPS proposed rule (84 FR 16986 through 16987), we solicited input on how providers had implemented the Hospital Consumer Assessment of Healthcare Providers and Systems (HCAHPS) survey in their

[134] *https://www.cms.gov/meaningful-measures-20-moving-measure-reduction-modernization.*

facilities. We also sought public comment on other potential surveys that commenters believed would be appropriate to adopt for the IPFQR Program. We received many comments on this subject, and many of these comments expressed that there is not one survey used predominantly across IPFs (84 FR 38467). Additional commenters expressed concerns that the HCAHPS survey may not be appropriate for the IPF setting because it does not include some of the unique aspects of inpatient psychiatric care including, group therapy, non-physician providers, and involuntary admissions. While we did not solicit public comment on this issue in the FY 2021 IPF PPS proposed rule, we received many comments addressing this issue (85 FR 47043). We continue to seek to identify a minimally burdensome patient experience of care instrument that would be appropriate for the IPF setting. Therefore, we are seeking public comment on instruments currently in use in the IPF setting, input on whether the HCAHPS survey may be appropriate for this setting, and information on how facilities that currently use the HCAHPS survey have addressed challenges with using this survey within this setting (that is, concerns regarding unique aspects of inpatient psychiatric care).

2. Functional Outcomes Instrument for Use in a Patient Reported Outcomes Measure

When we introduced the Meaningful Measures Framework, we stated that we wanted to focus on meaningful outcomes (83 FR 38591). As we have assessed the IPFQR Program measure set against the Meaningful Measures Framework, we have identified functional outcomes as a potential gap area in the IPFQR Program's measure set. Therefore, we are evaluating whether a patient reported outcomes measure that assesses functional outcomes, such as global functioning, interpersonal problems, psychotic symptoms, alcohol or drug use, emotional lability, and self-harm, would be an appropriate measure to include in the IPFQR program measure set. If we were to develop such a measure, we would develop a measure that compares a patient's responses to a standardized functional outcomes assessment instrument at admission with the patient's results on the same assessment instrument at discharge. We are seeking public comment on the value of such a measure in the IPFQR program measure set, what would be an appropriate functional outcome assessment instrument to use in the potential development of such a measure, and any additional topics or concepts stakeholders believe would be appropriate for patient reported outcomes measures.

3. Measures for Electronic Data Reporting

As we seek to improve digital measurement across our quality reporting and value-based payment programs, we are considering measures both within and appropriate to adopt for the IPFQR Program measure set that would be appropriate for digital data collection. In our assessment of the current measure set, we identified the Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) measure as a potential option for digital data collection. We are seeking stakeholder input on the current data collection burden associated with this measure, concerns regarding potential electronic specification and data collection for this measure, and other measures that may be appropriate for electronic data collection, either those currently in the IPFQR Program measure set, or those that we could adopt in the future.

I. Public Display and Review Requirements

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53653 through 53654), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50897 through 50898), and the FY 2017 IPPS/LTCH PPS final rule (81 FR 57248 through 57249) for discussion of our previously finalized public display and review requirements. In this proposed rule, we are not proposing any changes to these requirements.

J. Form, Manner, and Timing of Quality Data Submission for the FY 2022 Payment Determination and Subsequent Years

1. Procedural Requirements for the FY 2023 Payment Determination and Subsequent Years

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53654 through 53655), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50898 through 50899), and the FY 2018 IPPS/LTCH PPS final rule (82 FR 38471 through 38472) for our previously finalized procedural requirements. In this proposed rule, we are proposing to use the term ''QualityNet security official'' instead of ''QualityNet system administrator,'' proposing to revise § 412.434(b)(3) by replacing the term ''QualityNet system administrator'' with the term ''QualityNet security official,'' and clarifying our policy under the previously finalized requirement that hospitals ''[i]dentify a QualityNet Administrator who follows the registration process located on the QualityNet website'' (77 FR 53654).

a. Proposal To Update Reference to QualityNet System Administrator and to No Longer Require Active Account To Qualify for Payment

The previously finalized QualityNet security administrator requirements, including those for setting up a QualityNet account and the associated timelines, are described in the FY 2013 IPPS/LTCH final rule (77 FR 53654).

In this proposed rule, we propose to use the term ''QualityNet security official'' instead of ''QualityNet system administrator'' to denote the exercise of authority invested in the role and align with the Hospital Outpatient Quality Reporting Program and other programs. The term ''security official'' would refer to ''the individual(s)'' who have responsibilities for security and account management requirements for a facility's QualityNet account. To clarify, this proposed update in terminology would not change the individual's responsibilities or add burden.

We invite public comment on our proposal to replace the term ''QualityNet system administrator'' with ''QualityNet security official.''

Additionally, we are proposing to no longer require IPFs to maintain an active QualityNet security official account to qualify for payment. As we reviewed the requirements for the security official role and the basic user [135] role to identify the most appropriate language to describe the distinguishing authority invested in the security official role, we recognized that the QualityNet security official is not required for submitting data—a basic user can serve in this role—but remains necessary to set up QualityNet basic user accounts and for security purposes. Therefore, consistent with our proposal to adopt the security official term to differentiate the unique security authority and responsibilities of the role from the data submission responsibilities of the basic user role, we would continue to require a QualityNet basic user account to meet

[135] We also noted that a basic user is a QualityNet user who (1) does not have the registration access described for security officials, (2) has the appropriate data entry roles and permissions for program participation, (3) can submit and review measures and non-measure data, (4) signs and submits the Data Accuracy Completeness Acknowledgement (DACA) form, and (5) refreshes their QualityNet account password every 180 days to ensure that the facility's IPFQR Program Notice of Participation status is ''Participating.''

IPFQR Program requirements, including data submission and administrative requirements, while recommending, but not requiring, that hospitals maintain an active QualityNet security official account.

We welcome public comments on our proposal to no longer require facilities to maintain an active QualityNet security official account to qualify for payment.

b. Proposal To Update Reference to QualityNet Administrator in Code of Federal Regulations

In this proposed rule, we propose to revise our regulation at § 412.434(b)(3) by replacing ''QualityNet system administrator'' with ''QualityNet security official.'' The term ''QualityNet security official'' refers to the individual(s) who have responsibilities for security and account management requirements for a hospital's QualityNet account. To clarify, this proposed update in terminology would not change the individual's responsibilities or add burden. If finalized, the revised paragraph (b)(3) would read: ''Contact information for the inpatient psychiatric facility's chief executive officer and QualityNet security official, including each individual's name, email address, telephone number, and physical mailing address.''

We invite public comment on our proposal to replace the term ''QualityNet system administrator'' with ''QualityNet security official'' at § 412.434(b)(3).

2. Data Submission Requirements

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53655 through 53657), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50899 through 50900), and the FY 2018 IPPS/LTCH PPS final rule (82 FR 38472 through 38473) for our previously finalized data submission requirements. In this proposed rule, we are proposing to adopt one measure for the FY 2023 payment determination and subsequent years and one measure for the FY 2024 payment determination and subsequent years. Data submission requirements for each of these measures are described in the following subsections. Additionally, we are proposing to adopt patient level data submission for certain chart abstracted measures beginning with data submitted for the FY 2023 payment determination and subsequent years; details of this proposal are in subsection c. of this section.

a. Data Submission Requirements for FY 2023 Payment Determination and Subsequent Years

The measure we are proposing for FY 2023 payment determination and subsequent years (the COVID–19 HCP—Vaccination measure) requires facilities to report data on the number of HCP who have received completed vaccination course of a COVID–19 vaccine through the CDC's National Healthcare Safety Network (NHSN). Specific details on data submission for this measure can be found in the CDC's Overview of the Healthcare Safety Component, available at *https://www.cdc.gov/nhsn/PDFs/slides/NHSN-Overview-HPS_Aug2012.pdf.* For each CMS Certification Number (CCN), a percentage of the HCP who received a completed vaccine course of the COVID–19 vaccination will be calculated and publicly reported, so that the public will know what percentage of the HCP have been vaccinated in each IPF.

For the COVID–19 HCP Vaccination measure, we are proposing that facilities would report the numerator and denominator for the COVID–19 HCP vaccination measure to the NHSN for at least one week each month, beginning in October 2021 for the October 1, 2021 through December 31, 2021 reporting period affecting the FY 2023 payment determination. If facilities report more than one week of data in a month, the most recent week's data would be used to calculate the measure. Each quarter, the CDC would calculate a single quarterly result of COVID–19 vaccination coverage which would summarize the data submitted by IPFs for each of the three weeks of data submitted over the three month period. If finalized, CMS would publicly report the CDC's quarterly summary of COVID–19 vaccination coverage for IPFs.

We invite public comment on our proposal to require facilities to report the COVID–19 HCP vaccination measure.

b. Data Submission Requirements for FY 2024 Payment Determination and Subsequent Years

Because the Follow-Up After Psychiatric Hospitalization (FAPH) measure would be calculated by CMS using Medicare Fee-for-Service claims, there will be no additional data submission requirements for the FY 2024 payment determination and subsequent years. Therefore, we are not proposing any changes to our data submission policies associated with the proposal to adopt this measure.

c. Proposal To Adopt Patient-Level Reporting for Certain Chart-Abstracted Measures Beginning With FY 2024 Payment Determination and Subsequent Years

In the FY 2013 IPPS/LTCH PPS final rule (77 FR 53655 through 53657), we finalized that IPFs participating in the IPFQR Program must submit data to the Web-Based Measures Tool found in the Inpatient Psychiatric Facility section of the QualityNet website's secure portal between July 1 and August 15 of each year. We noted that the data input forms within the Quality Net secure portal require submission of aggregate data for each separate quarter. In the FY 2014 IPPS/LTCH PPS final rule, we clarified our intent to require that IPFs submit aggregate data on measures on an annual basis via the Web-Based Measures Tool found in the IPF section of the Quality Net website's secure portal and that the forms available require aggregate data for each separate quarter (78 FR 50899 through 50900). In the FY 2016 IPF PPS final rule (80 FR 46716), we updated our data submission requirements to require facilities to report data for chart-abstracted measures to the Web-Based Measures Tool on an aggregate basis by year, rather than by quarter. Additionally, we discontinued the requirement for reporting by age group. We updated these policies in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38472 through 38473) to change the specification of the submission deadline from exact dates to a 45-day submission period beginning at least 30 days following the end of the data collection period.

In the FY 2019 IPF PPS final rule (83 FR 38607), we observed that reporting aggregate measure data increases the possibility of human error, such as making typographical errors while entering data, which cannot be detected by CMS or by data submission systems. We noted that unlike patient-level data reporting, aggregate measure data reporting does not allow for data accuracy validation, thereby lowering the ability to detect error. We stated that we were considering requiring patient-level data reporting (data regarding each patient included in a measure and whether the patient was included in each numerator and denominator of the measure) of IPFQR measure data in the future. We sought public comment on including patient-level data collection in the IPFQR program. Several commenters expressed support for patient-level data collection, observing that it provides greater confidence in the data's validity and reliability. Other

commenters recommended that CMS use a system that has already been tested and used for IPF data reporting or work with IPFs in selecting a system so that any selected system would avoid additional burden.

We believe that patient-level data reporting would improve the accuracy of the submitted and publicly reported data without increasing burden. As we considered the current IPFQR measure set, we determined that patient-level reporting of the Hours of Physical Restraint Use (HBIPS–2, NQF #0640) measure and Hours of Seclusion Use (HBIPS–2, NQF #0641) measure would be appropriate for the numerators of these measures only, because these measures are calculated with a denominator of 1,000 hours rather than a denominator of patients who meet specific criteria for inclusion in the measure. Therefore, we are proposing to require reporting patient-level information for the numerators of these measures only. For the remainder of the chart-abstracted measures in the IPFQR Program we are proposing to require patient-level reporting of the both the numerator and the denominator. Table 6 lists the proposed FY 2023 IPFQR measure set categorized by whether we would require patient-level data submission through the QualityNet secure portal.

TABLE 6—PATIENT-LEVEL DATA SUBMISSION REQUIREMENTS FOR FY 2024 IPFQR PROGRAM MEASURE SET

NQF #	Measure ID	Measure	Patient-level data submission
0640	HBIPS–2	Hours of Physical Restraint Use	Yes, numerator only.
0641	HBIPS–3	Hours of Seclusion Use	Yes, numerator only.
0560	HBIPS–5	Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification.	Yes.
0576	FUH	Follow-Up After Hospitalization for Mental Illness	No (claims-based).
N/A *	SUB–2 and SUB–2a	Alcohol Use Brief Intervention Provided or Offered and SUB–2a Alcohol Use Brief Intervention.	Yes.
N/A *	SUB–3 and SUB–3a	Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and SUB–3a Alcohol and Other Drug Use Disorder Treatment at Discharge.	Yes.
N/A *	TOB–2 and TOB–2a	Tobacco Use Treatment Provided or Offered and TOB–2a Tobacco Use Treatment.	Yes.
N/A *	TOB–3 and TOB–3a	Tobacco Use Treatment Provided or Offered at Discharge and TOB–3a Tobacco Use Treatment at Discharge.	Yes.
1659	IMM–2	Influenza Immunization	Yes.
N/A *	N/A	Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).	Yes.
N/A *	N/A	Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or any Other Site of Care).	Yes.
N/A	N/A	Screening for Metabolic Disorders	Yes.
2860	N/A	Thirty-Day All-Cause Unplanned Readmission Following Psychiatric Hospitalization in an Inpatient Psychiatric Facility.	No (claims-based).
3205	Med Cont	Medication Continuation Following Inpatient Psychiatric Discharge.	No (claims-based).
TBD	COVID HCP	COVID–19 Healthcare Personnel (HCP) Vaccination Measure	No (calculated for HCP).

* Measure is no longer endorsed by the NQF but was endorsed at time of adoption. Section 1886(s)(4)(D)(ii) of the Act authorizes the Secretary to specify a measure that is not endorsed by the NQF as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization identified by the Secretary. We attempted to find available measures for each of these clinical topics that have been endorsed or adopted by a consensus organization and found no other feasible and practical measures on the topics for the IPF setting.

Submission of aggregate data requires facilities to abstract patient-level data, then calculate measure performance prior to submitting data through the QualityNet website's secure portal. For measures for which we would require patient-level data submission, we would allow facilities to submit data using a tool such as the CMS Abstraction & Reporting Tool (CART). This is the tool we use in our other quality reporting and value-based purchasing programs, and therefore, we believe that many facilities may already have familiarity with using this tool to abstract and report data. Additionally, the tool has been specifically designed to facilitate data reporting and minimize provider burden.

We note that under aggregate data reporting, facilities submit aggregate numerators and aggregate denominators for all measures to CMS in the Hospital Quality Reporting (HQR) system. These aggregate numerators and denominators are generally calculated by manually abstracting the medical record of each included patient using the algorithm, a paper tool, or a vendor abstraction tool. After each required medical record has been abstracted, the numerator and denominator results are added up and submitted as aggregate values in the HQR system. Under our patient level data reporting proposal, facilities would still manually abstract the medical record using either a vendor abstraction tool or an abstraction tool provided by CMS. The vendor abstraction tool or the CMS tool would then produce an individual XML file for each of the cases abstracted. Instead of submitting the aggregate data, the facility will log into HQR and upload batches of XML files that contain patient level data for each measure with data from all patients whose records were abstracted, and CMS would calculate the aggregate numerators, aggregate denominators, and measure rates from those XML file submissions. Because facilities must abstract patient-level data as one step in calculating measure results, we do not believe that requiring patient-level data submission will increase provider costs or burden associated with measure submission.

Because we believe that patient-level data will improve the data accuracy without increasing provider burden, we are now proposing to adopt patient-level data reporting for numerators only for the Hours of Physical Restraint Use

(HBIPS–2, NQF #0640) and the Hours of Seclusion Use (HBIPS–3, NQF #0631) for numerators and denominators for the following 9 chart-abstracted IPFQR Program measures as detailed in Table 6: Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification (NQF #0560); Alcohol Use Brief Intervention Provided or Offered and SUB–2a Alcohol Use Brief Intervention; Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and SUB–3a Alcohol and Other Drug Use Disorder Treatment at Discharge, Tobacco Use Treatment Provided or Offered and TOB–2a Tobacco Use Treatment, Tobacco Use Treatment Provided or Offered at Discharge and TOB–3a Tobacco Use Treatment at Discharge, Influenza Immunization (NQF #1659), Transition Record with Specified Elements Received by Discharged Patients (discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care), Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or any Other Site of Care), and Screening for Metabolic Disorders.

We believe that it is appropriate to transition to patient-level reporting incrementally. This would allow facilities to become familiar with the data submission systems and to provide feedback on any challenges they face in reporting data to us. Therefore, we are proposing to allow voluntary patient-level data submission for the FY 2023 payment determination (that is, data submitted during CY 2022). We note that because participation in patient-level reporting for these chart-abstracted measures would be voluntary for this one-year period, facilities would be able to choose whether to submit measure data in aggregate or at the patient level, and would not face a payment reduction as long as they submit all measure data either at the patient level or in aggregate for each measure for which reporting is required, and as long as they met all other IPFQR Program requirements. Therefore, we are proposing to allow voluntary patient-level reporting prior to requiring such data submission for one year prior to the FY 2024 payment determination. If we transition to patient-level reporting, we will ensure that facilities have guidance available through our standard communications channels (that is, listserv announcements, educational webinars, and training material on the QualityNet website).

We are also proposing to require patient-level data submission for these chart-abstracted measures for the FY 2024 payment determination (that is, data submitted during CY 2023) and subsequent years.

We welcome comment on our proposals to allow voluntary patient-level data reporting for these chart-abstracted measures for the FY 2023 payment determination and then to require patient-level data reporting for the FY 2024 payment determination and subsequent years.

3. Considerations for Data Validation Pilot

As discussed in section IV.J.4 and in the FY 2019 IPF PPS final rule, we are concerned about the limitations of aggregate data submission (83 FR 28607). One such concern was that the ability to detect error is lower for aggregate measure data reporting than for patient-level data reporting (that is, data regarding each patient included in a measure and whether the patient was included in the numerator and denominator of the measure). We note that if we finalize our proposal to adopt patient-level data requirements, we would be able to adopt a data validation policy for the IPFQR Program in the future. We believe that it would be appropriate to develop such a policy incrementally through adoption of a data validation pilot prior to national implementation of data validation within the IPFQR Program. We seek public input on elements of a potential data validation pilot, for example, the number of measures to validate, number of participating facilities, whether the pilot should be mandatory or voluntary, potential thresholds for determining measure accuracy, or any other policies that commenters believe would be appropriate to include in a data validation pilot or eventual data validation policy.

4. Reporting Requirements for the FY 2022 Payment Determination and Subsequent Years

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53656 through 53657), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50900 through 50901), and the FY 2015 IPF PPS final rule (79 FR 45976 through 45977) for our previously finalized reporting requirements. In this proposed rule, we are not proposing any changes to these policies.

5. Quality Measure Sampling Requirements

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53657 through 53658), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50901 through 50902), the FY 2016 IPF PPS final rule (80 FR 46717 through 46719), and the FY 2019 IPF PPS final rule (83 FR 38607 through 38608) for discussions of our previously finalized sampling policies. We note that neither the measure we are proposing to remove (FUH–NQF #0576) nor the measure we are proposing to adopt (FAPH) if we remove the FUH–NQF #0576 are affected by our sampling policies because these are both calculated by CMS using Medicare Fee-for-Service claims and, therefore, apply to all Medicare patients in the denominator. Furthermore, the denominator of the COVID–19 Healthcare Personnel Vaccination measure we are proposing to adopt in this proposed rule is all healthcare personnel, and therefore, this measure is not eligible for sampling. In this proposed rule, we are not proposing any changes to our previously finalized sampling policies.

6. Non-Measure Data Collection

We refer readers to the FY 2015 IPF PPS final rule (79 FR 45973), the FY 2016 IPF PPS final rule (80 FR 46717), and the FY 2019 IPF PPS final rule (83 FR 38608) for our previously finalized non-measure data collection policies. In this proposed rule, we are not proposing any changes to these policies.

7. Data Accuracy and Completeness Acknowledgement (DACA) Requirements

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53658) for our previously finalized DACA requirements. In this proposed rule, we are not proposing any changes to these policies.

K. Reconsideration and Appeals Procedures

We refer readers to 42 CFR 412.434 for the IPFQR Program's reconsideration and appeals procedures. In this proposed rule, we are not proposing any changes to these policies.

L. Extraordinary Circumstances Exceptions (ECE) Policy

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53659 through 53660), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50903), the FY 2015 IPF PPS final rule (79 FR 45978), and the FY 2018 IPPS/LTCH PPS final rule (82 FR 38473 through 38474) for our previously finalized ECE policies. In this proposed rule, we are not proposing any changes to these policies.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), we are required to provide 60-day notice

in the **Federal Register** and solicit public comment before a ''collection of information'' (as defined under 5 CFR 1320.3(c) of the PRA's implementing regulations) requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

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

We are soliciting public comment on each of the section 3506(c)(2)(A)—required issues for the following information collection requirements (ICRs).

A. Proposed ICRs for the (IPFQR) Program

The following proposed requirement and burden changes will be submitted to OMB for approval under control number 0938–1171 (CMS–10432).

1. Wage Estimates

In the FY 2020 IPF PPS final rule (84 FR 38468), which was the most recent rule in which we adopted updates to the IPFQR Program, we estimated that reporting measures for the IPFQR Program could be accomplished by a Medical Records and Health Information Technician (BLS Occupation Code: 29–2071) with a median hourly wage of $18.83/hr. (May 2017). Since then, BLS (the Bureau of Labor Statistics) has revised their wage data (May 2019) to $20.50/hr.[136] In response, we are proposing to adjust our cost estimates using the updated median wage rate figure of $20.50/hr., an increase of $1.67/hr.

Under OMB Circular A–76, in calculating direct labor, agencies should not only include salaries and wages, but also ''other entitlements'' such as fringe benefits and overhead.[137] Consistent with our past approach, we continue to calculate the cost of fringe benefits and overhead at 100 percent of the median hourly wage (81 FR 57266). This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly from employer to employer, and methods of estimating these costs vary widely from study to study. Therefore, using these assumptions, we estimate an hourly labor cost increase from $37.66/hr ($18.83/hr base salary + $18.83/hr fringe benefits and overhead) to $41.00/hr ($20.50/hr base salary + $20.50/hr fringe benefits and overhead). Table 7 presents these assumptions.

TABLE 7—WAGE ASSUMPTIONS FOR THE IPFQR PROGRAM

Occupation title	Occupation code	Median hourly wage ($/hr)	Fringe benefits and overhead ($/hr)	Adjustedhourly wage ($/hr)
Medical Records and Health Information Technician	29–2071	20.50	20.50	41.00

2. ICRs Regarding the Inpatient Psychiatric Facility Quality Reporting (IPFQR) Program

In subsection 2.a., we restate our currently approved burden estimates. In subsection 2.b., we estimate the proposed adjustments in burden associated with the updated BLS wage rate, our facility estimates, and our case estimates. In subsection 2.c., we estimate the changes in burden associated with the proposals in this rule. Finally, in subsection 2.d., we provide an overview of the total estimated burden.

a. Currently Approved Burden

For a detailed discussion of the burden for the IPFQR Program requirements that we have previously adopted, we refer readers to the following rules:

- The FY 2013 IPPS/LTCH PPS final rule (77 FR 53673);
- The FY 2014 IPPS/LTCH PPS final rule (78 FR 50964);
- The FY 2015 IPF PPS final rule (79 FR 45978 through 45980);
- The FY 2016 IPF PPS final rule (80 FR 46720 through 46721);
- The FY 2017 IPPS/LTCH PPS final rule (81 FR 57265 through 57266);
- The FY 2018 IPPS/LTCH PPS final rule (82 FR 38507 through 38508);
- The FY 2019 IPF PPS final rule (83 FR 38609 through 38612); and
- The FY 2020 IPF PPS final rule (84 FR 38468 through 38476).

Tables 8, 9, and 10 provide an overview of our currently approved burden. These tables use our previous estimate of $37.66 ($18.83 base salary plus $18.83 fringe benefits and overhead) hourly labor cost. For more information on our currently approved burden estimates, please see PRA Supporting Statement A on the Office of Information and Regulatory Affairs website.[138]

TABLE 8—CURRENTLY APPROVED MEASURE COLLECTION AND REPORTING BURDEN

NQF #	Measure ID	Measure description	Estimated cases (per facility)	Time per case (hours)	Annual time per facility (hours)	Number IPFs	Total annual time (hours)	Total annual cost ($)
0640	HBIPS–2	Hours of Physical Restraint Use	1,283	0.25	320.75	1,679	538,539.25	20,281,388
0641	HBIPS–3	Hours of Seclusion Use	1,283	0.25	320.75	1,679	538,539.25	20,281,388
0560	HBIPS–5	Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification.	609	0.25	152.25	1,679	255,627.75	9,626,941
N/A	SUB–2 and SUB–2a.	Alcohol Use Brief Intervention Provided or Offered.	609	0.25	152.25	1,679	255,627.75	9,626,941

[136] *https://www.bls.gov/oes/current/oes292098.htm* (Accessed on March 30, 2021).

[137] *http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction.*

[138] *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201908-0938-011.*

TABLE 8—CURRENTLY APPROVED MEASURE COLLECTION AND REPORTING BURDEN—Continued

NQF #	Measure ID	Measure description	Estimated cases (per facility)	Time per case (hours)	Annual time per facility (hours)	Number IPFs	Total annual time (hours)	Total annual cost ($)
N/A	SUB–3 and SUB–3a.	Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and Alcohol and Other Drug Use Disorder Treatment at Discharge.	609	0.25	152.25	1,679	255,627.75	9,626,941
0576	FUH	Follow-Up After Hospitalization for Mental Illness*.	0	0	0	0	0	0
N/A	TOB–2 and TOB–2a.	Tobacco Use Treatment Provided or Offered and Tobacco Use Treatment.	609	0.25	152.25	1,679	255,627.75	9,626,941
N/A	TOB–3 and TOB–3a.	Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge.	609	0.25	152.25	1,679	255,627.75	9,626,941
1659	IMM–2	Influenza Immunization	609	0.25	152.25	1,679	255,627.75	9,626,941
0647	N/A	Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).	609	0.25	152.25	1,679	255,627.75	9,626,941
0648	N/A	Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).	609	0.25	152.25	1,679	255,627.75	9,626,941
N/A	N/A	Screening for Metabolic Disorders	609	0.25	152.25	1,679	255,627.75	9,626,941
2860	N/A	Thirty-day all-cause unplanned readmission following psychiatric hospitalization in an IPF*.	0	0	0	0	0	0
3205	Med Cont	Medication Continuation Following Inpatient Psychiatric Discharge*.	0	0	0	0	0	0
Total			8,047	Varies	2,011.75	1,679	3,377,728	127,205,245

*CMS will collect these data using Medicare Part A and Part B claims; therefore, these measures will not require facilities to submit data on any cases.

TABLE 9—CURRENTLY APPROVED NON-MEASURE DATA COLLECTION AND REPORTING BURDEN

Tasks	Number IPFs	Annual time per facility (hours)	Total annual time (hours)	Wage rate ($/hr)	Cost per IPF ($)	Total annual cost for all IPFs ($)
Non-measure Data Collection and Submission	1,679	2.0	3,358	37.66	75.32	126,462

TABLE 10—CURRENTLY APPROVED TOTAL BURDEN

Requirement	Respondents	Responses	Time (hours)	Cost ($)
Measure Data Collection and Reporting	1,679	13,510,913 (8,047 responses or cases per facility * 1,679 facilities).	3,377,728	127,205,245
Non-Measure Data Collection and Reporting	1,679	6,716 (4 * responses per facility * 1,679 facilities) 4.	3,358	126,462
Notice of Participation, Data Accuracy Acknowledgment, and Vendor Authorization Form*.	N/A	N/A	N/A	N/A
Total	1,679	13,517,629	3,381,086	127,331,707

*The 15 minutes per measure for chart abstraction under Measure Data Collection and Reporting also includes the time for completing and submitting any forms.

b. Proposed Adjustments in Burden Due to Updated Wage, Facility Count, and Case Count Estimates

In the FY 2020 IPF PPS final rule (84 FR 38468), which is the most recent rule, that updated the IPFQR Program policies, we estimated that there were 1,679 participating IPFs and that (for measures that require reporting on the entire patient population) these facilities will report on an average of 1,283 cases per facility. In this FY 2022 rule, we are proposing to update our facility count and case estimates by using the most recent data available. Specifically, we estimate that there are now approximately 1,634 facilities (a decrease of 45 facilities) and an average of 1,346 cases per facility (an increase of 63 cases per facility). Tables 11, 12,

and 13, depict the effects of these updates, as well as the wage rate update to $41.00/hr described in section V.A.1 of the preamble of this proposed rule, on our previously estimated burden.

TABLE 11—MEASURE COLLECTION AND REPORTING BURDEN BASED ON UPDATED CASES PER FACILITY, FACILITY COUNTS, AND WAGE RATE

NQF #	Measure ID	Measure description	Estimated cases (per facility)	Time per case (hours)	Annual time per facility (hours)	Number IPFs	Total annual time (hours)	Total annual cost ($)
0640	HBIPS–2	Hours of Physical Restraint Use	1,346	0.25	336.50	1,634	549,841	22,543,481
0641	HBIPS–3	Hours of Seclusion Use	1,346	0.25	336.50	1,634	549,841	22,543,481
0560	HBIPS–5	Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification.	*609	0.25	152.25	1,634	248,776.5	10,199,836.50
N/A	SUB–2 and SUB–2a.	Alcohol Use Brief Intervention Provided or Offered and Alcohol Use Brief Intervention Provided.	*609	0.25	152.25	1,634	248,776.5	10,199,836.50
N/A	SUB–3 and SUB–3a.	Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and Alcohol and Other Drug Use Disorder Treatment at Discharge.	*609	0.25	152.25	1,634	248,776.5	10,199,836.50
0576	FUH	Follow-Up After Hospitalization for Mental Illness*.	0	0	0	0	0	0
N/A	TOB–2 and TOB–2a.	Tobacco Use Treatment Provided or Offered and Tobacco Use Treatment.	*609	0.25	152.25	1,634	248,776.5	10,199,836.50
N/A	TOB–3 and TOB–3a.	Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge.	*609	0.25	152.25	1,634	248,776.5	10,199,836.50
1659	IMM–2	Influenza Immunization	*609	0.25	152.25	1,634	248,776.5	10,199,836.50
0647	N/A	Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).	*609	0.25	152.25	1,634	248,776.5	10,199,836.50
0648	N/A	Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).	*609	0.25	152.25	1,634	248,776.5	10,199,836.50
N/A	N/A	Screening for Metabolic Disorders.	*609	0.25	152.25	1,634	248,776.5	10,199,836.50
2860	N/A	Thirty-day all-cause unplanned readmission following psychiatric hospitalization in an IPF*.	0	0	0	0	0	0
3205	Med Cont	Medication Continuation Following Inpatient Psychiatric Discharge*.	0	0	0	0	0	0
N/A	COVID–19 HCP	COVID–19 Vaccination Rate Among Healthcare Personnel.	**0	0	0	0	0	0
N/A	FAPH	Follow-Up After Psychiatric Hospitalization.	0	0	0	0	0	0
Total			8,173	Varies	2,043.25	1,634	3,338,671	136,885,491

*Under our previously finalized ''global sample'' (80 FR 46717 through 46718) we allow facilities to apply the same sampling methodology to all measures eligible for sampling. In the FY 2016 IPF PPS final rule (80 FR 46718), we finalized that facilities with between 609 and 3,056 cases that choose to participate in the global sample would be required to report data for 609 cases. Because facilities are only required to submit data on a number specified by the global sampling methodology, rather than abstracting data for all patients or applying measure specific sampling methodologies, we believe that the number of cases under the global sample is a good approximation of facility burden associated with these measures. Therefore, for the average IPF discharge rate of 1,346 discharges versus the previously estimated 1,283, the global sample continues to require abstraction of 609 records.

**The COVID–19 HCP measure will be calculated using data submitted to the CDC under a separate OMB Control Number (0920–1317).

TABLE 12—NON-MEASURE DATA COLLECTION AND REPORTING BURDEN BASED ON UPDATED CASES PER FACILITY, FACILITY COUNTS, AND WAGE RATE

Tasks	Number IPFs	Annual time per facility (hours)	Total annual time (hours)	Wage rate ($/hr)	Cost per IPF ($)	Total annual cost for all IPFs ($)
Non-measure Data Collection and Submission	1,634	2.0	3,268	41.00	82.00	133,988

TABLE 13—TOTAL BURDEN BASED ON UPDATED CASES PER FACILITY, FACILITY COUNTS, AND WAGE RATE

Requirement	Respondents	Responses	Time (hours)	Cost ($)
Measure Data Collection and Reporting	1,634	13,354,682 (8,173 responses per facility * 1,634 facilities).	3,338,671	136,885,491
Non-Measure Data Collection and Reporting	1,634	6,536 (4 responses per facility * 1,634 facilities).	3,268	133,988
Total	1,634	13,361,218	3,341,939	137,019,479

c. Changes in Burden Due to This Proposed Rule

(1). Updates Due to Proposed Measure Adoptions

In section IV.E of this preamble, we are proposing to adopt the following two measures:

- COVID–19 HCP Vaccination for FY 2023 Payment Determination and Subsequent Years; and
- Follow-Up After Psychiatric Hospitalization (FAPH) for FY 2024 Payment Determination and Subsequent Years.

We are proposing to adopt the COVID–19 HCP Vaccination measure beginning with an initial reporting period from October 1 to December 31, 2021 affecting the FY 2023 payment determination followed by annual reporting beginning with the FY 2024 payment determination and subsequent years. IPFs would submit data through the CDC NHSN. The NHSN is a secure, internet-based system maintained by the CDC and provided free. Currently the CDC does not estimate burden for COVID–19 vaccination reporting under the CDC PRA package currently approved under OMB control number 0920–1317 because the agency has been granted a waiver under Section 321 of the National Childhood Vaccine Injury Act (NCVIA).[139]

Although the burden as associated with the COVID–19 HCP Vaccination measure is not accounted for under the CDC PRA package currently approved under OMB control number 0920–1317 due to the NCVIA waiver, the cost and burden information is discussed here and will be included in a revised information collection request for 0920–1317. Consistent with the CDC's experience of collecting data using the NHSN, we estimate that it would take each IPF on average approximately 1 hour per month to collect data for the COVID–19 Vaccination Coverage among HCP measure and enter it into NHSN. We have estimated the time to complete this entire activity, since it could vary based on provider systems and staff availability. This burden is comprised of administrative hours and wages. We believe it would take an Administrative Assistant[140] between 45 minutes and 1 hour and 15 minutes to enter this data into NHSN. For the CY 2021 reporting period (consisting of October 1, 2021 through December 31, 2021) 3 months are required. For the CY 2021 reporting period/FY 2023 payment determination, IPFs would incur an additional burden between 2.25 hours (0.75 hours * 3 months) and 3.75 hours (1.25 hours * 3 months) per IPF. For all 1,634 IPFs, the total burden would range from 3,676.5 (2.25 hours * 1,634 IPFs) and 6,127.5 hours (3.75 hours * 1,634 IPFs). Each IPF would incur an estimated cost of between $27.47 (0.75 hour * $36.62/hr) and $45.78 (1.25 hours * 36.63/hr) monthly and between $82.40 (2.25 hours * $36.62/hr) and $137.33 (3.75 hours * $36.62/hr) in total over the CY 2021 reporting period to complete this task. Thereafter, 12 months of data are required annually. Therefore, IPFs would incur an additional annual burden between 9 hours (0.75 hours/month * 12 months) and 15 hours (1.25 hours/month * 12 months) per IPF and between 14,706 hours (9 hours/IPF * 1,634 IPFs) and 24,510 hours (15 hours/IPF * 1,634 IPFs) for all IPFs. Each IPF would incur an estimated cost of between $329.58 (9 hours × $36.62/hr) and $549.30 annually (15 hours × $36.62/hr). The estimated cost across all 1,634 IPFs would be between $134,641.6 ($82.40/IPF * 1,634 IPFs) and $224,397.22 ($137.33/IPF * 1,634 IPFs) for the CY 2021 reporting period. The estimated cost across all 1,634 IPFs would be between $538,533.72 ($329.58/IPF * 1,634 IPFs) and $897,556.2 ($549.30/IPF * 1,634 IPFs) annually thereafter.

We recognize that many healthcare facilities are also reporting other COVID–19 data to HHS. We believe the benefits of requiring IPFs to report data on the COVID–19 HCP Vaccination measure to assess whether they are taking steps to limit the spread of COVID–19 among their healthcare workers and to help sustain the ability of IPFs to continue serving their communities throughout the PHE and beyond outweigh the costs of reporting. We welcome comments on the estimated time to collect data and enter it into the NHSN.

We further note that as described in section IV.E.C of this preamble, we will calculate performance on the FAPH measure using Medicare Part A and Part B claims that facilities and other providers submit for payment. Since this is a claims-based measure, there is no additional burden outside of submitting the claim. The claim submission is approved by OMB under control number 0938–0050 (CMS–2552–10). This rule does not propose any changes under that control number.

(2). Updates Due to Proposed Measure Removals

In section IV.F. of this preamble, we are proposing to remove the following four measures for the FY 2024 payment determination and subsequent years:

- SUB–2—Alcohol Use Brief Intervention Provided or Offered and the subset measure SUB–2a Alcohol Use Brief Intervention Provided;
- TOB–2—Tobacco Use Brief Intervention Provided or Offered and the subset measure TOB–2a Tobacco Use Brief Intervention;
- Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care); and
- FUH—Follow-Up After Hospitalization for Mental Illness (NQF #0576).

For the FY 2024 payment determination, data on CY 2022 performance would be reported during the summer of 2023. Therefore, we are applying the burden reduction that would occur to the FY 2023 burden calculation. Three of these measures

[139] Section 321 of the National Childhood Vaccine Injury Act (NCVIA) provides the PRA waiver for activities that come under the NCVIA, including those in the NCVIA at section 2102 of the Public Health Service Act (42 U.S.C. 300aa–2). Section 321 is not codified in the U.S. Code, but can be found in a note at 42 U.S.C. 300aa–1.

[140] *https://www.bls.gov/oes/current/oes436013.htm* (accessed on March 30, 2021). The hourly rate of $36.62 includes an adjustment of 100 percent of the median hourly wage to account for the cost of overhead, including fringe benefits.

(SUB–2/2a, TOB–2/2a, and the Timely Transmission measure) fall under our previously finalized ''global sample'' (80 FR 46717 through 46718) and, therefore, would require abstraction of 609 records. We estimate that removing each of these three measures would result in a decrease in burden of 152.25 hours per facility, or 248,776.5 hours (152.25 hours × 1,634 facilities) across all IPFs. Therefore, the decrease in costs for each measure is approximately $6,242.25 per IPF ($41.00hr * 152.25 hours), or $10,199,836.50 across all IPFs ($6,242.25/facility * 1,634 facilities). For all three of these chart-abstracted measures the total decrease in burden is approximately 456.75 hours per IPF (3 measures * 152.25 hours per measure) or 746,329.5 hours across all IPFs (3 measures * 248,776.5 hours per measure). This equates to $18,726.75 per IPF (3 measures * $6,242.25 per measure), or $30,599,509.50 across all IPFs (3 measures * $10,199,836.50 per measure).

We have previously estimated that the FUH (NQF #0576) measure does not have any reporting burden because it is calculated from Medicare FFS claims. Therefore, we do not anticipate a reduction in facility burden associated with the removal of this measure. Table 14 describes our estimated reduction in burden associated with removing these four measures.

TABLE 14—BURDEN UPDATES DUE TO PROPOSED MEASURE REMOVALS

NQF #	Measure ID	Measure description	Estimated cases (per facility)	Time per case (hours)	Annual time per facility (hours)	Number IPFs	Total annual time (hours)	Total annual cost ($)
N/A	SUB–2 and SUB–2a.	Alcohol Use Brief Intervention Provided or Offered.	(609)	0.25	152.25	1,634	(248,776.5)	(10,199,836.5)
0576	FUH	Follow-Up After Hospitalization for Mental Illness*.	0	0	0	1,634	0	0
N/A	TOB–2 and TOB–2a.	Tobacco Use Treatment Provided or Offered and Tobacco Use Treatment.	(609)	0.25	152.25	1,634	(248,776.5)	(10,199,836.5)
0648	N/A	Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).	(609)	0.25	152.25	1,634	(248,776.5)	(10,199,836.5)
Total			(1,827)	Varies	(456.75)	1,634	(746,329.5)	(30,599,509.50)

*CMS will collect these data using Medicare Part A and Part B claims; therefore, these measures will not require facilities to submit data on any cases.

(3). Updates Due to Proposed Administrative Policies

(a). Updates Associated With Proposed Updated Reference to QualityNet System Administrator

In section IV.J.1.a of this preamble, we proposed to use the term ''QualityNet security official'' instead of ''QualityNet system administrator.'' Because this proposed update would not change the individual's responsibilities, we do not believe there would be any changes to the information collection burden as a result of this update. We also do not believe that removing the requirement for facilities to have an active QualityNet security official account to qualify for payment updates will affect burden because we continue to recommend that facilities maintain an active QualityNet security official account.

(b). Updates Associated With Proposed Adoption of Patient-Level Reporting for Certain Chart Abstracted Measures

In section IV.J.2.c of this preamble, we propose to adopt patient-level data submission for the eleven chart-abstracted measures currently in the IPFQR Program measure set (for more details on these measures we refer readers to Table 6). Because submission of aggregate data requires facilities to abstract patient-level data, then calculate measure performance prior to submitting data through the QualityNet website's secure portal, facilities must already abstract patient-level data. Therefore, we do not believe that submitting data that facilities must already calculate through a tool that facilities already have experience using will change provider burden.

d. Overall Burden Summary

Table 15 summarizes the estimated burden associated with the IPFQR Program if the proposals in this rule are finalized.

TABLE 15—TOTAL ESTIMATED IPFQR PROGRAM BURDEN

Measure/response description	Estimated responses per facility	Time per response (hours)	Annual time per facility (hours)	Total annual time (hours)	Total annual cost ($)
Hours of Physical Restraint Use	1,346	0.25	336.50	549,841	$22,543,481
Hours of Seclusion Use	1,346	0.25	336.50	549,841	22,543,481
Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification	*609	0.25	152.25	248,776.5	10,199,836.50
Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and Alcohol and Other Drug Use Disorder Treatment at Discharge	*609	0.25	152.25	248,776.5	10,199,836.50
Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge	*609	0.25	152.25	248,776.5	10,199,836.50
Influenza Immunization	*609	0.25	152.25	248,776.5	10,199,836.50
Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care)	*609	0.25	152.25	248,776.5	10,199,836.50
Screening for Metabolic Disorders	*609	0.25	152.25	248,776.5	10,199,836.50
Thirty-day all-cause unplanned readmission following psychiatric hospitalization in an IPF	**0	0	0	0	0
Medication Continuation Following Inpatient Psychiatric Discharge	**0	0	0	0	0
COVID–19 Vaccination Rate Among Healthcare Personnel	***0	0	0	0	0
Follow-Up After Psychiatric Hospitalization	**0	0	0	0	0

TABLE 15—TOTAL ESTIMATED IPFQR PROGRAM BURDEN—Continued

Measure/response description	Estimated responses per facility	Time per response (hours)	Annual time per facility (hours)	Total annual time (hours)	Total annual cost ($)
Non-Measure Data Collection and Reporting	4	0.5	2.0	3,268	133,988
Total	6,346	N/A	1,588.5	2,595,609	106,419,969

* Under our previously finalized ''global sample'' (80 FR 46717 through 46718) we allow facilities to apply the same sampling methodology to all measures eligible for sampling. In the FY 2016 IPF PPS final rule (80 FR 46718), we finalized that facilities with between 609 and 3,056 cases that choose to participate in the global sample would be required to report data for 609 cases. Because facilities are only required to submit data on a number specified by the global sampling methodology, rather than abstracting data for all patients or applying measure specific sampling methodologies, we believe that the number of cases under the global sample is a good approximation of facility burden associated with these measures. Therefore, for the average IPF discharge rate of 1,346 discharges versus the previously estimated 1,283, the global sample continues to require abstraction of 609 records.

** CMS will collect these data using Medicare Part A and Part B claims; therefore, these measures will not require facilities to submit data on any cases.

*** The COVID–19 HCP measure will be calculated using data submitted to the CDC under a separate OMB Control Number (0920–1317).

The total change in burden associated with this proposed rule (including all updates to wage rate, case counts, facility numbers, and the measures and administrative policies) is a reduction of 785,477 hours and $20,911,738 from our currently approved burden of 3,381,086 hours and $127,331,707. We refer readers to Table 16 for details.

TABLE 16—SUMMARY OF PROPOSED REQUIREMENTS AND ANNUAL BURDEN ESTIMATES UNDER OMB CONTROL NUMBER 0938–1171 (CMS–10432)

Program changes	Number respondents	Total responses	Time per response (hr)	Total time (hr)	Labor cost per hour ($/hr)	Total cost ($)
Active Burden	1,679	13,517,629	Varies	3,381,086	37.66	127,331,707
Total Burden Under CMS–1750–P	1,634	10,375,900	Varies	2,595,609	41.00	106,419,969
PROPOSED CHANGES	(45)	(3,141,729)	Varies	(785,477)	+3.34	(20,911,738)

B. Submission of PRA-Related Comments

We have submitted a copy of this proposed rule to OMB for its review of the rule's information collection and recordkeeping requirements. The requirements are not effective until they have been approved by OMB.

To obtain copies of the supporting statement and any related forms for the proposed collections previously discussed, visit CMS's website at: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html* or call the Reports Clearance Office at (410) 786–1326.

We invite public comments on these information collection requirements. If you wish to comment, identify the rule (CMS–1750–P) and, where applicable, the preamble section, and the ICR section. See this rule's **DATES** and **ADDRESSES** sections for the comment due date and for additional instructions.

VI. Regulatory Impact Analysis

A. Statement of Need

This rule proposes updates to the prospective payment rates for Medicare inpatient hospital services provided by IPFs for discharges occurring during FY 2022 (October 1, 2021 through September 30, 2022). We are proposing to apply the 2016-based IPF market basket increase of 2.3 percent, less the productivity adjustment of 0.2 percentage point as required by 1886(s)(2)(A)(i) of the Act for a proposed total FY 2022 payment rate update of 2.1 percent. In this proposed rule, we are proposing to update the IPF labor-related share and update the IPF wage index to reflect the FY 2022 hospital inpatient wage index.

B. Overall Impact

We have examined the impacts of this proposed rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act (the Act), section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), and Executive Order 13132 on Federalism (August 4, 1999).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

We estimate that this rulemaking is likely to be economically significant as measured by the $100 million threshold, and hence, if finalized as proposed, a major rule under the Congressional Review Act. Accordingly, we have prepared a Regulatory Impact Analysis that to the best of our ability presents the costs and benefits of the rulemaking.

We estimate that the total impact of these changes for FY 2022 payments compared to FY 2021 payments will be a net increase of approximately $90 million. This reflects an $80 million increase from the update to the payment rates (+$90 million from the 4th quarter 2020 IGI forecast of the 2016-based IPF market basket of 2.3 percent, and −$10 million for the productivity adjustment

of 0.2 percentage point), as well as a $10 million increase as a result of the update to the outlier threshold amount. Outlier payments are estimated to change from 1.8 percent in FY 2021 to 2.0 percent of total estimated IPF payments in FY 2022.

C. Detailed Economic Analysis

In this section, we discuss the historical background of the IPF PPS and the impact of this proposed rule on the Federal Medicare budget and on IPFs.

1. Budgetary Impact

As discussed in the November 2004 and RY 2007 IPF PPS final rules, we applied a budget neutrality factor to the Federal per diem base rate and ECT payment per treatment to ensure that total estimated payments under the IPF PPS in the implementation period would equal the amount that would have been paid if the IPF PPS had not been implemented. The budget neutrality factor includes the following components: Outlier adjustment, stop-loss adjustment, and the behavioral offset. As discussed in the RY 2009 IPF PPS notice (73 FR 25711), the stop-loss adjustment is no longer applicable under the IPF PPS.

As discussed in section III.D.1 of this proposed rule, we are updating the wage index and labor-related share in a budget neutral manner by applying a wage index budget neutrality factor to the Federal per diem base rate and ECT payment per treatment. Therefore, the budgetary impact to the Medicare program of this proposed rule will be due to the market basket update for FY 2022 of 2.3 percent (see section III.A.4 of this proposed rule) less the productivity adjustment of 0.2 percentage point required by section 1886(s)(2)(A)(i) of the Act and the update to the outlier fixed dollar loss threshold amount.

We estimate that the FY 2022 impact will be a net increase of $90 million in payments to IPF providers. This reflects an estimated $80 million increase from the update to the payment rates and a $10 million increase due to the update to the outlier threshold amount to set total estimated outlier payments at 2.0 percent of total estimated payments in FY 2022. This estimate does not include the implementation of the required 2.0 percentage point reduction of the market basket update factor for any IPF that fails to meet the IPF quality reporting requirements (as discussed in section V.A. of this proposed rule).

2. Impact on Providers

To show the impact on providers of the changes to the IPF PPS discussed in this proposed rule, we compare estimated payments under the IPF PPS rates and factors for FY 2022 versus those under FY 2021. We determined the percent change in the estimated FY 2022 IPF PPS payments compared to the estimated FY 2021 IPF PPS payments for each category of IPFs. In addition, for each category of IPFs, we have included the estimated percent change in payments resulting from the update to the outlier fixed dollar loss threshold amount; the updated wage index data including the updated labor-related share; and the market basket update for FY 2022, as adjusted by the productivity adjustment according to section 1886(s)(2)(A)(i) of the Act.

Our longstanding methodology uses the best available data as the basis for our estimates of payments. Typically, this is the most recent update of the latest available fiscal year of IPF PPS claims, and for this proposed rulemaking, that would be the FY 2020 claims. However, as discussed in section III.F.2 of this proposed rule, the U.S. healthcare system undertook an unprecedented response to the COVID–19 PHE during FY 2020. Therefore, we considered whether the most recent available year of claims, FY 2020, or the prior year, FY 2019, would be the best for estimating IPF PPS payments in FY 2021 and FY 2022.

To illustrate the impacts of the FY 2022 changes in this proposed rule, our analysis presents a side-by-side comparison of payments estimated using FY 2019 claims versus payments estimated using FY 2020 claims. We begin with FY 2019 IPF PPS claims (based on the 2019 MedPAR claims, June 2020 update) and FY 2020 IPF PPS claims (based on the 2020 MedPAR claims, December 2020 update). We estimate FY 2021 IPF PPS payments using these 2019 and 2020 claims, the finalized FY 2021 IPF PPS Federal per diem base rates, and the finalized FY 2021 IPF PPS patient and facility level adjustment factors (as published in the FY 2021 IPF PPS final rule (85 FR 47042 through 47070)). We then estimate the FY 2021 outlier payments based on these simulated FY 2021 IPF PPS payments using the same methodology as finalized in the FY 2021 IPF PPS final rule (85 FR 47061 through 47062) where total outlier payments are maintained at 2 percent of total estimated FY 2021 IPF PPS payments.

Each of the following changes is added incrementally to this baseline model in order for us to isolate the effects of each change:

- The proposed update to the outlier fixed dollar loss threshold amount.
- The proposed FY 2022 IPF wage index, the proposed FY 2022 labor-related share, and the proposed updated COLA factors.
- The proposed market basket update for FY 2022 of 2.3 percent less the productivity adjustment of 0.2 percentage point in accordance with section 1886(s)(2)(A)(i) of the Act for a payment rate update of 2.1 percent.

Our proposed column comparison in Table 17 illustrates the percent change in payments from FY 2021 (that is, October 1, 2020, to September 30, 2021) to FY 2022 (that is, October 1, 2021, to September 30, 2022) including all the payment policy changes in this proposed rule. For each column, Table 17 presents a side-by-side comparison of the results using FY 2019 and FY 2020 IPF PPS claims.

TABLE 17—FY 2022 IPF PPS PROPOSED PAYMENT IMPACTS

[Percent change in columns 3 through 5]

Facility by type	Number of facilities		Outlier		Wage index FY22, LRS, and COLA		Total percent change [1]	
	FY 2019 Claims	FY 2020 Claims	FY 2019 Claims	FY 2020 Claims	FY 2019 Claims	FY 2020 Claims	FY 2019 Claims	FY 2020 Claims
(1)	(2)		(3)		(4)		(5)	
All Facilities	1,526	1,536	0.2	−0.7	0.0	0.0	2.3	1.4
Total Urban	1,226	1,238	0.2	−0.7	0.0	0.0	2.3	1.3
Urban unit	742	738	0.3	−1.1	−0.1	−0.1	2.3	0.9
Urban hospital	484	500	0.1	−0.2	0.0	0.0	2.2	1.9
Total Rural	300	298	0.1	−0.5	0.1	0.1	2.4	1.8
Rural unit	240	237	0.1	−0.6	0.0	0.0	2.2	1.5
Rural hospital	60	61	0.1	−0.2	0.5	0.5	2.7	2.4

TABLE 17—FY 2022 IPF PPS PROPOSED PAYMENT IMPACTS—Continued

[Percent change in columns 3 through 5]

Facility by type	Number of facilities		Outlier		Wage index FY22, LRS, and COLA		Total percent change [1]	
	FY 2019 Claims	FY 2020 Claims	FY 2019 Claims	FY 2020 Claims	FY 2019 Claims	FY 2020 Claims	FY 2019 Claims	FY 2020 Claims
(1)	(2)		(3)		(4)		(5)	
By Type of Ownership:								
Freestanding IPFs:								
Urban Psychiatric Hospitals:								
Government	117	123	0.3	−1.1	−0.2	−0.2	2.2	0.7
Non-Profit	93	95	0.1	−0.3	−0.3	−0.2	1.9	1.6
For-Profit	274	282	0.0	−0.1	0.1	0.2	2.3	2.2
Rural Psychiatric Hospitals:								
Government	31	32	0.1	−0.4	0.5	0.6	2.8	2.2
Non-Profit	12	12	0.2	−0.7	0.0	0.1	2.3	1.5
For-Profit	17	17	0.0	0.0	0.6	0.6	2.7	2.7
IPF Units:								
Urban:								
Government	109	108	0.4	−2.1	0.1	0.1	2.7	0.0
Non-Profit	482	480	0.3	−1.1	−0.1	−0.1	2.3	0.9
For-Profit	151	150	0.1	−0.5	−0.1	−0.1	2.2	1.5
Rural:								
Government	58	57	0.1	−0.2	0.3	0.2	2.5	2.1
Non-Profit	133	130	0.2	−0.8	0.0	0.0	2.2	1.2
For-Profit	49	50	0.1	−0.4	−0.2	−0.2	2.0	1.4
By Teaching Status:								
Non-teaching	1,329	1,339	0.1	−0.6	0.0	0.0	2.2	1.5
Less than 10% interns and residents to beds	106	106	0.3	−1.2	0.0	0.0	2.4	0.9
10% to 30% interns and residents to beds	70	70	0.4	−1.6	0.0	0.0	2.4	0.5
More than 30% interns and residents to beds	21	21	0.4	−1.9	−0.1	−0.1	2.4	0.1
By Region:								
New England	106	106	0.2	−0.8	−0.3	−0.4	2.0	1.0
Mid-Atlantic	215	217	0.3	−1.3	−0.2	−0.2	2.1	0.5
South Atlantic	241	243	0.1	−0.5	0.7	0.7	2.9	2.3
East North Central	245	245	0.1	−0.4	−0.1	−0.1	2.2	1.5
East South Central	152	155	0.1	−0.5	−0.7	−0.7	1.5	0.8
West North Central	110	110	0.2	−0.9	0.2	0.2	2.6	1.4
West South Central	225	227	0.1	−0.4	−0.3	−0.3	1.9	1.4
Mountain	103	102	0.1	−0.4	0.1	0.1	2.3	1.8
Pacific	129	131	0.2	−0.9	0.4	0.5	2.8	1.6
By Bed Size:								
Psychiatric Hospitals:								
Beds: 0–24	85	90	0.1	−0.3	0.1	0.1	2.3	1.9
Beds: 25–49	79	83	0.1	−0.2	−0.5	−0.4	1.7	1.4
Beds: 50–75	84	87	0.0	−0.1	0.1	0.3	2.3	2.3
Beds: 76 +	296	301	0.1	−0.3	0.1	0.1	2.3	2.0
Psychiatric Units:								
Beds: 0–24	540	531	0.2	−0.8	0.0	−0.1	2.3	1.2
Beds: 25–49	258	259	0.2	−0.9	0.0	0.0	2.4	1.2
Beds: 50–75	115	115	0.3	−1.1	−0.2	−0.3	2.2	0.7
Beds: 76 +	69	70	0.3	−1.6	0.0	0.0	2.4	0.4

[1] This column includes the impact of the updates in column (3) and (4) above, and of the proposed IPF market basket increase factor for FY 2022 (2.3 percent), reduced by 0.2 percentage point for the productivity adjustment as required by section 1886(s)(2)(A)(i) of the Act. Note, the products of these impacts may be different from the percentage changes shown here due to rounding effects.

3. Impact Results

Table 17 displays the results of our analysis. The table groups IPFs into the categories listed here based on characteristics provided in the Provider of Services file, the IPF PSF, and cost report data from the Healthcare Cost Report Information System:

- Facility Type.
- Location.
- Teaching Status Adjustment.
- Census Region.
- Size.

The top row of the table shows the overall impact on the 1,526 IPFs included in the analysis for FY 2019 claims or the 1,536 IPFs included in the analysis for FY 2020 claims. In column 2, we present the number of facilities of each type that had information available in the PSF and also had claims in the MedPAR dataset for FY 2019 or FY 2020. The number of providers in each category therefore differs slightly between the two years.

In column 3, we present the effects of the update to the outlier fixed dollar loss threshold amount. Based on the FY 2019 claims, we would estimate that IPF outlier payments as a percentage of total IPF payments are 1.8 percent in FY 2021. Alternatively, based on the FY 2020 claims, we would estimate that IPF outlier payments as a percentage of total IPF payments are 2.7 percent in FY 2021.

Thus, we are proposing to adjust the outlier threshold amount in this proposed rule to set total estimated outlier payments equal to 2.0 percent of total payments in FY 2022. Based on the FY 2019 claims, the estimated change in total IPF payments for FY 2022 would include an approximate 0.2 percent increase in payments because we would expect the outlier portion of total payments to increase from approximately 1.8 percent to 2.0 percent. Alternatively, based on the FY 2020 claims, the estimated change in total IPF payments for FY 2022 would include an approximate 0.7 percent decrease in payments because we would expect the outlier portion of total

payments to decrease from approximately 2.7 percent to 2.0 percent.

The overall impact of the estimated increase or decrease to payments due to updating the outlier fixed dollar loss threshold (as shown in column 3 of Table 17), across all hospital groups, is 0.2 percent based on the FY 2019 claims, or −0.7 percent based on the FY 2020 claims. If we decrease the outlier fixed dollar loss threshold based on the FY 2019 claims, the largest increase in payments due to this change is estimated to be 0.4 percent for urban, government-owned IPF units and also 0.4 percent for teaching IPFs with 10 percent or more interns and residents to beds. These same provider types, along with IPF units having more than 75 beds, would experience the largest estimated decrease in payments if we instead increase the outlier fixed dollar loss threshold based on the FY 2020 claims distribution.

In column 4, we present the effects of the budget-neutral update to the IPF wage index, the Labor-Related Share (LRS), and the proposed updated COLA factors discussed in section III.D.3. This represents the effect of using the concurrent hospital wage data as discussed in section III.D.1.a of this proposed rule. That is, the impact represented in this column reflects the proposed updated COLA factors and the update from the FY 2021 IPF wage index to the proposed FY 2022 IPF wage index, which includes basing the FY 2022 IPF wage index on the FY 2022 pre-floor, pre-reclassified IPPS hospital wage index data and updating the LRS from 77.3 percent in FY 2021 to 77.1 percent in FY 2022. We note that there is no projected change in aggregate payments to IPFs, as indicated in the first row of column 4; however, there will be distributional effects among different categories of IPFs. We also note that when comparing the results using FY 2019 and FY 2020 claims, the distributional effects are very similar. For example, we estimate the largest increase in payments to be 0.7 percent for IPFs in the South Atlantic region, and the largest decrease in payments to be −0.7 percent for IPFs in the East South Central region, based on either the FY 2019 or FY 2020 claims.

Finally, column 5 compares the total proposed changes reflected in this proposed rule for FY 2022 to the estimates for FY 2021 (without these changes). The average estimated increase for all IPFs is approximately 2.3 percent based on the FY 2019 claims, or 1.4 percent based on the FY 2020 claims. These estimated net increases include the effects of the 2016-based market basket update of 2.3 percent reduced by the productivity adjustment of 0.2 percentage point, as required by section 1886(s)(2)(A)(i) of the Act. They also include the overall estimated 0.2 percent increase or 0.7 percent decrease in estimated IPF outlier payments as a percent of total payments from updating the outlier fixed dollar loss threshold amount. In addition, column 5 includes the distributional effects of the proposed updates to the IPF wage index, the labor-related share, and the proposed updated COLA factors, whose impacts are displayed in column 4. Based on the FY 2020 claims distribution, the increase to estimated payments due to the market basket update factor are offset in large part for some provider types by the increase to the outlier fixed dollar loss threshold.

In summary, comparing the impact results for the FY 2019 and FY 2020 claims, the largest difference in the results is due to the update to the outlier fixed dollar loss threshold. Therefore, we examined the differences between the FY 2019 and FY 2020 claims distributions to better understand the disparity in the estimate of outlier payments as a percentage of total PPS payments between the two years, which is driving the divergent results in column 3 of Table 17.

The calculation of the estimated outlier percentage has two components: Estimated outlier payments and estimated total PPS payments. As discussed in section III.F.1 of this proposed rule, we make outlier payments for discharges in which an IPF's estimated total cost for a case exceeds a fixed dollar loss threshold amount (multiplied by the IPF's facility-level adjustments) plus the Federal per diem payment amount for the case. Therefore, estimated outlier payments are a function of both estimated IPF costs and estimated IPF Federal per diem payment amounts per case. As such, we looked at changes in estimated costs, estimated Federal per diem payment amounts, estimated outlier payments, and estimated total PPS payments in order to understand the differences in the estimated outlier percentage when using the FY 2019 and FY 2020 claims data. To facilitate the comparison between our FY 2019 and FY 2020 datasets, we inflated all estimated costs to the midpoint of FY 2021 and estimated all payments based on the finalized FY 2021 IPF PPS patient and facility level adjustment factors (as published in the FY 2021 IPF PPS final rule (85 FR 47042 through 47070)). In summary, we found that estimated outlier payments using the FY 2020 claims dataset are 26 percent higher than the estimated outlier payments using the FY 2019 claims dataset, due to estimated costs per stay that were relatively higher than estimated Federal per diem payment amounts per stay. Estimated total payments using the FY 2020 claims dataset are 14 percent lower than the estimated total payments using the FY 2019 claims dataset. Therefore, both the estimated outlier payments and estimated total payments are contributing to the differences in the estimated outlier payment percentage of 2.7 percent using the FY 2020 claims dataset and 1.8 percent using the FY 2019 claims dataset. We discuss estimated total payments and estimated outlier payments in more detail below.

As stated above, we observed a reduction of estimated total PPS payments of approximately 14 percent using the FY 2020 claims dataset relative to estimated total PPS payments in our FY 2019 claims dataset. The reduction in estimated total PPS payments corresponds with a roughly 15 percent decline in covered IPF days and a roughly 17 percent decline in covered IPF stays. The consistency between the decline in IPF stays and IPF days indicates the overall length of stay is fairly consistent in the FY 2019 claims dataset and FY 2020 claims dataset.

An important consideration for how we estimate the percentage of estimated outlier payments in FY 2022 is whether we expect this lower level of total payments to persist in future years. We note that although there has been a downward trend in IPF stays and total payments in recent years, the decrease from FY 2019 to FY 2020 is 2 to 3 times greater than the decreases in recent prior years. Looking on a monthly basis at the claims in our FY 2020 claims dataset, we observed that estimated total PPS payments per month declined sharply, nearly 28 percent, from January 2020 to April 2020. Estimated total PPS payments per month decreased overall by approximately 21 percent from January 2020 to September 2020. The lower estimated total PPS payments per month were a result of both lower covered IPF days and covered IPF stays. The COVID–19 PHE was declared on January 31, 2020, and continued through the end of FY 2020, with an initial surge in cases occurring in many places in the early months of the PHE. Based on the timing of the declines in covered IPF stays and covered IPF days, we believe they are related to the response to the COVID–19 PHE. Therefore, we do not anticipate that decreases in total PPS payments,

covered IPF days, and covered IPF stays of the same magnitude as observed in FY 2020 are likely to occur in FY 2022. We are seeking comments on this analysis. Specifically, we are requesting comments from stakeholders about likely explanations for the declines in total PPS payments, covered IPF days, and covered IPF stays in FY 2020.

Next, we looked at estimated outlier payments. Estimated outlier payments were approximately 26 percent higher using the FY 2020 claims data compared to estimated outlier payments using the FY 2019 claims data despite overall covered IPF stays being approximately 17 percent lower using the FY 2020 claims data. As stated above, we make outlier payments for discharges in which an IPF's estimated total cost for a case exceeds a fixed dollar loss threshold amount (multiplied by the IPF's facility-level adjustments) plus the Federal per diem payment amount for the case. We examined estimated IPF costs and estimated IPF Federal per diem payment amounts in order to understand the increase in estimated outlier payments. Overall, estimated costs were approximately 12 percent lower when using the FY 2020 claims dataset. However, estimated Federal per diem payment amounts were approximately 15 percent lower. In other words, both estimated costs and estimated Federal per diem payments declined along with the number of stays, but, importantly, estimated Federal per diem payment amounts decreased by a greater amount. When we account for the number of stays, we can see that estimated costs and Federal per diem payment amounts per stay were greater in FY 2020 than in FY 2019, but the increase in estimated cost per stay was greater. Estimated Federal per diem payment amounts per stay were approximately 2.5 percent higher using the FY 2020 claims dataset than estimated Federal per diem payment amounts per stay using the FY 2019 claims dataset. However, estimated costs per stay were about 6.0 percent higher than estimated Federal per diem payments per stay using the FY 2019 claims dataset. In other words, we observed that estimated costs per stay increased by more than estimated IPF Federal per diem payment amounts per stay when the FY 2020 claims dataset was used. As a result, total estimated costs were approximately 12 percent lower but total estimated Federal per diem payments were approximately 15 percent lower. This difference between estimated costs and estimated Federal per diem payments contributed to the 26 percent greater estimated outlier payments using the FY 2020 claims dataset.

We wanted to understand whether there were monthly trends in estimated costs and estimated Federal per diem payment amounts that would explain why estimated costs increased more than estimated Federal per diem payment amounts from FY 2019 to FY 2020, and if any of these monthly trends might be related to the COVID–19 PHE. Looking on a monthly basis, we observed that estimated cost per stay and estimated IPF Federal per diem payment per stay generally moved in line with average length of stay until July 2020, however estimated costs remained relatively higher than estimated payments from July 2020 until September 2020. Discharges in our dataset occurring in February and March 2020 had an average length of stay that was roughly 6 percent shorter than for discharges occurring in April 2020, and for May 2020, average length of stay was approximately 4 percent shorter than in the preceding month. We observed comparable peaks and valleys in average cost per stay and average estimated IPF Federal per diem payment per stay. However, the changes in average cost per stay were smaller, around a 3 percent increase from March 2020 to April 2020 and a 3.4 decrease percent from April 2020 to May 2020. Additionally, we observed that estimated cost per stay declined less than average length of stay and estimated IPF Federal per diem payment per stay from July 2020 to September 2020, declining approximately 0.6 percent compared to 1.4 percent for length of stay and 1.5 percent for estimated IPF Federal per diem payment per stay. In other words, we observed that from July 2020 to September 2020, the declines in estimated payments were greater than the declines in estimated costs, and therefore the gap between costs and payments increased during this period.

Looking specifically at estimated outlier cases on a monthly basis, we observed a similar trend from March 2020 to May 2020 in average length of stay, estimated IPF Federal per diem payment per stay, and estimated cost per stay to those we observed in all FY 2020 claims in our dataset. However, from July 2020 to September 2020, estimated cost per stay, estimated IPF Federal per diem payment per stay, and average length of stay all increased. Estimated cost per stay and estimated length of stay increased approximately 3.9 percent and 2.0 percent, whereas estimated IPF Federal per diem payment per stay increased by a lower amount, approximately 2.4 percent. Additionally, we observed that estimated outlier payment per outlier stay was approximately 50 percent higher in July 2020 than it was in May 2020. In September 2020 estimated outlier payment per outlier stay was approximately 62 percent higher than May 2020. In other words, we observed that the divergence in estimated costs and estimated payments in our FY 2020 dataset corresponded with the increase in estimated outlier payment per stay.

Because the IPF PPS is a per diem payment system, we also looked at whether increased length of stay was contributing to the increased estimated outlier payment per case. Among estimated outlier cases, we calculated the estimated outlier payment per covered IPF day. We observed that estimated outlier payment per covered day was nearly 69 percent greater in July 2020 than it was in May 2020, and remained at a higher level through the end of the year than at the start of the year. Compared to January 2020, average length of stay for estimated outlier cases in September 2020 was approximately 10 percent lower, whereas estimated outlier payment per outlier stay was approximately 52 percent higher. Therefore, we concluded that increased length of stay among estimated outlier cases does not appear to be driving the increase in estimated outlier payments.

We examined the distribution of DRGs throughout the FY 2020 claims in our dataset but did not observe variation that would explain the substantial increases in estimated outlier payments. In general, the majority of IPF cases have a DRG of 885 (Psychoses). The percentage of claims with this DRG remained very similar from FY 2019 (74.5 percent) to FY 2020 (75.2 percent), and this percentage did not appear to diverge or fluctuate meaningfully during FY 2020. We also looked at comorbidities and observed that the percentage of cases with a comorbidity increased slightly, from approximately 3.6 percent in our FY 2019 dataset to 3.8 percent in our FY 2020 dataset. In general, most IPF cases in both FY 2019 and FY 2020 did not have any IPF comorbidities. Among cases with at least one comorbidity, the number of cases for each comorbidity category declined in FY 2020, with the exception of Chronic Obstructive Pulmonary Disorder. We note that this is the IPF comorbidity category in which the COVID–19 diagnosis code, U07.1, falls. However, cases with this comorbidity category remained a relatively small percentage of all IPF cases, approximately 0.8 percent in FY 2019 and approximately 1.3 percent in FY 2020. Additionally, among estimated

outlier cases, those with at least one comorbidity received approximately 58 percent less estimated outlier pay per covered day than those without any comorbidities. This makes intuitive sense, because cases with an IPF comorbidity would receive a payment adjustment corresponding to the appropriate IPF comorbidity category, therefore reducing the difference between estimated IPF Federal per diem payments and costs for those cases. Therefore, it does not seem likely that cases with IPF comorbidities were the main driver of the increases in estimated outlier payments.

Observing that changes in DRGs and comorbidities did not appear to be driving the increased estimated outlier payments in FY 2020, we wanted to understand what was causing the higher estimated costs relative to estimated IPF Federal per diem payments that we observed in FY 2020. Following our longstanding methodology, we estimate the costs per case based on the covered charges on each IPF claim and the IPF's most recent CCR. Therefore, in order to better understand estimated costs, we looked at covered charges in FY 2019 and FY 2020. For this analysis, we used a different source for claims which enabled us to calculate covered charge by categories corresponding to the MedPAR ancillary departments. We analyzed FY 2019 and FY 2020 IPF claims data from the Common Working File (CWF).

In general, laboratory charges make up roughly one third of the covered charges per IPF claim. Comparing FY 2019 to FY 2020, we observed that covered lab charges per claim in our CWF dataset increased approximately 6.8 percent. Looking on a monthly basis, we observed fluctuation in covered lab charges per claim and per day during the COVID–19 PHE. We looked specifically at the period January 2020 (the month in which the COVID–19 PHE was declared) to September 2020 (the end of FY 2020), and observed peaks and valleys in covered lab charges that we believe may be related to the response to the COVID–19 PHE. Covered lab charges per day increased approximately 6.3 percent (2.4 percent per claim) from January 2020 to March 2020, decreased approximately 7.1 percent (1.1 percent per claim) from March 2020 to April 2020, and then increased approximately 6.2 percent (0.9 percent per claim) from April 2020 to September 2020. Overall, covered lab charges per day increased approximately 4.9 percent (2.2 percent per claim) from January 2020 to September 2020. In other words, most of the 6.8 percent increase in covered lab charges from FY 2019 to FY 2020 occurred during the period January 2020 to September 2020, with the highest levels of lab charges occurring during February/March and June through September. Based on the data available, we are not able to determine the root cause of these increases in covered lab charges during the COVID–19 PHE, however we acknowledge that these increased charges may be related to services in response to the COVID–19 PHE, such as COVID–19 testing. We are requesting comments on this analysis. Specifically, we are requesting comments from stakeholders about likely explanations for the observed fluctuations and overall increases in covered lab charges per claim and per day. We are also requesting comments regarding likely explanations for the increases in estimated cost per stay relative to estimated IPF Federal per diem payment amounts per stay.

As discussed in this section, estimated outlier payments increased and estimated total PPS payments decreased, when comparing FY 2020 to FY 2019. Based on our analysis, we believe it is likely that the response to the COVID–19 PHE in FY 2020 has contributed to both of these trends. As a result, in contrast to our usual methodology, we are not confident that FY 2020 claims are the best available data for setting the FY 2022 proposed outlier fixed dollar loss threshold. Furthermore, the distributional effects of the updates presented in column 4 of Table 17 (the budget-neutral update to the IPF wage index, the LRS, and the proposed updated COLA factors) are very similar when using the FY 2019 or FY 2020 claims data. Therefore, we believe the FY 2019 claims would be the best available data for estimating payments in this FY 2022 proposed rulemaking, and we are proposing to use the FY 2019 claims to calculate the outlier fixed dollar loss threshold and wage index budget neutrality factor.

IPF payments are therefore estimated to increase by 2.3 percent in urban areas and 2.4 percent in rural areas based on this proposal. Overall, IPFs are estimated to experience a net increase in payments as a result of the updates in this proposed rule. The largest payment increase is estimated at 2.9 percent for IPFs in the South Atlantic region.

4. Effect on Beneficiaries

Under the FY 2022 IPF PPS, IPFs will continue to receive payment based on the average resources consumed by patients for each day. Our longstanding payment methodology reflects the differences in patient resource use and costs among IPFs, as required under section 124 of the BBRA. We expect that updating IPF PPS rates as proposed in this rule will improve or maintain beneficiary access to high quality care by ensuring that payment rates reflect the best available data on the resources involved in inpatient psychiatric care and the costs of these resources. We continue to expect that paying prospectively for IPF services under the FY 2022 IPF PPS will enhance the efficiency of the Medicare program.

As discussed in sections IV.E.2, IV.E.3, and V.A.2.d of this proposed rule, we expect that additional program measures will improve follow-up for patients with both mental health and substance use disorders and ensure health-care personnel COVID–19 vaccinations. We also estimate a $20,911,738 reduction in information collection burden as a result of our measure removal proposals. Therefore, we expect that the proposed updates to the IPFQR program will improve quality for beneficiaries.

5. Effects of Updates to the IPFQR Program

As discussed in section V. of this proposed rule and in accordance with section 1886(s)(4)(A)(i) of the Act, we will apply a 2 percentage point reduction in the FY 2022 market basket update for IPFs that have failed to comply with the IPFQR Program requirements for FY 2022, including reporting on the required measures. In section V. of this proposed rule, we discuss how the 2 percentage point reduction will be applied. For FY 2021, of the 1,634 IPFs eligible for the IPFQR Program, 43 IPFs (2.6 percent) did not receive the full market basket update because of the IPFQR Program; 31 of these IPFs chose not to participate and 12 did not meet the requirements of the program. We anticipate that even fewer IPFs would receive the reduction for FY 2022 as IPFs become more familiar with the requirements. Thus, we estimate that the IPFQR Program will have a negligible impact on overall IPF payments for FY 2022.

Based on the IPFQR Program proposals made in this proposed rule, we estimate a total decrease in burden of 785,477 hours across all IPFs, resulting in a total decrease in information collection burden of $20,911,738 across all IPFs. As discussed in section VI. of this proposed rule, we will attribute the cost savings associated with the proposals to the year in which these savings begin; for the purposes of all the proposals in this proposed rule, that year is FY 2023. Further information on these estimates

can be found in section VI. of this proposed rule.

We intend to closely monitor the effects of the IPFQR Program on IPFs and help facilitate successful reporting outcomes through ongoing stakeholder education, national trainings, and a technical help desk.

6. Regulatory Review Costs

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this proposed rule, we should estimate the cost associated with regulatory review. Due to the uncertainty involved with accurately quantifying the number of entities that will be directly impacted and will review this proposed rule, we assume that the total number of unique commenters on the most recent IPF proposed rule from FY 2021 (85 FR 20625) will be the number of reviewers of this proposed rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this proposed rule. It is possible that not all commenters reviewed the FY 2021 IPF proposed rule in detail, and it is also possible that some reviewers chose not to comment on that proposed rule. For these reasons, we thought that the number of commenters would be a fair estimate of the number of reviewers who are directly impacted by this proposed rule. We solicited comments on this assumption.

We also recognize that different types of entities are in many cases affected by mutually exclusive sections of this proposed rule; therefore, for the purposes of our estimate, we assume that each reviewer reads approximately 50 percent of this proposed rule.

Using the May, 2019 mean (average) wage information from the BLS for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this proposed rule is $110.74 per hour, including overhead and fringe benefits (*https://www.bls.gov/oes/current/oes119111.htm*). Assuming an average reading speed of 250 words per minute, we estimate that it would take approximately 93.5 minutes (1.56 hours) for the staff to review half of this proposed rule, which is approximately 23,365 words. For each IPF that reviews the proposed rule, the estimated cost is (1.56 × $110.74) or $172.75. Therefore, we estimate that the total cost of reviewing this proposed rule is $79,810.50 ($172.75 × 462 reviewers).

D. Alternatives Considered

The statute does not specify an update strategy for the IPF PPS and is broadly written to give the Secretary discretion in establishing an update methodology. We continue to believe it is appropriate to routinely update the IPF PPS so that it reflects the best available data about differences in patient resource use and costs among IPFs as required by the statute. Therefore, we are proposing to update the IPF PPS using the methodology published in the November 2004 IPF PPS final rule; applying the 2016-based IPF PPS market basket update for FY 2022 of 2.3 percent, reduced by the statutorily required multifactor productivity adjustment of 0.2 percentage point along with the wage index budget neutrality adjustment to update the payment rates; and proposing a FY 2022 IPF wage index which uses the FY 2022 pre-floor, pre-reclassified IPPS hospital wage index as its basis.

As discussed in section VI.C.3 of this proposed rule, we also considered using FY 2020 claims data to determine the proposed FY 2022 outlier fixed dollar loss threshold, wage index budget neutrality factor, per diem base rate, and ECT rate. For the reasons discussed in that section, we are proposing to use FY 2019 claims data.

E. Accounting Statement

As required by OMB Circular A–4 (available at *www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf*), in Table 18, we have prepared an accounting statement showing the classification of the expenditures associated with the updates to the IPF wage index and payment rates in this proposed rule. Table 18 provides our best estimate of the increase in Medicare payments under the IPF PPS as a result of the changes presented in this proposed rule and based on the data for 1,526 IPFs with data available in the PSF and with claims in our FY 2019 MedPAR claims dataset. Table 18 also includes our best estimate of the cost savings for the 1,634 IPFs eligible for the IPFQR Program. Lastly, Table 18 also includes our best estimate of the costs of reviewing and understanding this proposed rule.

TABLE 18—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED COSTS, SAVINGS, AND TRANSFERS

Category	Primary estimate ($million/year)	Low estimate	High estimate	Units		
				Year dollars	Discount rate (%)	Period covered
Regulatory Review Costs	0.08			2020		* 2021–2022
Annualized Monetized Costs Savings	−20.91	−15.68	−26.14	2020	7	* 2023–2031
	−17.79	−13.34	−22.24	2020	3	2023–2031
Annualized Monetized Transfers from Federal Government to IPF Medicare Providers	90			2020		2021–2022

F. Regulatory Flexibility Act

The RFA requires agencies to analyze options for regulatory relief of small entities if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most IPFs and most other providers and suppliers are small entities, either by nonprofit status or having revenues of $8 million to $41.5 million or less in any 1 year. Individuals and states are not included in the definition of a small entity.

Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IPFs or the proportion of IPFs' revenue derived from Medicare payments. Therefore, we assume that all IPFs are considered small entities.

The Department of Health and Human Services generally uses a revenue impact of 3 to 5 percent as a significance threshold under the RFA. As shown in Table 17, we estimate that the overall revenue impact of this proposed rule on all IPFs is to increase estimated Medicare payments by approximately 2.3 percent. As a result, since the estimated impact of this proposed rule is a net increase in revenue across almost all categories of IPFs, the Secretary has determined that this proposed rule will have a positive revenue impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a

significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. As discussed in section V.C.1 of this proposed rule, the rates and policies set forth in this proposed rule will not have an adverse impact on the rural hospitals based on the data of the 240 rural excluded psychiatric units and 60 rural psychiatric hospitals in our database of 1,526 IPFs for which data were available. Therefore, the Secretary has determined that this proposed rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

G. Unfunded Mandate Reform Act (UMRA)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2021, that threshold is approximately $158 million. This proposed rule does not mandate any requirements for state, local, or tribal governments, or for the private sector. This proposed rule would not impose a mandate that will result in the expenditure by state, local, and Tribal Governments, in the aggregate, or by the private sector, of more than $158 million in any one year.

H. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has Federalism implications. This proposed rule does not impose substantial direct costs on state or local governments or preempt state law.

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

■ 1. The authority citation for part 412 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 2. Section 412.402 is amended by adding definitions for ''Closure of an IPF'', ''Closure of an IPF's residency training program'', and ''Displaced resident'' in alphabetical order to read as follows:

§ 412.402 Definitions.

* * * * *

Closure of an IPF means closure of a hospital as defined in § 413.79(h)(1)(i) by an IPF meeting the requirements of § 412.404(b) for the purposes of accounting for indirect teaching costs.

Closure of an IPF's residency training program means closure of a hospital residency training program as defined in § 413.79(h)(1)(ii) by an IPF meeting the requirements of § 412.404(b) for the purposes of accounting for indirect teaching costs.

* * * * *

Displaced resident means a displaced resident as defined in § 413.79(h)(1)(iii) for the purposes of accounting for indirect teaching costs.

* * * * *

■ 3. Section 412.424 is amended by revising paragraph (d)(1)(iii)(F) to read as follows:

§ 412.424 Methodology for calculating the Federal per diem payment amount.

* * * * *

(d) * * *

(1) * * *

(iii) * * *

(F) *Closure of an IPF.* (*1*) For cost reporting periods beginning on or after July 1, 2011, an IPF may receive a temporary adjustment to its FTE cap to reflect displaced residents added because of another IPF's closure if the IPF meets the following criteria:

(*i*) The IPF is training additional displaced residents from an IPF that closed on or after July 1, 2011.

(*ii*) No later than 60 days after the IPF begins to train the displaced residents, the IPF submits a request to its Medicare contractor for a temporary adjustment to its cap, documents that the IPF is eligible for this temporary adjustment by identifying the displaced residents who have come from the closed IPF and have caused the IPF to exceed its cap, and specifies the length of time the adjustment is needed.

(*2*) *Closure of an IPF's residency training program.* If an IPF that closes its residency training program on or after July 1, 2011, agrees to temporarily reduce its FTE cap according to the criteria specified in paragraph (d)(1)(iii)(F)(*2*)(*ii*) of this section, another IPF(s) may receive a temporary adjustment to its FTE cap to reflect displaced residents added because of the closure of the residency training program if the criteria specified in paragraph (d)(1)(iii)(F)(*2*)(*i*) of this section are met.

(*i*) *Receiving IPF(s).* For cost reporting periods beginning on or after July 1, 2011, an IPF may receive a temporary adjustment to its FTE cap to reflect displaced residents added because of the closure of another IPF's residency training program if the IPF is training additional displaced residents from the residency training program of an IPF that closed a program; and if no later than 60 days after the IPF begins to train the displaced residents, the IPF submits to its Medicare Contractor a request for a temporary adjustment to its FTE cap, documents that it is eligible for this temporary adjustment by identifying the displaced residents who have come from another IPF's closed program and have caused the IPF to exceed its cap, specifies the length of time the adjustment is needed, and submits to its Medicare contractor a copy of the FTE reduction statement by the hospital that closed its program, as specified in paragraph (d)(1)(iii)(F)(*2*)(*ii*) of this section.

(*ii*) *IPF that closed its program.* An IPF that agrees to train displaced residents who have been displaced by the closure of another IPF's program may receive a temporary FTE cap adjustment only if the hospital with the closed program temporarily reduces its FTE cap based on the FTE of displaced residents in each program year training in the program at the time of the program's closure. This yearly reduction in the FTE cap will be determined based on the number of those displaced residents who would have been training in the program during that year had the program not closed. No later than 60 days after the displaced residents who were in the closed program begin training at another hospital, the hospital with the closed program must submit to its Medicare contractor a statement signed and dated by its representative that specifies that it agrees to the temporary reduction in its FTE cap to allow the IPF training the displaced residents to obtain a temporary adjustment to its cap; identifies the displaced residents who were in training at the time of the program's closure; identifies the IPFs to which the displaced residents are transferring once the program closes; and specifies the

reduction for the applicable program years.

* * * * *

■ 4. Section 412.434 is amended by revising paragraph (b)(3) to read as follows:

§ 412.434 Reconsideration and appeals procedures of Inpatient Psychiatric Facilities Quality Reporting (IPFQR) Program decisions.

* * * * *

(b) * * *

(3) Contact information for the inpatient psychiatric facility's chief executive officer and QualityNet security official, including each individual's name, email address, telephone number, and physical mailing address;

* * * * *

Dated: March 29, 2021.

Elizabeth Richter,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: April 6, 2021.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–07433 Filed 4–7–21; 4:15 pm]

BILLING CODE 4120–01–P

FEDERAL REGISTER

Vol. 86 Tuesday,

No. 69 April 13, 2021

Part IV

Federal Communications Commission

47 CFR Part 54

Emergency Broadband Benefit Program; Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 20–445; FCC 21–29; FRS 19812]

Emergency Broadband Benefit Program

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) established the Emergency Broadband Benefit Program (EBB Program) to support broadband services and devices to help low-income households. The Consolidated Appropriations Act, 2021 (CAA) established an Emergency Broadband Connectivity Fund of $3.2 billion in the Treasury of the United States for the fiscal year 2021, to remain available until expended. The CAA directed the Commission to use the fund to establish the EBB Program, under which eligible low-income households may receive a discount off the cost of broadband service and certain connected devices during an emergency period related to the COVID–19 pandemic.

DATES: Effective April 13, 2021.

FOR FURTHER INFORMATION CONTACT: Jodie Griffin, Wireline Competition Bureau, 202–418–7400 or by email at *jodie.griffin@fcc.gov.* We ask that requests for accommodations be made as soon as possible in order to allow the agency to satisfy such requests whenever possible. Send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Emergency Broadband Benefit Program Report and Order (RO) in WC Docket No. 20–445; FCC No. 21–29, adopted February 25, 2021 and released February 26, 2021. Due to the COVID–19 pandemic, the Commission's headquarters will be closed to the general public until further notice. The full text of this document is available at the following internet address: *https://docs.fcc.gov/public/attachments/FCC-21-29A1.pdf*

I. Introduction

1. In the RO, the Commission establishes the EBB Program to support broadband services and devices to help low-income households stay connected during the COVID–19 pandemic. Efforts to slow the spread of COVID–19 have resulted in the dramatic disruption of many aspects of Americans' lives, including social distancing measures to prevent person-to-person transmission which have required the closure of businesses and schools across the country for indefinite periods of times, and in turn has caused millions of Americans to become newly unemployed or unable to find work. These closures have also led people to turn to virtual learning, telemedicine, and telework to enable social distancing measures, which has only increased every household's need for access to broadband services. The cost of broadband services, however, can be difficult to overcome for low-income families and for families that have been struggling during the pandemic.

2. On December 27, 2020, the CAA became law. Among other actions intended to provide relief during the pandemic, the CAA established an Emergency Broadband Connectivity Fund of $3.2 billion in the Treasury of the United States for the fiscal year 2021, to remain available until expended. The CAA directed the Commission to use the funds to establish the EBB Program, under which eligible low-income households may receive a discount off the cost of broadband service and certain connected devices during an emergency period relating to the COVID–19 pandemic, and participating providers can receive a reimbursement for such discounts.

3. In creating the EBB Program, the CAA does not preclude the Commission from utilizing in whole or in part any of the Commission's part 54 rules or amending them to suit the EBB Program. Moreover, Congress directed the Commission to utilize existing regulatory tools in support of the EBB Program, such as the National Verifier and the National Lifeline Accountability Database—originally designed to support the existing Lifeline program—which helps ensure low-income consumers have access to affordable voice or broadband internet access service. The EBB Program, however, is funded through a separate appropriation from the Universal Service Fund. Consistent with Congress's direction in the CAA, the Commission establishes the EBB Program.

II. Discussion

4. The Commission establishes the requirements and processes of the EBB Program, pursuant to the CAA. The Commission sets forth the providers that may participate in the EBB Program, the household eligibility requirements for the program, benefits for covered services and devices, the program's budget and reimbursement, and other administrative aspects of the program.

5. *Participating Providers.* In the CAA, Congress required that in order to participate in the EBB Program a carrier must have provided broadband internet access service to households as of December 1, 2020. To meet these requirements, Congress defined ''participating provider'' as either an existing eligible telecommunications carrier (ETC) or providers approved by the Commission under an ''expedited approval process.'' Congress directed the Commission to create an ''expedited approval process'' to approve providers to participate EBB Program where the provider is not an existing ETC. This expedited approval process requires that providers with an ''established program as of April 1, 2020'' offering broadband services to eligible households with verification process sufficient to prevent fraud, waste, and abuse ''shall be automatically approve[d].'' The Commission seeks to encourage as many providers as possible to participate in the EBB Program. Consistent with the CAA and the proposal in the *Public Notice,* DA 21–6, the Commission also adopts a carrier election process administered by USAC applicable to all providers participating in the EBB Program. Providers that are not designated as an ETC by a state or the Commission must also file for automatic approval or seek expedited approval from the Commission. In the CAA, Congress recognized the pressing need to quickly deliver much-needed support to Americans by providing the Commission with the authority to streamline and expedite the provider participation process. At the same time, the Commission must also safeguard the EBB Program's funding to ensure it provides help to those in need and is not wasted by providers unable to quickly deliver broadband services. Accordingly, the election and approval process the Commission adopts provides assurances that providers can promptly deliver broadband services to low-income households.

6. The Commission directed the Wireline Competition Bureau (WCB), within seven days of the adoption of the RO, to announce a timeline for the submission of information by providers required by the CAA, such as applications from non-ETCs to participate in the EBB Program, requests by all providers for approval of alternative verification processes, and the submission by ETCs and non-ETCs of election notices. By *Public Notice,* DA 21–265, the WCB set a priority application deadline of March 22, 2021,

by which providers must submit these filings to receive approval prior to the beginning of the EBB Program. The Commission also directs the WCB to announce at a later date other administrative deadlines or milestones, such as when the EBB Program will begin and when providers may begin enrolling subscribers in the program. The Commission expects that the EBB Program and the enrollment process will begin in less than 60 days after the adoption of the RO.

7. *Providers Eligible to Participate.* In the CAA, a ''participating provider'' for the EBB Program shall be a ''broadband provider'' that is either ''designated as an eligible telecommunications carrier'' or seeks approval from the Commission for participation in the EBB Program. The Commission agrees with commenters that the Commission should establish a broad, technologically neutral approach to provider participation in the EBB Program. This interpretation of provider eligibility aligned with the plain language of the CAA, which defined ''broadband provider'' as any ''provider of broadband internet access service.'' Further, the CAA defined ''broadband internet access service'' broadly by referencing the definition in § 8.1 of the Commission's rules. Section 8.1 of the Commission's rules defines ''broadband internet access service'' as:

> a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.

Accordingly, ETCs and non-ETCs seeking to participate in the EBB Program must establish they provide broadband services. the Commission declines to further narrow provider eligibility among those providers that offer broadband services as defined by the CAA. This interpretation allows participation by not only ETCs or non-ETCs like traditional internet Service Providers (ISPs) including cable providers and wireless internet service providers, but also non-traditional broadband providers like community-owned networks, electric cooperatives, or municipal governments.

8. In the CAA, Congress established that participating providers would be eligible to receive reimbursement for ''internet service offering[s]'' offered in the ''same manner, and on the same terms, as described in any of such provider's offerings for broadband internet access service to [an eligible] household[s], as on December 1, 2020.'' The Commission interprets this provision to require participating providers to have offered retail broadband internet access service to eligible households as of December 1, 2020. Consistent with the Commission's broadband data reporting rules, participating providers will be able to establish through certification that they provided broadband internet access service and reimbursable internet service offerings on December 1, 2020, through reference to timely filing of FCC Form 477. For providers that do not file FCC Form 477, participating providers must certify that they provided retail broadband internet access service to end-users as of December 1, 2020. The Commission further clarifies that the retail broadband internet access service must be provisioned to end users, meaning the provider of retail broadband internet access service maintains a direct relationship with the customer, is responsible for dealing with customer complaints, handles customer billing, and provides quality of service guarantees to the end user. The Commission finds these provider certifications, in addition to the submission of broadband plan and rate information described in the following, appropriately satisfied the CAA's eligibility requirements. As described further in the following, ETCs must make a showing that they offer qualifying broadband service in the election notice filed with USAC. Non-ETCs must make a threshold showing in the approval process to the WCB.

9. *Election to Participate in Emergency Broadband Benefit Program by Existing ETCs and Bureau-Approved Providers.* The CAA directed the Commission to establish an expedited process where existing ETCs and other approved providers could ''elect'' to participate in the EBB Program and gain access to the necessary USAC databases used to administer the Program. The Commission adopts the proposal to require all participating providers to file an election notice to participate in the EBB Program. This election will be filed with USAC to facilitate the administration of the EBB Program and provide USAC the necessary information to incorporate providers into its systems for eligibility determination, enrollment, and reimbursement.

10. Existing ETCs will need to only file an election with USAC, while non-ETCs will need to first apply and then obtain WCB approval prior to filing their election with USAC. Accordingly, the Commission directs the WCB to establish a priority application window during which non-ETC providers seeking approval to participate in the EBB Program will have the opportunity to obtain approval prior to commencement of consumer enrollments. Non-ETCs that file complete applications for approval meeting the necessary criteria by the priority application deadline will know their status prior to the start date for the EBB Program. The Commission believes establishing this priority application deadline provides adequate time for prospective providers to evaluate the rules of the EBB Program adopted and to prepare applications, while also encouraging prospective providers to accelerate their consideration consistent with the need to quickly begin providing these supported broadband services. The Commission directs the WCB and USAC to work expeditiously to review provider applications and elections, respectively, and the Commission directs the WCB to issue additional guidance and instruction as necessary for providers seeking to participate in the EBB Program. Further, the Commission expects the WCB and USAC to prioritize their reviews to limit excessive delay in issuing approvals of the applications and elections once properly submitted by the providers.

11. The Commission agrees with commenters that providers and, more importantly, their subscribers should have equal opportunity and access to the Emergency Broadband Benefit. By allowing non-ETC providers to obtain the necessary administrative approvals prior to the commencement of the EBB Program, eligible households will have more choices in the provider they can select to obtain supported broadband service and devices. Following the close of this priority application window, the WCB, in coordination with USAC, will establish and announce a uniform start date on which providers can begin to enroll qualifying subscribers in the EBB Program. This start date must allow for processing of elections and applications of both existing ETCs and non-ETCs to enable a consistent start date for all providers.

12. By establishing a priority application window and uniform start date, the Commission intends to afford providers the necessary time to update their systems and enrollment processes to effectively participate in the EBB Program. Furthermore, preparation and modification to both Commission and USAC systems is necessary to administer the EBB Program. While leveraging the existing Lifeline

processes provides some efficiencies, USAC needs to modify the Lifeline systems to accommodate workflows associated with the EBB Program, including updates to the National Verifier, NLAD, RAD, and the Lifeline Claims System (LCS). These updates require development, security assessments, and privacy assessments and approvals required by the Privacy Act, such as System of Records Notices (SORNs), Computer Matching Agreements (CMAs), and systems testing to ensure an effective launch. These measures comply with Congressional and government-wide directives designed to protect the privacy and security of members of the public who submit their information to the government, including households who choose to participate in the EBB Program. While the Commission can launch the EBB Program with manual review processes that do not require all of these approvals, automated eligibility, and administrative processes greatly improve functionality. The Commission remains committed to expeditiously and successfully launching the EBB Program.

13. *Obligations of Existing ETCs to Participate in the Emergency Broadband Benefit Program.* The CAA provides that an existing ETC is a ''participating provider'' for the purposes of the EBB Program. The CAA does not require existing ETCs to seek approval to participate in the EBB Program. Instead, existing ETCs must only ''elect'' to participate in the EBB Program to be eligible for reimbursement for broadband services. Existing ETCs will be able to file these elections to participate in the EBB Program in the states or territories where they have already received an existing ETC designation. To ease administrative burdens, the Commission allows an ETC to file an election for itself and its affiliates who provided broadband service as of December 1, 2020, within the states or territories (collectively ''jurisdictions'') where the provider was designated as an ETC. In other jurisdictions where neither the provider nor its affiliate has an existing ETC designation, the provider must seek either automatic or expedited approval from the WCB prior to submitting the election notice to USAC.

14. The Commission finds extending elections to ETC affiliates consistent with the Commission's practices in Lifeline and High Cost that ETCs can satisfy their statutory obligations to ''offer'' reimbursable and supported services through affiliated entities. Similarly, commenters supported the ability of ETCs and affiliates to elect to participate in jurisdictions where the ETC is designated. Allowing elections to be filed for both ETCs and affiliates without seeking additional approval for the affiliated entities will also ease administrative burdens and more quickly allow providers access to the EBB Program. Further, ETCs and affiliated entities are more familiar with the obligations and requirements within a particular jurisdiction to safeguard funds similar to the EBB Program. The Commission finds permitting this election to be consistent with the CAA's provisions regarding ETC elections and the Commission past treatment of ETC requirements.

15. The Commission declines to adopt the proposals in the record that would allow an existing ETC to offer service supported by the EBB Program in any jurisdiction, or even nationwide, regardless of where the ETC has been designated or where it had previously provided broadband service. First, ETC designations are inherently geographically limited due to the unique authority states have to designate ETCs. Thus, the Commission believes the provision in the CAA that relies on existing ETC designations and automatically qualifies ETCs to participate in the EBB Program supports the proposition that ETCs should be limited in the EBB Program to the jurisdictions in which they have already been designated. Moreover, had the CAA intended to allow ETCs to offer supported service everywhere regardless of the designation, Congress would not have needed to provide a path for non-ETC providers to participate in the EBB program. As identified in the record, providers with existing ETC designations or affiliated with ETCs have significant relevant experience with the policies and procedures needed to carry out the EBB Program obligations. However, in states where a provider is not designated as an ETC, the Commission has less confidence that the provider has established procedures and compliance processes necessary for EBB Program participation in that state. This decision is further bolstered by the CAA's requirement that participating providers would be eligible to receive reimbursement for ''internet service offerings'' offered in the ''same manner, and on the same terms, as described in any of such provider's offerings for broadband internet access service to [eligible] household, as on December 1, 2020.'' Approving a provider to participate in a jurisdiction where it previously did not offer service would render this statutory provision moot.

16. *Provider Election Process to Participate in the Emergency Broadband Benefit Program.* The Commission directs USAC, under the supervision of and in coordination with the WCB, to establish and administer a process to enable all participating EBB Program providers to file election notices containing information sufficient to effectively administer the program. The Commission directs USAC to collect information in such notices that includes: (1) The states in which the provider plans to participate in the EBB Program; (2) a statement that, in each such state, the provider was a ''broadband provider'' as of December 1, 2020; (3) a list of states where the provider is an existing ETC, if any; (4) a list of states where the provider received FCC approval, whether automatic or expedited, to participate, if any; (5) whether the provider intends to distribute connected devices under the EBB Program; (6) a description of the internet service offerings for which the provider plans to seek reimbursement from the EBB Program in each state; (7) documentation demonstrating the standard rates for those services; and (8) any other administrative information necessary for USAC to establish participating providers in the EBB Program. In addition to these criteria, participating providers must certify under penalty of perjury that the information set forth in the election notice is true, accurate, and complete; they understand and will comply with all statutory and regulatory obligations described within the RO, including the public interest conditions of offering EBB Program services throughout the provider's designated service area; and all terms and conditions and other requirements applicable to using the National Verifier, NLAD, RAD, and other USAC systems. Providing materially false information in the election notice will disqualify a provider from participation in the EBB Program. The Commission finds support in the record for adopting these requirements and certifications. These requirements also align with the CAA's requirements for provider participation and eligibility.

17. Provider elections must include the following information to establish that the provider has met the criteria and can provide enough information to allow USAC to administer the EBB Program. The Commission directs USAC, under the supervision of and in coordination with the WCB, to establish and administer this election process consistent with the RO.

(a) *List of states in which the provider plans to participate in the EBB Program.* A provider must list each state in which it will offer EBB Program services.

Consistent with USAC's existing processes, providers should be prepared to identify to USAC the postal ZIP code(s) or Census Block(s) where the provider will offer EBB Program service to obtain Service Provider Identification Number(s) (SPINs) or Study Area Codes (SACs) to the extent necessary.

(b) *A statement that, in each such state, the provider was a ''broadband provider'' as of December 1, 2020.* Consistent with the Commission's broadband data reporting rules, participating providers will be able to establish that they provided broadband internet access service and reimbursable internet service offerings on December 1, 2020 through reference to previous FCC Form 477 filings. Providers are required to submit data as of December 31, 2020, and reference to an FCC Form 477 filing for the December data submission will demonstrate the provider offered broadband services. Providers that are not required to file FCC Form 477 must certify that they provided retail broadband internet access service to end users as of December 1, 2020 and identify the underlying carrier providing the network facilities.

(c) *A statement identifying where the provider is an existing ETC.* A provider who is an ETC or is affiliated with an ETC seeking to begin offering the Emergency Broadband Benefit must submit to USAC documentation demonstrating that it is a participating provider in specific states. While ETCs are automatically eligible to participate and likely have already obtained administrative numbers from USAC, such as SPINs or SACs, requiring demonstration of ETC status, filing this statement with USAC will allow for better processing of elections.

(d) *A statement identifying where the provider received FCC approval to participate in the EBB Program.* Providers seeking approvals outside of states where they are existing ETCs or are affiliated with existing ETCs will need to identify those states and submit to the WCB approval to participate in the EBB Program.

(e) *A statement confirming whether the provider intends to distribute connected devices under the EBB Program.* Providers seeking reimbursement for connected devices must submit a statement of intent to distribute connected devices as part of their election notice. These providers should also include documentation detailing the equipment, rates, and applicable costs of the laptop, desktop or tablet. Connected devices should be accessible to and usable by users with disabilities. To the extent the provider will offer connected devices that are also generally available to the public, it may provide summary information regarding the devices, rates, and costs, such as a link to a public website or screenshots.

(f) *Description and documentation of the internet service offerings for which the provider plans to seek reimbursement from the EBB Program in each state.* Providers must submit documentation for the internet service offerings they will offer through the EBB Program. The participating provider should provide information detailing each service offering for which it plans to seek reimbursement from the EBB Program. This information and documentation should identify the service plan, details about the service such as speed and data caps, the service offering standard rate, equipment costs, jurisdiction where it is offered, and documentation establishing the rate was available on December 1, 2020. The provider can provide this information and documentation through the submission of price lists, rack rates, rate cards, or similar documentation. For service offerings that are publicly available a website or screenshot can be provided. For offerings that cannot be publicly viewed the provider should submit documentation demonstrating the offering was available on December 1, 2020, such as customer bills or publicly available advertisements. The provider can provide aggregated summaries of service offerings and standard rates made available to eligible households, if those offerings and rates are the same for multiple jurisdictions. This will reduce the administrative burden for both participating providers and the Commission in producing and reviewing voluminous service offering descriptions that are substantially similar.

18. In addition, providers must also be able to provide or otherwise obtain the necessary administrative registrations to utilize Commission and USAC processes. These processes include the Commission Registration System (CORES), FCC Registration Number (FRN), Service Provider Identification Number(s) (SPINs), Study Area Codes (SACs), System for Award Management (SAM), and/or Dun & Bradstreet DUNS number for all entities the provider anticipates seeking reimbursement. Providers should be prepared to provide this administrative information during the election process to USAC.

19. *Processing of Elections.* The Commission directs USAC in coordination with the WCB to expeditiously process election notices. USAC should establish necessary systems and processes to systematically review election notices as quickly as possible, and at least ensure all elections filed by existing ETCs and elections from providers seeking approvals in the priority application window are processed prior to the commencement of the EBB Program. USAC should notify a provider promptly if its election notice is incomplete or otherwise contains errors that prevent USAC from processing the election notice. USAC shall process election notices received during the priority application window prior to the uniform reimbursement start date. USAC will only reject election notices that are materially incomplete, and that the provider fails to update.

20. *Non-ETC Provider Application and Approval Process.* The CAA established that providers not already designated as an ETC that wish to participate in the EBB Program can seek either an automatic or expedited approval from the Commission based on certain criteria. Specifically, the CAA required the Commission to establish an expedited process for such approval and ''to automatically approve as a participating provider a broadband provider that has an established program as of April 1, 2020, that is widely available and offers internet service offerings to eligible households and maintains verification processes that are sufficient to avoid fraud, waste, and abuse.'' Consistent with this Congressional directive, the Commission establishes both an automatic approval and an expedited approval process for non-ETC providers seeking to participate in the EBB Program. The Commission delegates to the WCB the authority to establish the process by which providers seek these approvals, including through appropriate direction to USAC. Eligible providers that have submitted complete applications by the priority application deadline will know prior to the start date of the EBB Program if they are eligible to participate. Applications from providers filed after priority application deadline will be reviewed on an expedited, rolling basis.

21. Some commenters suggested the Commission provide an opportunity for states to assist in the decisions to approve non-ETC providers for the EBB Program. After due consideration, the Commission declines to provide a formal role in the approval process to state public utilities commissions (PUCs). First, the Commission acknowledges the states' traditional and essential role in designating ETCs as provided in section 214 of the

Communications Act of 1934. It is well-established that states have the primary responsibility for designating ETCs, and the Commission is only to designate an ETC where a state lacks jurisdiction over the carrier applying for designation. In fact, in the CAA, Congress recognized the importance of states' roles in the selection of providers for the EBB Program by permitting ETCs designated by states automatic entry. However, the CAA also specifically requires that non-ETC providers be approved for participation by the Commission and does not provide a role for the states. The Commission also recognizes this is a temporary, emergency program with limited funding and it is essential the Commission moves quickly in establishing the EBB Program and approving the participating providers. While the Commission declines to establish a formal role for states in the approval of those non-ETC providers, the Commission recognizes the states' interest in knowing the providers who are or will be providing the supported broadband service in their jurisdiction and thus will make publicly available the names of approved providers in each state, along with other information related to the Commission approvals.

22. *Automatic Approval Process for Providers with Existing Support Programs.* The Commission adopts an automatic approval process consistent with the CAA to enable non-ETC broadband providers with ''an established program as of April 1, 2020, that is widely available and offers internet service offerings to eligible households and maintains verification processes that are sufficient to avoid fraud, waste, and abuse'' to be automatically approved upon the filing of information meeting the criteria. Any non-ETC broadband provider seeking to qualify for such automatic approval must file an application describing: (1) The jurisdiction in which it plans to participate, (2) the service areas in which the provider has the authority, if needed, to operate in each state, but has not been designated an eligible telecommunications carrier, and (3) a description, supported by documentation, of the established EBB Program with which the provider seeks to qualify for automatic admission to the EBB Program.

23. *Established Program as of April 1, 2020.* To facilitate provider participation in the EBB Program, the Commission adopts a broad interpretation of what constitutes an ''established program'' that is ''widely available.'' The Commission finds that this requirement encompasses any eligible broadband provider that maintains an existing program that was made available by April 1, 2020 to subscribers meeting at least one of the criteria in the CAA's definition of an eligible household. Specifically, providers offering broadband subscribers discounted rates based on criteria such as low-income, loss of income, participation in Federal, state, or local assistance programs, or other means-tested eligibility criteria qualify for this automatic approval process. Additionally, providers that made commitments to keep subscribers connected during the pandemic and offered widely available bill forbearance or forgiveness programs beginning no later than April 1, 2020, and continuing through the end of this EBB Program, will be eligible for automatic approval. The Commission finds that providing automatic approval for providers that actively offer targeted low-income programs or programs in which providers otherwise engaged in systematic and ongoing billing practices, like forbearance or forgiveness, that actively reduced costs for struggling subscribers is consistent with the CAA's requirements. These actions reduced the financial burden on struggling households consistent with the Congressional intent of the EBB Program. The principal consideration in determining an ''established program'' for automatic approval is whether subscribers receive or were eligible to receive a financial benefit through either reduced rates or rate forbearance.

24. Consistent with such a broad interpretation, the Commission finds that a program is ''widely established'' when it was offered to subscribers in a substantial portion of the service provider's service area in a particular state. The Commission declines to adopt an interpretation that a program must be offered throughout the provider's national or multi-state service territory to be widely available. The Commission finds support in the record that many considerations factor into offering such programs that are not consistent across jurisdictions, such as state and local privacy laws, access to eligibility information, broadband carrier requirements, or the lack of consistent assistance programs. The Commission believes Congress's use of ''widely available'' in lieu of more sweeping alternatives expresses the intent to have this term apply to service offerings made publicly available even if the existing program was not available throughout a provider's entire service area. Further, the public interest favors an interpretation of this requirement that broadly defines the type of qualifying programs, supports expeditious entry where possible and in turn makes EBB Program support available as quickly as possible.

25. *Required Verification Processes.* The CAA also requires that providers seeking automatic approval to participate in the EBB Program have established programs that maintain verification processes that are ''sufficient to avoid fraud, waste, and abuse.'' The Commission finds that applying this requirement in a forward-looking manner strikes the appropriate balance between responsible stewardship of the funds and ensuring broad provider participation. Providers that have been offering a broadband program for eligible households have generally foregone collecting revenue they might otherwise have assessed from participating subscribers. Those providers therefore already have incentive to prevent enrollment in their programs by ineligible households. Providers submitting applications for automatic approval must describe only the established program and participation requirements to meet the approval criteria.

26. Providers that receive automatic approval to participate in the EBB Program will use the Lifeline National Verifier and NLAD to verify household eligibility or their own alternative household eligibility verification processes, or the combination of both before seeking reimbursement. Even if a provider has its own existing broadband program for determining eligible households, it may decide to use the National Verifier for some or all applications to the EBB Program, although it is not required to do so. The Commission finds that permitting automatically approved providers to use USAC's eligibility determination systems in a manner consistent with the CAA as described in the following further bolsters program protections against waste, fraud, and abuse.

27. *Timing of Approvals.* Providers that file applications certifying to and making necessary demonstrations for the criteria outlined in the document will receive approval automatically upon filing once the WCB confirms all required information was submitted. The Commission agrees with commenters in the record who argue the intent of Congress was to create an automatic presumption of approval for providers with existing support programs. Thus, the Commission delegates to the WCB the authority to create and administer an application process that will automatically approve provider applications meeting the

criteria described in the document. Additionally, once approved, all providers must file with USAC an election to participate in the EBB Program to gain access to USAC systems.

28. *Expedited Review Process for Non-ETC Providers.* The Commission adopts an expedited review process for non-ETC providers that do not qualify for automatic application processing and are not affiliated with an ETC in the same jurisdiction. Such providers must file an application for expedited review to receive approval from the WCB to participate in the EBB Program. As proposed in the *Public Notice,* DA 21–6, each non-ETC broadband provider seeking to participate must file an application describing: (1) The state(s) in which it plans to participate, (2) the service areas in which the provider has the authority, if needed, to operate in each state but has not been designated an eligible telecommunications carrier, and (3) documentation of the provider's plan to combat waste, fraud, and abuse. These requirements align with the CAA's requirements for provider participation and eligibility.

29. Provider applications for review must establish a sufficient showing that the provider has met the criteria for expedited review and approval, as outlined in the following. The Commission directs the WCB to establish and administer this expedited application review process consistent with the RO.

(a) *A list of states or territories where the provider will offer EBB Program services.* A provider seeking approval must list each jurisdiction in which it seeks to be approved to offer EBB Program services. While the provider need only identify the state or territory where it plans to offer qualifying services for purposes of its submission to the WCB, providers should be prepared to identify to USAC in their election the postal ZIP code(s) or Census Block(s) where EBB Program service will be offered to obtain Service Provider Identification Number(s) (SPINs) or Study Area Codes (SACs), as necessary.

(b) *A statement identifying the jurisdiction in which the provider requires FCC approval and jurisdictions in which the provider is an existing ETC.* Providers that are designated as an ETC or affiliated with an ETC in some states or territories must submit an application and obtain WCB approval to participate in the EBB Program in states or territories where the provider is not designated as an ETC. Providers, even if already designated as an ETC in some states or territories, must seek WCB approval to offer EBB Program services in states or territories in which the provider is not designated as an ETC. Because such applications will be reviewed on either an automatic or expedited basis, the Commission does not expect such a requirement to impose a significant burden on providers. Providers without an ETC designation or unaffiliated with an ETC must certify that they are authorized to provide broadband services as of December 1, 2020.

(c) *Documentation of the provider's plan to combat waste, fraud, and abuse.* Participating provider applications must include a certification that the provider understands and complies with all statutory and regulatory obligations, including those described within the RO, as public interest conditions of offering EBB Program services. Specifically, a provider must certify that it will:

(i) Confirm a household's eligibility for the EBB Program through either the National Verifier or a Commission-approved eligibility verification process prior to seeking reimbursement for the respective subscriber;

(ii) follow all enrollment requirements and obtain all certifications as required by the EBB Program, including providing eligible households with information describing the Program's eligibility requirements, one-per-household rule, and enrollment procedures;

(iii) interact with the necessary USAC systems, including the National Verifier, NLAD, and RAD, before submitting claims for reimbursement, including performing the necessary checks to ensure the household is not receiving duplicative benefits within the EBB Program;

(iv) de-enroll from the EBB Program any household it has a reasonable basis to believe is no longer eligible to receive the benefit consistent with Program requirements;

(v) comply with the EBB Program's document retention requirements and agree to make such documentation available to the Commission or USAC, upon request or any entities (for example, auditors) operating on their behalf; and

(vi) agree to the Commission's enforcement and forfeiture authority.

30. *Timing of Approvals.* Providers that have filed an application satisfying the criteria outlined in the document will receive expedited review. The Commission declines to adopt a deemed granted date or other specific application review deadlines for the expedited review process. Providers submitting applications by the priority application deadline will receive a determination prior to the start of the EBB Program. Accordingly, the Commission believes specific application review deadlines are unnecessary. The Commission delegates to the WCB the authority to create and administer an application review process that will expeditiously consider provider applications meeting the criteria described in the document. Additionally, all approved providers must file an election with USAC to participate in the EBB Program.

31. *Conditions and Requirements for Participating Providers.* The Commission finds there is authority within the CAA to require participating providers to offer the EBB Program benefit throughout the provider's approved service area. Additionally, the Commission finds that use of existing USAC databases is the most efficient way to begin the program quickly while ensuring adequate safeguards to prevent waste, fraud, and abuse. Accordingly, the Commission authorizes USAC to make available the appropriate databases to administer the EBB Program including the National Verifier, NLAD, RAD, and LCS. The Commission directs USAC to take the appropriate actions to update, modify, or create the necessary USAC systems to administer the EBB Program in line with the Commission's direction in the RO. The Commission further delegates authority to the WCB and the Office of Managing Director () to supervise and coordinate with USAC all actions necessary to make USAC databases and systems available for the EBB Program.

32. *Public Interest Conditions of Approvals.* The Commission adopts its proposal to require providers to offer the EBB Program discount on at least one service offering across all of its approved service areas in each of the states in which it is approved to participate. The Commission finds that such an approach is consistent with the CAA's requirements regarding the establishment of the EBB Program to reimburse providers for discounts provided to subscribers and supports the public interest in ensuring subscribers have access to the EBB Program. Further, the CAA grants the authority to the Commission to determine whether a provider meets the requirements to participate in the EBB Program. The Commission agrees with commenters that providers should not have to extend service offerings into areas where they currently do not exist and should not be mandated to offer a certain quality of service for the reasons further explained in the following. Requiring providers to expand or

otherwise deploy service offerings or existing programs into areas where they currently do not exist increases provider burdens and delays implementation for providers seeking to quickly offer EBB Program services. Approved providers must offer at least one EBB Program-reimbursed service to each of its eligible households within its service area. However, the Commission also encourages participating providers to make EBB Program support available for all its service offerings for eligible households. Additionally, pursuant to the CAA, participating providers must not deny an eligible household the ability to participate in the EBB Program based on any past or present arrearages with that provider, may not require an eligible household to pay an early termination fee if the household enters into a contract for its EBB Program-supported service and later terminates that contract, and may not subject EBB Program-supported service to a mandatory waiting period based on a household having previously received service from that provider.

33. *Notice to Consumers.* Providers also play an important role in ensuring that their customers are informed about the EBB Program at the point of application and enrollment. Providers will have a direct relationship with their customers, and as such, have a responsibility to ensure that these customers have the information they need to make an informed decision about the broadband service product they subscribe to supported by the EBB Program. Accordingly, the Commission requires participating providers to collect and retain documentation demonstrating that, prior to enrolling an existing subscriber in the EBB Program, the provider clearly disclosed to the household that the EBB Program is a government program that reduces the customer's broadband internet access service bill, is temporary in nature, that the household will be subject to the provider's undiscounted rates and general terms and conditions at the end of the program if they continue to receive service, that the household may obtain broadband service supported by the EBB Program from any participating provider of their choosing, and that the household may transfer their EBB Program benefit to another provider at any time. The provider must also retain documentation demonstrating that, having received such disclosures, the household provided affirmative consent to applying their EBB Program benefit to the service received from the EBB Program provider. The Commission believes that this disclosure and consent process will help ensure that low-income households are aware of their choices in the EBB Program without creating overly burdensome application requirements for those households.

34. *Use of the National Verifier, NLAD, RAD and other USAC databases.* The Commission finds that, consistent with the CAA's provision allowing the Commission to use USAC's systems and services to implement the EBB Program, participating providers will be required to use certain USAC systems, such as the Lifeline NLAD and RAD, for program administration and will be permitted to use the National Verifier to determine household eligibility. The Commission adopts its proposal to rely on the USAC-administered National Verifier, NLAD, RAD, LCS, and other established processes for the EBB Program, including the provider reimbursement process, call centers for program support, provider and consumer outreach, and conducting program integrity reviews. Accordingly, the Commission adopts the applicable part 54 rules that currently govern Lifeline provider interactions with these USAC systems. Specifically, the Commission applies the requirements of § 54.400(i) and (o) of the Commission's rules defining the NLAD and National Verifier; § 54.404 of the Commission's rules outlining carrier interactions with the NLAD; § 54.406 of the Commission's rules outlining enrollment agent activities and requiring registration with the RAD; § 54.410 of the Commission's rules where appropriate in requiring the use of the National Verifier for eligibility determinations; and § 54.419 of the Commission's rules allowing the use of electronic signatures. The Commission directs the WCB, and USAC as directed by the WCB, to issue any further guidance or instruction necessary to clarify the obligations of EBB Program providers when using USAC databases and the administrative process established for the EBB Program.

35. *Safe harbor for participating providers.* The CAA provides a safe harbor provision stating that the Commission may not enforce a violation of the CAA using sections 501, 502, or 503 of the Communications Act, or any rules of the Commission promulgated under such sections, if a participating provider demonstrates that it relied in good faith on information provided to such provider to make any verification required by subsection 904(b)(2) of the CAA. Section 904(b)(2) of the CAA imposes a duty on participating providers to verify whether a household is eligible to receive the service and connected devices supported by the EBB Program. The Commission establishes that this safe harbor will apply to providers who utilize the National Verifier for eligibility determinations or any alternative eligibility verification process that has received approval from the Commission consistent with the RO. The safe harbor applies to providers who act in ''good faith'' with respect to these eligibility verification processes. The Commission has extensive experience in evaluating good faith actions of regulated entities in both negotiation and cost reimbursement. In line with this experience, this safe harbor applies to participating providers for eligibility determinations who act in good faith based on information provided to them in the household eligibility and enrollment process. Good faith will be determined on the totality of circumstances surrounding the participating providers actions or statements. Participating providers that reasonably rely upon the documentation regarding eligibility determinations provided by eligible households or eligibility determinations from the National Verifier will be able to avail themselves of this statutory safe harbor for purposes of their compliance with the EBB Program rules.

36. *Application and Election Procedures.* A provider application to participate in the EBB Program will provide information used to determine whether the applicant has the legal and technical qualifications to participate in the EBB Program. An applicant must certify, under penalty of perjury, its qualifications. Non-ETC providers must certify under penalty of perjury that the information set forth in their application is true, accurate, and complete; they understand and will comply with all statutory and regulatory obligations described within the RO; and all terms and conditions and other requirements applicable to using the National Verifier, NLAD, RAD, and other USAC systems. Providing materially false information in the application will disqualify a provider from participation in the EBB Program. Eligibility to participate in the EBB Program is based on an applicant's submission of required information and certifications. A potential applicant must take seriously its compliance duties and responsibilities and carefully determine before filing an application that it is able to meet the obligations associated with EBB Program support. An applicant's filing and subsequent approval does not guarantee the applicant will receive EBB Program reimbursement. Each participating provider must file all

required forms, information, and certifications with the Commission and USAC to receive reimbursement.

37. A non-ETC provider seeking to participate in the EBB Program must file the appropriate application, whether it is eligible for expedited or automatic approval, electronically, whether filing for automated or expedited approval, through the process announced by the WCB following the adoption of the RO. An applicant provider bears full responsibility for submitting an accurate, complete, and timely application, and should thoroughly review the EBB Program participating provider requirements, in addition to any subsequent guidance, to ensure all required information is included in its application. An applicant provider should be cognizant that submitting an application (and any amendments thereto) constitutes a representation by the certifying official that he or she is an authorized representative of the applicant, that he or she has read the appropriate instructions and certifications, and that the contents of the application, its certifications, and any attachments are true and correct. Submitting a false certification to the Commission may result in penalties, including monetary forfeitures, license forfeitures, and ineligibility to participate in future Commission auctions or competitions, as well as criminal prosecution and/or liability under the False Claims Act.

38. *Household Eligibility—Emergency Broadband Benefit Program Eligible Households.* The CAA directs that a household will qualify for the EBB Program if at least one member of the household: (1) Meets the qualifications for participation in the Lifeline program; (2) has applied for and been approved to receive benefits under the free and reduced price lunch program under the Richard B. Russell National School Lunch Act or the school breakfast program under section 4 of the Child Nutrition Act of 1966; (3) has experienced a substantial loss of income since February 29, 2020 that is documented by layoff or furlough notice, application for unemployment insurance benefits, or similar documentation or that is otherwise verifiable through the National Verifier or the NLAD; (4) has received a Federal Pell Grant under section 401 of the Higher Education Act of 1965 in the current award year; or (5) meets the eligibility criteria for a participating provider's existing low-income or COVID–19 program, subject to approval by the Commission and any other requirements deemed by the Commission to be necessary in the public interest. A household is eligible for the EBB Program regardless of whether any member of the household already receives a Lifeline benefit. Further, a household is eligible for the EBB Program ''regardless of whether any member of the household has any past or present arrearages with a broadband provider.''

39. While the CAA provides a definition for ''eligible household,'' it does not define ''household'' itself, and the *Public Notice,* DA 21–6, sought comment on using the definition of ''household'' provided in [the] Lifeline rules for purposes of administering the EBB Program. The Lifeline rules define ''household'' as:

> any individual or group of individuals who are living together at the same address as one economic unit. A household may include related and unrelated persons. An ''economic unit'' consists of all adult individuals contributing to and sharing in the income and expenses of a household. An adult is any person eighteen years or older. If an adult has no or minimal income, and lives with someone who provides financial support to him/her, both people shall be considered part of the same household. Children under the age of eighteen living with their parents or guardians are considered to be part of the same household as their parents or guardians.

The record contains broad consensus supporting the proposal to use Lifeline's definition of household, and the Commission adopts this proposal. Other commenters agreed, generally, without reference to the Lifeline definition, that multiple people should be able to receive the EBB Program benefit at a single address, so long as the people were part of different households, similar to Lifeline's definition of a household. Some commenters disagree with the Commission proposal to permit one benefit per household, noting that often times households will have multiple people requiring access to quality broadband and devices, and each may need a benefit even though they are part of the same household. While the Commission is cognizant of the varying needs of households, it read the CAA to allow only a single benefit per household. As a result, the Commission will use the Lifeline program's definition of household and limit to each economic unit a single monthly Emergency Broadband Benefit and single connected device reimbursement. To help applicants determine if there is more than one household at an address, the Commission made available for the EBB Program a Household Worksheet to confirm whether an applicant is part of an independent economic household from other existing EBB Program subscribers. For providers conducting eligibility determinations pursuant to an approved alternative verification process, the Commission requires that such processes include measures to confirm that a household, under the definition the Commission adopts within, is not receiving more than one EBB Program benefit. The Commission also directs USAC to conduct periodic program integrity reviews to confirm that EBB Program subscribers located at the same address are in compliance with these requirements.

40. Commenters also argue the EBB Program should support broadband provided to multiple dwelling units at a single address, such as senior and student living, mobile home parks, apartment buildings, and Federal housing units, that receive service as part of a bulk billing arrangement where the households ''are not directly billed for services by their internet service provider, but instead pay a monthly fee for broadband services to their landlord.'' Similarly, there may be ''entities such as school districts, health care providers, assisted living or nursing facilities, and local governments who purchase service 'in bulk' for eligible households.'' The Commission concludes on balance to make available the Emergency Broadband Benefit available in these arrangements as long as the provider is approved in the EBB Program and the household is eligible under the statute. These eligible households are otherwise at risk of missing out on broadband services supported by the EBB Program because they may not be directly billed by the participating provider and may not have a typical relationship with the participating provider. As a result, the Commission believes that including support in the EBB Program for these eligible households will increase the number of struggling households that are able to benefit from the EBB Program. In situations where the support is passed through as a discount off of the monthly price paid by the eligible household, the eligible household must provide consent to the bulk purchaser/aggregator or participating provider to apply their EBB Program benefit to that service, and the participating provider must retain documentation of such consent. The participating provider claiming reimbursement for the service provided under the bulk arrangement must retain documentation demonstrating that the amount claimed by the provider from the EBB Program is fully passed through to the eligible household as a discount

off of the monthly price that the eligible household otherwise would have paid directly to the bulk purchaser. To ensure compliance with these requirements, the Commission requires participating providers offering service through such bulk billing arrangements to retain documentation demonstrating the identity of the entity or entities through which the discount was passed and the eligible households who received the subsidized service. As an example, if a bulk purchaser typically provides eligible households broadband service for $30 a month, each eligible household that receives such service must provide consent to the bulk purchaser or participating provider that the participating provider can seek reimbursement from the EBB Program for the $30 a month service. The participating provider would need to retain documentation of such consent, as well as documentation that the $30 that the participating provider is seeking reimbursement for will be fully passed through to the eligible household. As a result of the discount, the bulk purchaser would be paying $30 less to the participating provider, and the eligible household would be receiving free broadband service and not paying anything to the bulk purchaser. In cases where the household does not pay a fee for the service, either to the provider or a bulk purchaser/aggregator, but the fee is paid by another entity, the service cannot be claimed for EBB Program support.

41. The *Public Notice,* DA 21–6, sought comment on whether there should be a limitation on the number of benefits per address regardless of the number of households. The Commission concludes that the Commission will not impose any limitations inconsistent with the Lifeline definition of a ''household.'' The Commission also sought comments on whether additional enrollments at a single address require a separate, more rigorous verification process. Some commenters cautioned against using a separate process, and the Commission finds that the Household Worksheet as used in Lifeline will help protect against duplicate benefits, while not being overly burdensome to applicants. The *Public Notice,* DA 21–6, also sought comment on whether an applicant should certify that no other person in the economic household is receiving a benefit. The Commission finds that the Household Worksheet requires an applicant to confirm their understanding of the one-per-household rule and that the person will lose their benefit if they break the rule, and the Commission will not need any further certification from an EBB Program subscriber regarding more than one benefit at a household. The Commission further directs USAC to apply its existing periodic Lifeline program integrity reviews for addresses with an unusually high number of subscribers to addresses enrolled in the EBB Program as well.

42. The WCB also sought comment on whether the EBB Program should adopt the same NLAD processes used for Lifeline. After consideration of the record, the Commission concludes that the Commission should use the NLAD for a variety of functions for the EBB Program. The CAA, for example, contemplates the use of the NLAD by participating providers for purposes of determining whether a household is an eligible household. The *Public Notice,* DA 21–6, sought comment on a proposal to require all participating providers to track enrollments of eligible households in the EBB Program in the NLAD to prevent duplicative support. There was broad support in the record supporting the proposal, and the Commission adopts it. Further, the Commission finds that all providers, including those that use an approved alternative verification process or verify eligibility via a school as discussed in the following, must enroll their subscribers in the NLAD prior to claiming reimbursement for those subscribers, to prevent duplicative support between providers.

43. Finally, the Commission observes that households are eligible to participate in both the EBB Program and the Lifeline program, either on the same or different services, and the Commission directs USAC to enable the NLAD to allow an eligible household to have separate subscriber IDs for the EBB Program and Lifeline and to associate such subscriber IDs with a respective Lifeline provider or Emergency Broadband Benefit provider, as applicable. If a household is enrolled only in the Lifeline program, then it will only have a Lifeline subscriber ID and be associated with a Lifeline provider. If a household is enrolled only in the EBB Program, then it will only have an EBB Program subscriber ID and be associated with an EBB Program provider. If a household is enrolled in both the Lifeline program and the EBB program, then it will have separate Lifeline and EBB Program subscriber IDs, and each of those subscriber IDs will be associated with their respective Lifeline or EBB Program provider (in some cases, a household may choose the same provider for both the Lifeline program and the EBB Program).

44. *National Verifier and NLAD Eligibility Determination.* The CAA provides that participating providers can use one of three methods to verify eligibility for the EBB Program. In the following, the Commission discusses the first method of verification, use of the National Verifier and NLAD. The CAA allows a participating provider to use the National Verifier and NLAD to confirm applicants' eligibility. The Commission finds that allowing participating providers to use the National Verifier will help to stand up the EBB Program quickly and provide administrative efficiency, while also serving as an effective tool to prevent waste, fraud, and abuse. The Commission directs USAC to make available an EBB Program consumer portal and application form leveraging the existing National Verifier infrastructure. Commenters also requested that the Commission enables a service provider portal or eligibility check application programming interface (API) so that providers can help consumers with the application process. The Commission agrees that these additional application methods would enable providers to help enroll consumers, and the Commission directs USAC to make available these other application methods as well if feasible within the overall timeframe of the EBB Program.

45. Generally, the National Verifier is a system of systems, with computer connections to state and Federal eligibility databases that can automatically check and confirm a household's eligibility electronically, followed by manual review of eligibility documentation for any applicants whose eligibility cannot be verified using an automated data source. To assist those participating providers that want the National Verifier to be a one-stop shop for determining eligibility for the EBB Program and do not to conduct their own verification processes, the Commission directs USAC to enable the National Verifier to verify three additional eligibility bases that are required by the CAA for the EBB Program: (1) Participation in free and reduced lunch program under the Richard B. Russell National School Lunch Act or the school breakfast program under section 4 of the Child Nutrition Act; (2) a substantial loss of income since February 29, 2020; and (3) receipt of a Federal Pell Grant under section 401 of the Higher Education Act of 1965 in the current award year. The CAA contemplates substantial loss of income and Federal Pell Grant participation would be verified by the National Verifier where possible, and commenters agreed with adding those

eligibility bases to the National Verifier. Commenters also suggested that participation in school breakfast or lunch should also be added to the National Verifier, and the Commission agrees. Where possible, the Commission directs USAC to enable database connections through computer matching agreements with the respective government entities for those programs. Where not possible, the Commission directs USAC, under the direction of the WCB, to allow eligible households to submit documentation so that USAC can manually process the eligibility information for inclusion in the National Verifier. The Commission delegates authority to the WCB to direct USAC in these efforts and to provide any additional interpretations of section 904 necessary for implementing use of the National Verifier for the EBB Program. Unless and until such database connections have been enabled, USAC will verify program eligibility based on manual documentation review, consistent with the guidelines discussed in the following.

46. Where the National Verifier cannot verify eligibility through any automated data sources, the Commission delegates to the WCB to direct USAC to establish documentation criteria for the three added eligibility programs. While the Consolidated Appropriations Act identified a few types of documentation to demonstrate income loss, such as ''layoff or furlough notice, application for unemployment benefits, or similar documentation,'' the Commission sought comment on other types of documentation. Some commenters argued that other documentation for substantial loss of income should be construed broadly, or that the Commission has kept in mind the widespread loss of income. Consistent with the Commission's clarification of ''substantial loss of income since February 29, 2020,'' discussed in the following, any documentation must clearly show loss of a job, including due to a furlough, that began after February 29, 2020, however documented, as well as the household's annual income for 2020. In addition, many commenters suggested acceptable documentation for receipt of a Pell Grant under section 904(a)(6)(D) of the CAA, including: (1) Written or electronic confirmation from a student's Institution of Higher Education that the student has received a Pell Grant for the current award year; (2) a student's official financial aid award letter documenting the amount of a student's Pell Grant award received for the current year; (3) a copy of a student's paid invoice that clearly documents the student's receipt of a Pell Grant during the current award year; and (4) a copy of a student's Student Aid Report that clearly documents the student's receipt of a Pell Grant during the current award year. USAC should consider these documents when establishing documentation criteria for receipt of a Pell Grant.

47. The CAA allows that current Lifeline enrollees are automatically eligible for the EBB Program based on their Lifeline eligibility. Many commenters suggested that customers already enrolled in Lifeline should not have to also apply for the EBB Program. The Commission finds that current Lifeline households will not need to apply for the EBB Program or submit new eligibility documentation if they are already enrolled in NLAD. Current Lifeline enrollees, however, must still opt-in or affirmatively request enrollment in the EBB Program. As explained in the document, providers must collect and retain documentation demonstrating that, prior to enrolling an existing Lifeline household in the EBB Program, the provider made clear disclosures regarding the EBB Program benefit and the consumer's choices within the EBB Program, and the household provided affirmative consent to applying their Emergency Broadband Benefit to the service received from the EBB Program provider.

48. In the Lifeline program, potential households are required to provide the last four digits of a Social Security Number to enroll in National Verifier and NLAD to verify subscriber identity. Some commenters, however, argue that the CAA does not require a Social Security Number for enrollment in the EBB Program, and that if the Commission imposes a Social Security Number requirement, many of the neediest households may not be able to enroll because they may not have a Social Security Number, may have difficulty accessing data, or fear providing a Social Security Number. Commenters suggested alternative forms of identification instead of a Social Security Number, such as an Individual Taxpayer Identification Number (ITIN), Government ID, current utility bill, or current employment photo identification badge. While the Commission permits a consumer to use the last four digits of a Social Security Number during enrollment, the Commission was persuaded that accepting only a Social Security Number may prevent eligible households from enrolling in the EBB Program. Applicants who choose not to provide the last four digits of their Social Security Number or cannot be verified using a Social Security Number may verify their identity using a variety of other types of identity documentation, including a government-issued ID, passport, driver's license, or Individual Taxpayer Identification Number documentation. The Commission directs USAC to work with the WCB to establish approval criteria for acceptable identity documentation. In developing that criteria, USAC should consider the methods used to verify identity by providers with existing low-income programs.

49. The *Public Notice,* DA 21–6, proposed that eligible households will be required to interact directly with National Verifier as is currently required for the Lifeline benefit, and many commenters supported this proposal. The Commission adopts this proposal and will require households to interact directly with National Verifier. Some commenters suggested that the Commission permit service providers to submit verification requests through the National Verifier on behalf of households even if the households consumers are not physically present with the service provider, while others were concerned that consumers may not be able to access National Verifier as they do not have broadband access, and places such as libraries or community centers that typically offer broadband access are closed or operating in a limited capacity due to the pandemic. Although allowing service providers to remotely submit information on behalf of consumers may benefit some consumers, the Commission finds that the risk to program integrity and potential for waste, fraud, and abuse outweighs the benefit. Further, households that do not have internet access to apply electronically through the National Verifier may still apply for the EBB Program using a paper application. In addition, verification through the National Verifier is not the only way for households to get verified in the EBB Program, as service providers may have their own approved alternative verification processes to enroll households, while other households may be qualified by a provider through verification with a school. Given these alternatives, the Commission thought that permitting providers to sign up consumers remotely was necessary.

50. The CAA permits households with members who qualify for free and reduced-price school lunch or the school breakfast program to enroll in the EBB Program. As a result, the Commission permits qualifying

households to apply for the EBB Program and will have USAC enable the National Verifier to approve the household based on participation in free and reduced lunch program or the school breakfast program. In the *Public Notice,* DA 21–6, the WCB sought comment on the reduced or free school breakfast or lunch eligibility from section 904(a)(6)(B) of the CAA and how to treat households with students enrolled in the EBB Program in schools or school districts that participate in the USDA Community Eligibility Provision. Participation in the Community Eligibility Provision allows the nation's highest-poverty schools and school districts to serve breakfast and lunch at no cost to all enrolled students without needing to collect individual household applications. Thus, households with a student enrolled in a school or school district participating in the Community Eligibility Provision will not have ''applied for and been approved to receive'' school lunch or breakfast programs but are still beneficiaries of these programs. Many commenters support that households with children enrolled in largely low-income schools or school districts that participate in the Community Eligibility Provision should be eligible for the emergency broadband benefit under section 904(a)(6)(B) of the CAA despite not individually applying for assistance. The Commission agrees with these commenters.

51. Some commenters argue that accepting participation in the Community Eligibility Provision would be overinclusive. On balance, the Commission finds that the risk of including otherwise ineligible households is outweighed by the importance of making the EBB Program accessible and removing barriers to participation. Indeed, because the schools that participate in the Community Eligibility Provision are the among the highest-poverty schools in the nation, the Commission believes that including households with students that attend those schools efficiently targets low-income households and excluding such schools would counterintuitively effectively remove the National School Lunch Program as a qualifying program for households in largely low-income schools and school districts. The Commission also recognizes that allowing use of the Community Eligibility Provision as a qualifying program limits disclosure to less sensitive information of households. While the CAA does not provide a specific time frame for when the member of the household should have been approved for benefits under the free and reduced price lunch or breakfast programs, the California Emerging Technology Fund proposed that the Commission should allow proof of enrollment in these programs for either the 2019–2020 and 2020–2021 school year, given that many schools have been closed since mid-March 2020 due to the pandemic and students may not be enrolled in the programs in the current school year. The Commission agrees with this proposal. The Commission therefore accepts for eligibility determination purposes a household's confirmation that the household has dependent children who participated or are participating in the Community Eligibility Provision school breakfast or free and reduced-price school lunch program in the 2019–2020 or 2020–2021 school year. The Commission directs USAC to develop a process for such eligibility determinations that has the capability to, after a household provides the name of a dependent child's school, automatically check for CEP participation against the nationwide lists maintained by U.S. Department of Agriculture and/or the Food Research & Action Center. The Commission also directs USAC to conduct program integrity reviews of a sample of households who enrolled in the EBB Program using this eligibility criteria to confirm EBB Program compliance.

52. The *Public Notice,* DA 21–6, also sought comment on whether a school's participation in the E-Rate program would facilitate any needed verification. The Commission receives some comments supporting the idea that a school participating in E-Rate should be sufficient to confirm household eligibility for its students' households. However, schools can participate in E-Rate even if less than 1% of its students are eligible for the National School Lunch Program. As such, the Commission did not find that a school's participation in E-Rate alone would provide any help as to the eligibility of households that have students enrolled in that school, and the Commission declines to use participation in E-Rate as a basis of eligibility for qualifying for school lunch or breakfast.

53. Households with members who have experienced a substantial loss of income are also qualified to enroll in the EBB Program according to the CAA. The WCB sought comment on how to define a ''substantial loss of income since February 29, 2020'' in section 904(a)(6)(C) of the CAA, and whether households with an income above a certain level should be excluded from the EBB Program. Although the Commission receives comments that the Commission should clearly define ''substantial loss of income,'' only a few commenters provided criteria for the Commission to consider. Consistent with the requirements of the CAA, the Commission clarifies that a ''substantial loss of income'' includes the loss of a job, including a furlough, that is documented by a layoff or furlough notice, application for unemployment insurance benefits, or similar documentation. The Commission permits households with such members to enroll in the EBB Program through the National Verifier. To target eligibility to households most in need, the Commission agrees with commenters that the Commission imposes a household income limitation, and consistent with the criteria established by the Centers for Disease Control to halt evictions, a household that has suffered a job loss must not have had an income in 2020 greater than $99,000 for single-filers and $198,000 for joint filers to be eligible for the EBB Program.

54. The CAA also permits eligibility into the EBB Program if a member of a household has received a Federal Pell Grant under Section 401 of the Higher Education Act of 1965 in the current award year. Commenters supported and welcomed the inclusion of receipt a Pell Grant as an eligibility basis for the EBB Program. USTelecom has asked for clarification on what constitutes a household for purposes of a Pell Grant, given that students that are awarded Pell Grants are typically living away from parents, yet that student may be dependent on parental support. The Commission clarifies that consistent with the EBB Program's adoption of the Lifeline definition of ''household,'' people are part of the same household if they share income and expenses and live at the same address. If the recipient of a Pell Grant lives at a separate address from the recipient's parents, the recipient and the family are separate households, and only the recipient of the Pell Grant would be eligible for the EBB Program using Pell Grant eligibility.

55. The CAA also allows into the EBB Program a household where at least one member meets the eligibility criteria for a participating provider's existing low-income or COVID–19 program. For eligibility under this provision, commenters suggested that providers should be able to continue to operate the EBB Program with the existing eligibility requirements. Although this provision of the CAA suggests the Commission could impose other eligibility requirements on these existing programs that the Commission

considers necessary for the public interest, given the emergency nature of the EBB Program, the Commission declines to modify the programmatic or income eligibility requirements of any provider's existing low-income or COVID–19 program for purposes of eligibility in the EBB Program. Some commenters suggested that the Commission work with providers to set a baseline eligibility for the provider's existing low-income or COVID–19 program. The Commission similarly believes imposing baseline criteria on all existing low-income or COVID–19 programs would be disruptive to those programs and cause undue burden on the providers at a time when it is essential those programs continue to operate efficiently. Finally, consistent with the CAA's allowance that a broadband provider that had an established a low-income or COVID–19 program as of April 1, 2020 shall be automatically approved as a participating provider, and to ensure that such eligibility determinations are made pursuant to well-established verification mechanisms, the Commission finds that a participating provider's existing low-income or COVID–19 program must have been available as of April 1, 2020, and any eligibility criteria for such programs must have been established as of April 1, 2020, for use of that program as a qualifying program under section 904(a)(6)(E) of the CAA.

56. Some commenters suggested that although the Commission does not allow Lifeline applicants to self-certify, the Commission should allow EBB Program applicants to self-certify given the emergency nature of the EBB Program. While the Commission recognizes that self-certification could in some circumstances lessen the burden on some households, the Commission declines to allow self-certification. Self-certification presents a sizable risk of waste fraud and abuse in the EBB Program. Further, the Commission finds the CAA contemplates documentation and verification to confirm eligibility and permitting a household to enroll in the EBB Program while only self-certifying to eligibility would run contrary to these statutory requirements. And given the many bases of eligibility through which a household is able to enroll in the EBB Program and different avenues for verification, the Commission finds that these ample opportunities make self-certification far less urgent.

57. *Participating Provider Alternative Verification Process.* The CAA also allows a participating provider to ''rely upon an alternative verification process of the participating provider,'' subject to certain conditions. As set out by the CAA, the ''participating provider submits information as required by the Commission regarding the alternative verification process prior to seeking reimbursement,'' and the Commission has seven days after receipt of the information to notify the participating provider if the participating provider's ''alternative verification process will be sufficient to avoid waste, fraud, and abuse.''

58. The *Public Notice,* DA 21–6, sought comment on what information should be provided to the Commission concerning the alternative verification process, and the criteria the Commission should consider in determining whether a provider's alternative verification process is sufficient to avoid waste, fraud, and abuse. Some commenters suggested that the Commission create a model ''alternative verification process'' for participating providers to choose, while others suggested that the Commission automatically approve the verification processes for providers that have low-income programs that are not provided with government assistance and instead subsidized by the provider, as those providers already have strong incentives to ensure that only qualified customers take advantage of those programs. Other commenters proposed that local governments may act as the alternative verification process for providers. The Navajo Nation Telecommunications Regulatory Commission suggested that the Commission should work with providers who have worked in Indian Country to get their input as to verification, given the challenge that Lifeline has in verifying consumers in Indian Country. The Commission also received comments that any alternative verification process should be allowed to have different household eligibility definitions, but the Commission finds that it cannot expand eligibility beyond what the Consolidated Appropriations Act authorizes. The Commission notes, however, that under section 904(a)(6)(E) of the CAA, a broadband provider's eligibility criteria for their *existing* low-income or COVID–19 program may provide eligibility bases other than those explicitly listed in sections 904(a)(6)(A)–(D) of the CAA.

59. Regardless of how a provider seeks or receives authorization to participate in the EBB Program (as an ETC, as a non-ETC with expedited approval, or as a non-ETC with automatic approval), a provider must submit and receive WCB approval of its alternative verification process prior to using such a process to enroll consumers in the EBB Program. The *Public Notice,* DA 21–6, proposes that the Commission delegates to the WCB authority to review and approve (or deny) alternative verification processes, and the Commission adopts this proposal. The Commission directs the WCB to develop a process for submitting proposed alternative verification processes and to review and approve or reject such submissions within the seven days required by the CAA. For ETCs, the Commission directs such providers to submit to the WCB requests for approval describing their alternative verification process after submitting their notice of election to USAC. The ETC's request for approval of its alternative verification process must still go through the approval process required by section 904(b)(2)(B) of the CAA and be approved by the WCB before the ETC can begin providing EBB Program service. For providers seeking a non-ETC approval from the WCB, the Commission directed such providers to submit requests for approval describing their alternative verification process along with their application to participate in the EBB Program, where possible. Although the provider application to participate may be granted automatically if the provider qualifies for such a grant, the provider's request for approval of its alternative verification process must still go through the approval process required by section 904(b)(2)(B) of the CAA and be approved by the WCB before the provider can begin providing EBB Program service.

60. The Commission also agrees with commenters that non-ETCs that are automatically approved as a participating provider based on having an established low-income or COVID–19 program as of April 1, 2020 pursuant to section 904(d)(2)(B) of the CAA should also have the alternative verification processes for those programs automatically approved. The CAA not only provides an automatic approval for such providers but also deems as eligible for the EBB Program households with at least one member that meets the eligibility criteria for a participating provider's existing low-income or COVID–19 program. The Commission finds Congress' heavy reliance on these existing aid programs instructive. The Commission is persuaded that such providers have strong incentives to ensure that only qualified customers take advantage of a provider's own low-income or COVID–19 program, as these programs are currently subsidized by the provider. Any such automatically approved provider must still submit a

description of their alternative verification process to the WCB.

61. The *Public Notice,* DA 21–6, proposed to allow alternative verification methods that are at least as stringent as methods used by the National Verifier, and the Commission received comment agreeing with this proposal. To be at least as stringent as the National Verifier, information collected by participating providers in the alternative verification process should at least include the applicant's: (1) Full name, (2) phone number, (3) date of birth, (4) email address, (5) home and mailing addresses, (6) name and date of birth of the benefit qualifying person if different than applicant, (7) basis for inclusion in program (*e.g.,* SNAP, SSI, Medicaid, school lunch, Pell Grant, income, provider's existing program, etc.) and documentation supporting verification of eligibility, and (8) certifications from the household that the information included in the application is true. The provider must describe the processes it (or a third-party) uses to verify the requested preceding information, including the applicant's identity and eligibility, and as required by the CAA, the provider must explain why the provider's alternative process will be sufficient to avoid waste, fraud, and abuse. For example, Comcast requires consumers to submit an application to obtain proof of identification and establish eligibility for its internet Essentials program, which is open to individuals in a high poverty area or through participation in a government assistance program. Comcast cross-references information from the application against internal databases populated with publicly available data from government sources to confirm participation in National School Lunch Program, residence at a public housing address, or residence in high poverty area, and if eligibility cannot be verified through internal databases or based on participation in a different government program, Comcast requires documentation of proof of participation and the documentation is reviewed by a vendor. The provider must also explain how it trains its employees and agents to prevent ineligible enrollments, including enrollments based on fabricated documents. If the alternative verification process fails to include any of the preceding information in the document, the provider should explain why it thinks such information is not necessary to prevent waste, fraud, and abuse. If a provider without an established low-income program seeks approval of an alternative verification process, it must explain why it proposes to use an alternative verification process instead of the National Verifier eligibility determinations. The Commission declines to issue a model alternative verification process, and the Commission further declines to approve any of the other alternative verification processes submitted by commenters.

62. The *Public Notice,* DA 21–6, also sought comment on documentation and records providers should be required to keep complying with audit requirements. Commenters suggested that the providers should at least collect and retain documentation of the applicant's identity and eligibility criteria. The Commission requires that providers keep all documentation provided to them from the applicant used to make eligibility determinations, for as long as the applicant receives the Emergency Broadband Benefit, and also for no less than the six full calendar years following the termination of the EBB Program. For example, if a subscriber enrolls in the EBB Program through participation in the school breakfast or lunch program or the Pell Grant, retained documentation should include the name of the school and school year for which the subscriber has claimed eligibility. This requirement is similar to the document retention requirement used in the Lifeline program but is long enough to cover the statute of limitations under the False Claims Act laws for Federal wire fraud and ensures that documentation is available to confirm program compliance. Commenters also agree with the proposal in the *Public Notice,* DA 21–6, that providers identify the alternative verification process used when enrolling a household in the NLAD, and the Commission adopts that proposal. The Commission also directs USAC to conduct periodic program integrity reviews to ensure that subscribers enrolled through a provider's alternative verification process are eligible for the emergency broadband benefit.

63. *School-Based Eligibility Verification.* The CAA also allows a participating provider to rely on a school to verify eligibility under the free and reduced price school lunch or school breakfast program. The *Public Notice,* DA 21–6, proposed that a provider identify the school it relied on when enrolling a household in NLAD, and commenters agreed. The Commission also sought comment on what other information a participating provider should be required to submit or maintain. Commenters were concerned about the ability of schools to provide information about households and individuals enrolled in the EBB Program without violating data privacy and confidentiality laws. The Commission also received a comment suggesting that the Commission create a standard protective order or consent form that providers can use. One commenter was also concerned that there may be significant administrative burdens and staffing requirements placed on schools if they are required to verify students, particularly if schools have a large number of students that qualify. One commenter estimated that it could take a school district 192 hours a month to process income verification requests from service providers. The Commission shares those concerns and was sympathetic to the burdens this method could impose on schools, especially during the pandemic when so many school administrators and teachers are struggling with the challenges of safe, in-person education, supporting students in need, and distance learning. The Commission concludes that, to comply with the requirements of the CAA, for a participating provider to rely on information provided by a school when enrolling a household in the EBB Program, the participating provider must certify in NLAD that it relied on information provided by a school for eligibility verification and that it retains documentation indicating: (1) The school providing the information, (2) the program(s) that the school participates in, (3) the household that qualifies (and qualifying student(s)), (4) and the program(s) the household participates in. The Commission believes this permits access to the EBB Program for student households through the school and also minimizes the burden on the school, especially in light of the relevant privacy and consent requirements. At the same time, households with students can also verify eligibility for and enroll in the EBB Program without relying upon schools, and will be able to use on any of the qualifying criteria for eligible households set forth in the CAA. And while the Commission declines to create a standard protective order or consent form, it recognized that it may be a beneficial tool for consumers and providers, and delegate to the WCB the authority to create such a form if it is needed for the National Verifier's processes.

64. *Covered Services and Devices.* The COVID–19 pandemic continues to challenge Americans' access to and reliance on broadband connections as households try to adapt and ensure that they have the tools to succeed in their

everyday tasks, including telework, telehealth, telemedicine, and virtual learning. The CAA permits, in the EBB Program, eligible households to receive a discount off the cost of broadband service and certain connected devices, and participating providers can receive a reimbursement for such discounts during the emergency period.

65. *Services.* In describing the services eligible for EBB Program support, the CAA defines ''internet service offering'' as a broadband internet access service provided to a household, and defines ''broadband internet access service'' with the meaning given to that term in § 8.1(b) of the Commission's rules. The Consolidated Appropriations Act further requires that an internet service offering must have a ''standard rate'' in order to receive the emergency broadband benefit, and that standard rate equals the ''the monthly retail rate for the applicable tier of broadband internet access service as of December 1, 2020, excluding any taxes or other governmental fees.'' The Commission interprets this requirement to mean that an internet service offering eligible for EBB Program support must have a retail rate that was on offer as of December 1, 2020 and that, but for the application of the EBB Program discount, would have been charged to the customer on a monthly basis. The Commission interprets the CAA's reference to a ''monthly retail rate'' to exclude broadband service products that are priced based primarily on the data allowance of the product (for example, a purchase 1 GB of data for $5.00) and are sold separate from a monthly recurring service plan). This requirement also helps to focus limited funding toward more robust broadband service offerings to maximize the EBB Program's benefits for enrolled households. Additionally, the Commission clarifies that the CAA's application of the emergency broadband benefit as a discount off of the monthly retail rate charged to the subscriber means that service plans that are already offered with no fee to the end user—for example, as a result of Lifeline program support or other benefit programs—are not eligible for additional or duplicative support from the EBB Program. At the same time, the CAA does permit plans where the end result is no fee being assessed on the household *after* the application of the monthly benefit.

66. Some parties asked that the Commission require participating providers to make the emergency broadband benefit available on all of their service offerings. On balance, the Commission believes that dictating the required offerings in a temporary program will discourage participation and result in less consumer choice than would otherwise be available if it provided participating providers with more flexibility. However, the Commission notes that participating providers may apply the emergency broadband benefit to any of their eligible offerings, including promotional offerings that were available as of December 1, 2020. Specifically, pursuant to the CAA, participating providers are required to make available to eligible households a monthly discount off the standard rate for an internet service offering and associated equipment, up to $50.00 per month. For households residing on Tribal lands, the monthly discount may be up to $75.00 per month. Participating providers will receive reimbursement from the EBB Program for the discounts provided.

67. The Commission provides further clarity on the internet service offerings and associated equipment eligible for reimbursement. Internet service offering is defined as ''broadband internet access service provided by such provider to a household, offered in the same manner, and on the same terms, as described in any of such provider's offerings for broadband internet access service to such household, as on December 1, 2020.'' Accordingly, providers who participate in the EBB Program are only eligible to receive reimbursement for offerings that were available on and include the same terms as those available as of December 1, 2020. The majority of commenters do not oppose the service offering date of December 1, 2020, but some commenters explain that the December 1, 2020 date should not limit the ability of providers to offer upgrades on top of such existing service offerings to consumers. The Commission agrees and finds that participating providers may offer free enhancements of service quality elements of a discount-eligible internet service offerings but may not increase the price charged for that offering. The Commission believes the December 1, 2020 restriction is best understood as a method of avoiding arbitrage opportunities and waste in the EBB Program by allowing unscrupulous providers to take advantage of the increased subsidy available. By referring to offerings that were available prior to the enactment of the law, the CAA prevents participating providers from increasing prices above the usual market rate for their services for the purpose of claiming the maximum reimbursement amount. Interpreting that restriction to also restrict the ability of participating providers to offer free upgrades to the quality of the broadband services provided to eligible households, however, such as speed, data caps, and other non-price elements, would be contrary to the law's purpose of supporting robust modern broadband service during an unprecedented pandemic. The Commission therefore permits provider offerings that were available on and include the same terms as those available as of December 1, 2020 to include free enhancements in quality with respect to such non-price elements.

68. *Minimum Service Standards.* The Commission declines to apply minimum service standards to covered services for the EBB Program. The Commission finds that qualifying internet service offerings must include a broadband connection (as defined in section 904(a)(9) of the CAA)—fixed or mobile—that permits households to rely on these connections for the purposes essential to participating in society during the pandemic, such as telework, remote learning, and telehealth. A majority of commenters supported this approach, explaining that broadband speeds should be sufficient for telework and distance learning, and discount-eligible internet service offerings should feature speeds comparable to those offered to market-rate customers. The Commission also recognizes that Congress did not limit the discount to lower-cost broadband plans. Consumers purchasing discounted services under the EBB Program qualify for the same protections as those purchasing services at standard rates. Thus, providers that offer discounted broadband services pursuant to the EBB Program rules, either on a standalone or bundled basis, must comply with the same consumer-protection requirements that apply to the corresponding services that they offered on or before December 1, 2020. Thus, providers must disclose accurate information regarding the performance characteristics, commercial terms, and other features of their discounted broadband services to enable consumers to make informed choices regarding the purchase and use of such services.

69. Some commenters also suggested that participating providers should offer services that meet the Commission's definition of broadband at 25/3 Mbps or encourage the Commission to require high-capacity, affordable broadband service. Given the emergency nature of the EBB Program and the vital need to maximize consumer choice and benefits in a short timeframe, the Commission was not persuaded by such arguments. By administering the program within the definition of ''internet service offering,'' and permitting non-ETCs to

participate, the Commission obviates the need for lengthy service obligations and the risk of slow speeds and maintain consumer choice—allowing consumers to select offerings that work best for their household—as well as permit participating providers to serve eligible households as quickly as possible during the emergency period. The Commission further declines to apply the Lifeline program's minimum service standards to covered services for the EBB Program. The Commission recognizes that some commenters encouraged it to use Lifeline's minimum service standards or the Lifeline program itself as a starting point. Indeed, the Commission understands that low-income consumers must have access to reliable broadband connections vital for basic education, health care, remote work, disability access and public safety, but the CAA does not indicate Congressional intent that the Commission applies Lifeline's minimum service standards for the EBB Program. The Commission is supported in this decision by the measures adopted that clarify that participation in the EBB Program does not preclude the same household from participating in the Lifeline program or other aid programs offered at the state and local level as long as participants meet the requirements for such programs. Even though the EBB Program is an emergency, temporary program, it will operate concurrently with Universal Service Fund programs and other existing programs at the state and local levels so eligible consumers can choose a broadband connection that meets their connectivity needs.

70. The Commission, however, anticipates that providers that elect to participate in the EBB Program that are already designated as ETCs through their participation in other Universal Service Fund programs, particularly the Lifeline program, will draw from that experience and offer similar or upgraded broadband services. In the EBB Program, the Commission anticipates that existing ETCs will continue to offer quality and innovative services, and encouraged other broadband providers (non-ETCs) to offer service standards that promote robust broadband access to vital services.

71. *Bundled Service Offerings.* The Commission also recognizes that participating providers in the EBB Program may offer qualifying broadband service combined with other services, otherwise known as bundled service offerings (*e.g.,* voice, data, texting, associated equipment). While the CAA does not explicitly direct the Commission regarding how to handle bundled broadband service offerings, the Commission finds if such bundled service options were offered ''in the same manner, and on the same terms'' on December 1, 2020, participating providers should be able to apply the monthly discount of up to $50 per month, or up to $75 for Tribal lands, to the entire bundled service. The Commission draws this conclusion from record support that viewed such offerings as enhancing flexibility between participating providers and consumers. Also, the Commission draws from its experience with the Lifeline program that participating providers in the EBB Program, including ETCs that are already adept at applying such a discount in the Lifeline program to bundled services, offer bundled service offerings to address consumer demands outside of any Commission regulation. In contrast to the record support for permitting EBB Program reimbursement for broadband bundled services that include voice and/or text messaging, there was not similar support for permitting reimbursement for the full price of broadband bundled services that include video service. The Commission finds that permitting EBB Program reimbursement for the full price of a bundle that includes video service is not contemplated by the statute and was not necessary to ensure that consumers in the EBB Program have robust service choices, and the Commission therefore does not permit support for such bundles with video service.

72. The Commission finds that the CAA's requirement that the service offerings be offered ''in the same manner'' as they were on December 1, 2020, authorized the Commission to support both standalone broadband service offerings and broadband service offerings bundled with voice, text messaging, and/or associated equipment. For many fixed and mobile internet service offerings, it is common to offer broadband service as part of a bundle without separating out the price of the broadband component and its associated equipment. By permitting participating providers to offer broadband in those same bundles in the EBB Program, the Commission permits providers to make available internet service offerings ''in the same manner'' as they were on December 1, 2020.

73. *Associated Equipment and Other Customer Premises Equipment.* The CAA requires participating providers to make available to eligible households a monthly discount off the rate for an internet service offering *and* associated equipment, up to $50.00 per month, and on Tribal lands, the monthly discount may be up to $75 per month. In the *Public Notice,* DA 21–6, the WCB also sought comment on how to define associated equipment and whether that undefined term should include, for example, the monthly rental costs for modems and/or routers that are offered as part and parcel of an internet service offering. The record overwhelmingly supported including modems, routers, and hotspot devices and antennas, if offered as monthly rental costs or part and parcel of an internet service offering as eligible for the EBB Program monthly discount as of December 1, 2020. Combined with record support and recognizing that the CAA does not specifically define or identify any associated equipment as it relates to any particular broadband service, the Commission finds that associated equipment includes equipment necessary for the transmission functions of internet service offerings supported through the EBB Program which households may choose to receive. Commenters support the Commission's conclusion by encouraging the Commission to define the scope of eligible associated equipment ''in a technology-neutral manner'' to accommodate household choice and the different types of broadband networks. The Commission agrees that a technology-neutral approach is appropriate as long as it meets the requirements of the CAA. However, the Commission declines to include Wi-Fi extenders or repeaters as associated equipment or any other customer premises equipment that enhances or extends a broadband signal beyond a participating provider's internet service offering. First, any associated equipment that enhances or extends a broadband signal from its existing coverage area as outlined in the participating provider's internet service offering would not be offered ''in the same manner, and on the same terms'' as defined in the CAA. Second, these types of devices are typically sold as add-on options to a broadband connection or sold separately through major manufacturers and are therefore not offered as part and parcel of an internet service offering. Accordingly, Congress does not clearly allow the Commission to include these devices, and if it had intended to do so, it would have included such devices in its definition of ''connected devices.'' The Commission also notes that the ''associated equipment'' discussed in this paragraph must be billed monthly on the same terms and same manner as it would have been in an offering available on December 1, 2020. The price for such associated equipment

cannot be frontloaded. For example, if a provider has a $30 monthly service offering and would have offered a modem for a monthly rental of $5 for a total monthly fee of $35, the provider cannot front-load the monthly rental fee and charge $20 for four months of a modem rental in the first month in order to maximize reimbursement up to the $50 monthly discount allowed.

74. *Connected Devices.* The CAA clearly and narrowly defines a ''connected device'' eligible for a separate, one-time reimbursement as ''a laptop or desktop computer or tablet.'' In the *Public Notice,* DA 21–6, the Commission sought comment on whether the Commission should provide any further clarity regarding connected devices that are eligible for reimbursement. The CAA does not leave room for a broad interpretation of ''connected device.'' Congress explicitly declined to include mobile phones in its definition, and thus the Commission finds that the definition of a tablet does not include devices that can independently make cellular calls such as large phones or phablets.

75. Various commenters urge the Commission to fund additional end-user devices outside the scope of the CAA, including mobile phones (*i.e.,* smartphones) and portable Wi-Fi hot spots arguing that these devices are capable of supporting video conferencing platforms and other software, and limiting such devices could ''impose more financial burdens to a student.'' CTIA, for example, explained that ''mobile devices from the 4G era or later should qualify as 'tablets' under the definition'' while ''mobile phones, including feature phones and smartphones from the 3G era or earlier, should not qualify as ''tablets.'' T-Mobile explained ''that certain mobile phones that provide similar functionality as a basic tablet'' should be considered a ''connected device.'' TDI et al. proposed that devices that enable Video Relay Service or internet Protocol Captioned Telephone Service should be eligible for reimbursement. Conversely, other commenters supported the exclusion of mobile phones, with one commenter opposing the inclusion of tablets, as a connected device. Common Sense Media, in its comments, excludes cell phones from its research-based list of requirements for a robust learning experience, explaining that ''students and teachers need laptops or tablets capable of meeting the distance learning requirements of their curriculum.'' The record also indicated that, while tablets are capable of supporting video conferencing platforms and other software, commenters expressed caution that tablets may require more specific service standards or a broad interpretation. Taking into consideration the record, and the narrow and specific language in the CAA's definition of a connected device, the Commission is unable to expand the definition of connected device and concluded that the EBB Program will provide reimbursement for any connected device, defined as ''a laptop or desktop computer or tablet.''

76. The Commission next clarifies that participating providers may only receive a single reimbursement of up to $100 for one connected device per household, and the eligible household must contribute towards the cost of the connected device at least $10 but no more than $50. The *Public Notice,* DA 21–6, sought comment on whether eligible households should be able to receive more than one connected device through the EBB Program, for example, if the household changes providers. The Consolidated Appropriations Act provides that a participating provider may receive reimbursement for no more than one connected device per eligible household, but it is silent as to whether households may receive the connected device reimbursement benefit from more than one provider. Although some commenters suggested that eligible households should receive more than one connected device, the Commission finds no legal basis to do so. In order to preserve limited funds, ensure that benefits reach the greatest number of eligible households, and avoid wasteful spending, the Commission finds that households are limited to a single connected device during the EBB Program for which a provider seeks reimbursement. The Commission takes this position in order to maintain the integrity of the EBB Program—ensuring that reimbursements, and the subsequent disbursements, for a connected device are only processed for valid claims that comply with the CAA.

77. *Minimum System Requirements for Connected Devices.* In the *Public Notice,* DA 21–6, the WCB sought comment on whether the Commission should impose minimum system requirements for connected devices supported by the EBB Program. The Commission adopts its proposal that a connected device supported by the EBB Program should be expected to support video conferencing platforms and other software essential to ensure full participation in online learning, should be Wi-Fi enabled, and have video and camera functions. The record overwhelmingly supported that, at a minimum, connected devices must be able to support video conferencing and camera functionality and online learning software. Recognizing however that the ongoing COVID–19 pandemic has compounded challenges for numerous households to maintain broadband services, the Commission finds that setting minimum system requirements for connected devices could limit consumer choice and exacerbate barriers to broadband service that may have existed prior to COVID–19. While some commenters suggested specific standards the Commission should adopt for connected devices, the Commission declines to adopt such standards and instead encourage participating providers and interested stakeholders to explore other opportunities, including partnering with school districts and state and local programs that may provide funding or other avenues for access to end-user devices and equipment due to the COVID–19 pandemic. The Commission also expects that connected devices be accessible to and usable by people with disabilities.

78. *Benefits for Households on Tribal Lands.* The CAA also provides a discount up to $75 for internet service offerings to eligible households on Tribal Lands. The Commission finds that it was vital to utilize the EBB Program in an efficient way to help provide more households on Tribal lands with affordable, reliable connectivity. The Commission adopts its proposal in the *Public Notice,* DA 21–6, to use the same definition of Tribal lands as used in the Lifeline program, including certain lands near the Navajo Nation treated as Tribal lands. The Commission also allows members of households on Tribal lands to use their participation in the same Tribal programs permitted under the Lifeline program to qualify for the EBB Program, in addition to other permitted means of qualifying. The Commission also adopts its proposal to use the processes USAC has in place for identifying the location of a household residence.

79. Many commenters supported the Commission's proposal to use the Lifeline program's definition of Tribal lands as well as existing USAC processes for verifying eligibility of households on Tribal lands. The Commission finds this to be the best and most efficient approach for households and participating providers in the EBB Program because it will continue to help the Commission quickly address existing impediments to connectivity on Tribal lands and allow providers to offer EBB Program benefits to a wide-range of households that will, in turn, increase

the number of subscribers of broadband internet access service. The Commission therefore declines to use any other definitions suggested by commenters that would expand upon the established definitions in the Commission Lifeline rules and would accordingly prevent USAC from using the existing Lifeline informational tools to identify whether an applicant resides on Tribal lands.

80. With respect to other accommodations to ensure eligible households on Tribal lands are able to participate in the EBB Program, some commenters encouraged a flexible approach that would use additional methods other than USAC databases (*i.e.,* National Verifier, NLAD) to verify addresses. The Commission disagrees with such an approach and finds that USAC's databases, especially its mapping tool in the National Verifier, offered a sufficiently comprehensive process for identifying residences on Tribal lands for the EBB Program. Additionally, USAC provides multiple other methods for applicants and providers to submit residential location data to confirm whether an applicant resides on Tribal lands. Expanding or otherwise modifying the USAC systems to accommodate new methods would also require additional time. To facilitate timely and efficient processing of participating providers and eligible households on Tribal lands, the Commission finds the benefits of using USAC's existing mapping tool and other address verification methods far outweighs commenters' concerns to this action and also eliminates time-consuming or wasteful administrative processes. The Commission directs USAC to make available its existing comprehensive address verification methods to applicants and providers in the EBB Program, including providers using their own alternative verification process pursuant to the CAA.

81. *Budget and Reimbursement—Emergency Broadband Connectivity Fund and Reimbursement for the Emergency Broadband Benefit.* The EBB Program is funded through the $3.2 billion Emergency Broadband Connectivity Fund in the CAA, and does not rely on contributions to the Universal Service Fund. The CAA further provides that no more than 2% of the Emergency Broadband Connectivity Fund (Fund) or $64 million is to be used for the administration of the EBB Program, and funding for the EBB Program will remain available until the Fund is expended or six months after the end of the Emergency Period as defined in the CAA, whichever comes first. The Commission recognizes that while Congress allocated that a portion of the Fund be used for the administration of the EBB Program, the primary purpose of the Fund is to provide support for the households enrolled in the program. To that end, the Commission directs USAC, in coordination with the OMD, to re-evaluate no later than three months after the start of the EBB Program to determine if there are any of its administrative funds that can be used to fund reimbursements for service and connected device claims. Moreover, the Commission directs USAC to continue to regularly report to the OMD its projected budget for its administration of the EBB Program. Based on USAC's initial estimates provided to the OMD, USAC's EBB Program administrative costs will be under the 2 percent cap, which includes costs associated with business process outsourcing, project management, IT professional fees, and call center activities. Pursuant to the terms of the Memorandum of Understanding between USAC and the Commission, USAC and the Commission will not incur administrative costs beyond the $64 million cap.

82. The emergency nature of the EBB Program requires a prompt processing of claims that ensures participating providers, including those who currently have no relationship with USAC, receive reimbursement for valid claims for services and connected devices provided to eligible households. To ensure that there is a mechanism for disbursing funds to providers that balances the need to guard against waste, fraud, and abuse in the EBB Program with the need to reimburse valid claims quickly and efficiently, the Commission adopts the following requirements for the reimbursement process.

83. *Lifeline Claims System.* The Commission recognizes the importance of using existing, functional systems such as the NLAD and the Lifeline Claims System to ensure that EBB Program providers can submit timely reimbursement claims yet are not claiming support for the same household. The NLAD plays a vital role in ensuring that providers can only claim subscribers enrolled in NLAD on the first of each month and the information captured in NLAD serves as the basis for claims in the Lifeline Claims System. As with Lifeline, the Commission requires providers in the EBB Program to transmit to the NLAD the required information necessary to uniquely identify households. To help maintain the integrity of the EBB Program and to facilitate efficient processing of reimbursement claims, the Commission adopts the proposal in the *Public Notice,* DA 21–6, to use USAC's Lifeline Claims System to reimburse providers for the provision of covered devices, services and associated equipment to eligible households. The Lifeline Claims System is the online filing system hosted by USAC that service providers use to submit claims for reimbursement for service they provide to Lifeline customers. In the Lifeline program, providers are required to submit a reimbursement request through the Lifeline Claims System based on the number of subscribers enrolled in the NLAD on a specific date each month, called a snapshot date. Providers are instructed to review the snapshot report from NLAD for all of the provider's households in NLAD as of that date, validate the households for which they wish to seek reimbursement, or indicate a reason for not claiming reimbursement for other households on the report, and review, correct, and certify the requested reimbursement amount. The Commission employs the same process for reimbursing providers in the EBB Program. The Commission directs USAC to make the Lifeline Claims System available to EBB Program providers, once they are approved to participate in the program, subject to USAC system access requirements.

84. Commenters generally support the WCB's proposal to use the Lifeline Claims System for managing reimbursements, stating that the use of an existing USAC platform will avoid unnecessary delays that would result from developing a new reimbursement platform for use in the EBB Program. Some noted the importance of issuing reimbursements quickly, particularly for smaller providers that may find it financially difficult to wait months for reimbursement. The Information Technology and Innovation Foundation (ITIF) contends that using the Lifeline Claims System for managing reimbursements will ''expedite[ ] financial recovery by providers to ensure stability while also leveraging a tested, already established system with Lifeline.'' Other commenters, such as the National Consumer Law Center and the United Church of Christ OC, Inc. (NCLC and UCC) noted that using the Lifeline Claims System will provide integrity to the EBB Program by helping to ensure that the funds are directed to providers and consumers for eligible services and connected devices.

85. *Uniform snapshot date.* The disbursement of EBB Program claims will be based on the number of Program subscribers enrolled with a provider in the NLAD as of the first of each month. The first of the month will serve as the

uniform snapshot date. When establishing the uniform snapshot date for Lifeline, the Commission finds that the practice would (1) reduce the risk that the EBB Program would reimburse multiple providers for serving the same customer in a month; (2) assist with the adoption of uniform audit procedures; and (3) aid in the calculation of support based on the number of subscribers that a service provider has listed in NLAD. Commenters also recognized the value of establishing a uniform snapshot date for use in the EBB Program. For example, T-Mobile stated that applying the uniform snapshot date will simplify the enrollment and reimbursement process in the EBB Program as it currently does for Lifeline. The Commission agrees that the uniform snapshot date brings efficiencies to the reimbursement process by restricting support to those eligible subscribers that are enrolled in NLAD on the first of each month and removing any uncertainty that would come with a requirement for providers to claim subscribers on a pro-rata basis in the event households receive service for less than the full month. On the other hand, employing a method that allows for partial claims would be cumbersome to administer and would make it difficult for USAC to track disbursements from the Emergency Broadband Connectivity Fund. The Commission finds it most efficient to require providers to claim subscribers that are enrolled in NLAD as of the first of the month regardless of how many days in the month the provider was providing service to the subscriber.

86. *Program-wide use of NLAD for reimbursements.* The Commission also establishes that NLAD will be used as a tool for reimbursement calculations and duplicate checks in all states, territories and the District of Columbia, regardless of a state's NLAD opt-out status for purposes of the Lifeline Program. Uniformity in the ways providers interact with the Lifeline Claims System and other USAC systems is essential in ensuring that the EBB Program operates efficiently, which is a priority given the emergency and temporary nature of the Program. Asking USAC to develop and administer different reimbursement processes for different states would delay the implementation of this emergency program and potentially burden state administrators. Moreover, the Commission recognizes the need for non-ETC providers to quickly become familiar with the reimbursement process to ensure that claims are made correctly and to reduce the need for revisions. Having multiple reimbursement processes would further complicate the EBB Program and lead to confusion among providers who are not familiar with existing Lifeline processes, particularly in opt-out states. This uniform approach and program-wide reliance on the NLAD for the generation of the snapshot report is important in facilitating the swift processing of reimbursement claims.

87. *Certification requirements.* To submit their reimbursement claims for broadband internet access service provided to eligible households, the Commission requires participating providers to review their snapshot report and validate the eligible households for which they are requesting reimbursement. The provider shall confirm that the reimbursement amount matches the amount of the monthly service or connected device for which the participating provider is permitted to seek reimbursement and make any corrections to the amount as necessary. The Commission also requires providers to review the snapshot report and to confirm that households receiving a fully subsidized service have used the service during the relevant period. If a household has not used their service during the relevant period, then the provider shall not submit a reimbursement claim for service provided to that household until the service is used and the non-usage is cured. To add more accountability and to help ensure that only service that subscribers are using is funded through the EBB Program, the Commission requires that providers certify that their EBB Program service claims for reimbursement meet the usage requirements. To ensure that the Program is supporting broadband service that is actually being used, the Commission will not permit providers to seek reimbursement for a service month in which a household did not meet the usage requirements, even if the household meets the usage requirements in subsequent months.

88. Additionally, the Commission requires providers to make the certifications, including those set forth in the CAA when submitting a reimbursement claim. The CAA requires that in order to receive reimbursement from the Emergency Broadband Connectivity Fund, the providers shall make several certifications regarding the accuracy of their claims, compliance with the requirements of the EBB Program and various consumer protection-related provisions. Specifically, the CAA requires that providers certify that the amount for which they are seeking reimbursement from the Emergency Broadband Connectivity Fund is not more than the standard rate, and that each eligible household for which the provider is seeking reimbursement for providing internet service has not or will not be charged (1) for that offering if the standard rate for that offering is less than or equal to the amount of the EBB Program benefit for that household; or (2) more for that offering than the difference between the standard rate for that offering and the amount of the EBB Program benefit for that household. The provider is also required to certify that each eligible household for which it is seeking reimbursement will not be required to pay an early termination fee, was not after December 27, 2020, subject to a mandatory waiting period for the covered broadband internet service, and will otherwise be subject to the provider's generally applicable terms and conditions as they are applied to other customers. Moreover, providers are required to certify that each household for which they are seeking a reimbursement for a connected device has been charged more than $10 and less than $50 for the connected device. Finally, for providers that are claiming households that they determined to be eligible to enroll in the EBB Program through the alternative verification process, providers must provide a description of that verification process and certify that the process was designed to avoid waste, fraud, and abuse and has been approved by the Commission as required by section III(B) of the RO.

89. The *Public Notice,* DA 21–6, proposed that these certifications accompany each reimbursement claim, in addition to an annual certification submitted by participating providers. Commenters did not object to this certification, although some asked for additional certifications while others requested that the Commission not require certifications beyond those listed in the CAA. The Commission finds that certifications, along with the possibility of audits, are a vital tool for managing waste, fraud, and abuse. While the certifications required by the CAA address many of the Program requirements, the Commission finds that additional certifications are necessary to ensure compliance with Commission's requirements that it finds essential to help guard against waste, fraud, and abuse in the EBB Program. Accordingly, the Commission directs USAC to make any adjustments necessary to the Lifeline Claims System to ensure that providers are prompted to certify that their reimbursement claims meet the usage requirements and to

certify the statements included in section 904(b)(6) of the CAA. The Commission further directs USAC, in coordination with the WCB, to develop an annual certification for all participating providers and a process for its submission. As discussed in the following, the Commission also adopts additional certifications to accompany reimbursement claims for connected devices distributed through the EBB Program.

90. As well-established in the record, the Emergency Broadband Connectivity Fund has limited funding and the Commission must make every effort to ensure that the Commission maximizes the use of these funds to serve as many eligible households as possible, including responsibly leveraging EBB Program funding with other sources of support. To that end the Commission requires participating providers that are applying both the Lifeline discount and the Emergency Broadband Benefit to a household's supported broadband service to apply the full Lifeline discount first before calculating the reimbursement amount claimed under the EBB Program. This approach responsibly stewards limited EBB Program funding where Lifeline support is available and is consistent with the requirements of § 54.403(b) of the Commission's rules regarding the application of the Lifeline support amount.

91. *Reimbursement for Connected Devices.* EBB Program providers can also seek up to $100 reimbursement for a connected device provided to a household satisfying the requirements set forth in the RO and as long as the household has been charged more than $10 but less than $50 for the device. To facilitate the efficient review and processing of reimbursement claims for connected devices, the Commission directs USAC to modify the Lifeline Claims System to manage these claims. Because the Consolidated Appropriations Act limits the connected device reimbursement to providers who are providing the EBB Program benefit to the household, the Commission requires that claims for connected devices must be made concurrent with or after the provider's first reimbursement claim for service for that household. To ensure that a household does not receive more than one connected device for which a provider has received reimbursement from the EBB Program, providers are also required to confirm in NLAD that no reimbursement claim for a connected device has been made for that household.

92. Some commenters agreed with the proposal in the *Public Notice,* DA 21–6, to require providers to certify that the household receiving the device is an EBB Program beneficiary and that the household has been charged the required co-pay for the device. To help make the Emergency Broadband Connectivity Fund last as long as possible, Public Knowledge urged the Commission to require providers to prove the retail value of the connected device to ensure that the provider is not receiving a reimbursement that exceeds the value of the device. The Commission acknowledges the need to balance speedy and efficient processing of reimbursement claims with the need to protect the integrity of the EBB Program by ensuring the reimbursements are only processed for valid claims that comply with the requirements of this Order. To that end, to ensure the quick reimbursement of valid claims for connected devices, USAC will not be required collect and review documentation before processing a reimbursement claim. Instead, the Commission requires providers, under penalty of perjury, to certify that the connected device meets the Commission's requirements, that the reimbursement claim amount reflects the market value of the device, that the household has been charged a compliant co-pay amount, and that the connected device has been delivered to the household. Providers are instructed to retain any materials that document compliance with these requirements, including the device type (*e.g.,* laptop, tablet, mobile hotspot, modem, gateway, router, antenna, receiver, or satellite dish) and device make and model. The Commission finds that requiring certifications under penalty of perjury along with the possibility of an audit will help to encourage compliance with EBB Program requirements and reduce the incidence of improper payments.

93. *Timing of Reimbursement Claims.* The EBB Program is a limited duration program with limited funds, and it is important that the Commission is able to project accurately when those funds will run out. To this end, USAC must have actual reimbursement claims information from providers as soon as possible after each service month. USAC will use this claims information for reporting the disbursement information to the public and for creating a forecast for the projected final month of the EBB Program, both of which are discussed in the following. To ensure that this claims information is submitted to USAC by providers in a timely manner so that it can be used to administer the program efficiently, and so providers can receive timely reimbursement for the discount they provide to households, the Commission established a limited time period during which providers can submit reimbursement claims. The process for submitting a reimbursement claim will largely track the process in the Lifeline program, where a snapshot report of a provider's enrolled subscribers as of the first of the month is sent to the provider. Providers will then have until the 15th of each month, or the following business day in the event the 15th falls on a weekend or holiday, in which to submit to USAC their reimbursement claims for both service and connected device support for households captured on the snapshot report. For those providers seeking to have their reimbursement claim processed quicker, they must review and certify their reimbursement claims sooner, as established by USAC.

94. The record was clear that there is universal support for accurate and timely reporting of reimbursement information so that providers and the public can make informed decisions regarding their participation in the EBB Program. Providers can help the Commission ensure that USAC is collecting nearly real-time claims information by submitting their accurate reimbursement claims as soon as possible and within that 15-day period. Moreover, given the importance of the projection of the program's end date as it relates to the smooth administration of the end of the EBB Program, the Commission trusts that providers will do their part in ensuring that USAC has reimbursement claims information as soon as possible. The Commission also believes providers will be motivated to receive reimbursements as soon as possible. To that end, to ensure the timely filing of reimbursement claims so that USAC's projections are reliable and based on current activity in the EBB Program, the Commission finds it necessary to restrict the processing of reimbursement claims to those submitted by the deadline set for each month—either the 15th of that month or the following business day in the event that the 15th falls on a holiday or weekend. Reimbursement claims submitted after that deadline will not be processed. Therefore, providers are strongly encouraged to submit their claims as soon as possible.

95. To further support the Commission effort to track disbursements and to provide a projection for the depletion of the Fund that is based on the most accurate and up-to-date household and disbursement information, the Commission is

prohibiting providers from revising previously submitted claims associated with the provision of EBB Program services and connected devices. The Commission expects that this limitation will encourage providers to be especially cautious when reviewing reimbursement claims prior to submission to ensure accuracy. Moreover, preventing changes to prior disbursements will give the Commission, USAC, providers and households confidence in the reported disbursement amounts. Providers are required to certify to the accuracy of reimbursement claims and that the United States, the Commission, and USAC retain the right to pursue recoveries as well as take enforcement action for any claims improperly disbursed from the Fund. Additionally, to help support USAC's efforts to project the end of the EBB Program, the Commission sought participating providers' cooperation and request that they transmit to NLAD the amount they intend to claim for service and connected device support for each household they enroll in NLAD. While the reimbursement amount processed for the provider will be based on the amount contained in the provider's certified reimbursement claim submitted through the Lifeline Claims System, the information transmitted to NLAD will, in part, be relied upon for calculating the EBB Program's projected end date. The Commission encourages providers to transmit a good faith estimate of the monthly support amount for service and any device provided to the household through the EBB Program within seven days of enrolling the household in NLAD.

96. *USAC training and support.* Finally, the Commission recognizes that the EBB Program will attract a variety of broadband providers, including those with no prior experience with USAC and its systems. To provide guidance on the reimbursement claims process, the Commission directs USAC, subject to the oversight of the OMD and the WCB, to conduct extensive training, including webinars, to distribute instructions, and otherwise to provide support to broadband providers considering participation in the EBB Program. The Commission further directs USAC to ensure that interested providers are given access, subject to system and USAC requirements, to the USAC systems essential for the management and processing of reimbursement claims.

97. *Payment Administration.* While USAC will be administering the EBB Program, as permitted under section 904(i)(5) of the CAA, and pursuant to the terms of the MOU between the Commission and USAC that authorizes the use of USAC for the administration of the EBB Program, the Commission must authorize the payments from the Emergency Broadband Connectivity Fund in the United States Treasury to providers who have submitted valid claims for reimbursement. In the RO, the Commission describes steps to remove impediments to participation in the EBB Program for those providers that would otherwise be prohibited from receiving reimbursements due to unpaid debts to the Commission or which the Commission has referred to the United States Department of the Treasury (Treasury). The Commission also provides guidance on the information providers must be prepared to provide to ensure timely payment of reimbursement claims from the Fund.

98. *Red Light Rule.* The Commission finds that there is good cause to suspend the Commission's red light rule for the EBB Program and that doing so will serve the public interest. To implement the requirements of the Debt Collection Improvement Act of 1996, the Commission establishes what is commonly referred to as the ''red light rule,'' although the red light rule itself is not a statutory requirement and therefore can be waived by the Commission. Under the red light rule, the Commission will not take action on applications or other requests by an entity that is finds to owe debts to the Commission until full payment or resolution of that debt.

99. Generally, the Commission's rules may be waived for good cause shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an overall basis.

100. The Commission finds that the temporary nature of this emergency program and the enduring disruption caused by the COVID–19 pandemic justify a waiver of the red light rule. In order to encourage provider participation and facilitate consumer choice in the EBB Program, the Commission finds that it is in the public interest and that good cause exists to waive the red light rule with respect to providers submitting otherwise valid claims for reimbursement in the EBB Program. Allowing more providers to participate in the EBB Program, even those who may be in red light status, is a crucial step in expanding the broadband service options available to low-income consumers through the EBB Program. The Commission issues this waiver to ensure that otherwise eligible broadband providers are not discouraged from participating in the EBB Program for fear that a debt owed to the Commission would prevent them from receiving reimbursement. To be clear, this waiver is limited only to participation of providers in the EBB Program and does not affect the Commission's right or obligation to collect any debt owed by an applicant by any other means available to the Commission, including by referral to the Treasury for collection.

101. *Treasury Offset.* The Treasury has a number of collection tools, including its offset program, known as the Treasury Offset Program (TOP), pursuant to which it collects delinquent debts owed to Federal agencies and states by individuals and entities, by offsetting those debts against Federal monies owed to the debtors. EBB Program providers that owe past-due debt to a Federal agency or a state may have all or part of their EBB Program payments offset by Treasury to satisfy such debt. Prior to referral of its debt to Treasury, a provider is notified of the debt owed, including repayment instructions. If the referred debt of an EBB Program participating provider remains outstanding at the time of a payment from the EBB Program to that provider, the provider will be notified by Treasury that some or all of its EBB Program payment has been offset to satisfy an outstanding Federal or state debt. EBB Program providers are required to pass the EBB Program discount to the customer for the service or connected device claimed even if Treasury offsets the payment for such service or device against debt owed by the provider. EBB Program providers that owe past due Federal or state debts are encouraged to resolve such debts and in doing so, consult the TOP Frequently Asked Questions for the Public, available at *https://fiscal.treasury.gov/top/faqs-for-the-public.html,* for delinquent debt that has been referred to Treasury, and for delinquent debt that the Commission has not yet referred to Treasury, consult *https:/www.fcc.gov/general/red-light-frequently-asked-questions.*

102. *Additional Requirements.* To be eligible to receive disbursements from the Emergency Broadband Connectivity Fund, providers must obtain and report an FCC Registration Number (FRN). Persons or entities doing business with the Commission are required to obtain an FRN, a unique identifier that is obtained through the Commission Registration System (CORES).

Participating providers are directed to obtain an FRN if they do not already have one and report it as directed by USAC or the Commission.

103. All entities that intend to provide service through the EBB Program must also register with the System for Award Management (SAM). SAM is a web-based, government-wide application that collects, validates, stores, and disseminates business information about the Federal Government's partners in support of Federal awards, grants, and electronic payment processes. Registration in the SAM provides the Commission with an authoritative source for information necessary to provide funding to applicants and to ensure accurate reporting pursuant to the Federal Funding Accountability and Transparency Act of 2006, as amended by the Digital Accountability and Transparency Act of 2014 (collectively the Transparency Act or FFATA/DATA Act). Only those providers registered in SAM will be able to receive reimbursement from the Emergency Broadband Connectivity Fund. EBB Program providers that are already registered with SAM do not need to re-register with that system in order to receive payment from the Emergency Broadband Connectivity Fund. Broadband providers not yet registered with SAM may still elect to participate in the EBB Program, enroll eligible customers and receive program commitments. Active SAM registration, however, is required for an eligible provider to receive a payment from the EBB Program. Furthermore, participating providers may be subject to reporting requirements. To the extent that participating providers subaward the payments they receive from the EBB Program, as defined by FFATA/DATA Act regulations, providers may be required to submit data on those subawards.

104. *Do Not Pay.* Pursuant to the requirements of the Payment Integrity Information Act of 2019 (PIIA), the Commission is required to ensure that a thorough review of available databases with relevant information on eligibility occurs to determine program or award eligibility and prevent improper payments before the release of any Federal funds. To meet this requirement, the Commission and USAC will make full use of the Do Not Pay system administered by the Treasury's Bureau of the Fiscal Service. If a check of the Do Not Pay system results in a finding that an EBB Program provider should not be paid, the Commission will withhold issuing commitments and payments. USAC may work with the EBB Program provider to give it an opportunity to resolve its listing in the Do Not Pay system if the provider can produce evidence that its listing in the Do Not Pay system should be removed. However, the EBB Program provider will be responsible for working with the relevant agency to correct its information before payment can be made by the Commission.

105. *Tracking and Reporting of Available Funding.* While the Commission considers carefully many of the details of the implementation of the EBB Program, the amount of appropriated funds is finite and it must also prepare for a transition when funds are exhausted. The CAA provides that the EBB Program will conclude upon the earlier of six months after the end of the emergency period or when the amount in the Fund is exhausted. At the conclusion of the EBB Program when the discount is eliminated, participating households will be subject to their provider's ''generally applicable terms and conditions.'' The Commission agrees with commenters that the Emergency Broadband Connectivity Fund may well be depleted before the end of the emergency period, which means that the benefit on which households have been relying to afford broadband service may disappear while the public health emergency is ongoing. To prepare providers and households for the end of the program and the benefit, commenters stressed the importance of transparency regarding the financial state of the EBB Program and have urged the Commission to track and report disbursements from the program at frequent intervals so that the public can anticipate the end of the program.

106. Commenters recommended the creation of a tracker that displays the number of enrollments and amounts of disbursements made from the Emergency Broadband Connectivity Fund. Some commenters suggested that the tracker be updated either in real-time, or on a weekly or monthly basis. Commenters also urged the Commission to display disbursements and enrollment activity by different geographic levels or by provider, and to provide additional information about the programs through which EBB Program customers are qualifying. Commenters argued that providers need this information prepare their customers for the elimination of the benefit.

107. The Commission agrees that tracking and reporting on disbursement and program enrollment activity will be an essential tool for managing the EBB Program and for developing an informed forecast of the end of the EBB Program. Given the anticipated limited duration of the EBB Program, the Commission further agrees with commenters that clear and frequent updates on the remaining funds available will help give participating providers the data they need to begin the process of providing notice to subscribers about the end of the benefit and preparing them for a potential transition to other broadband options. The Commission will develop and publish online a tracker that, at a minimum, displays (1) the number of EBB Program households enrolled in NLAD; (2) the number of net new households enrolling into the EBB Program each week; and (3) the total dollar amount of the reimbursement claims approved to date, disaggregated by monthly amounts for internet access service and associated equipment, as well as connected devices, with historical data remaining so that the public can monitor any trends in the disbursement rates between updates. The Commission directs USAC, subject to the oversight of the WCB and the OMD, to develop this tracker and make it available on USAC's website as well as the Commission's website. The posted information shall be updated at least every two weeks by USAC, with the goal of weekly updates as the EBB Program ramps up.

108. The Commission declines to require that USAC post detailed information about EBB Program activities by geographic region, finding that such information would not be essential for informing providers and the public about the status of the program, which is the Commission's more immediate goal. USAC should focus its resources on what is necessary to successfully administer the implementation of the EBB Program and its wind-down. However, the Commission agrees that more information about the communities the EBB Program serves could help the Commission evaluate the success of this program and could inform future broadband-related initiatives. Therefore, to be transparent about participation in the EBB Program, the Commission directs USAC to submit a report to the Commission that provides information about how households qualified for the EBB Program, the claimed support amounts for connected devices and services, the geographic locations of consumers at the county level, and other information that the WCB, in consultation with USAC, believes would be essential for evaluating the program. This report shall be filed with the WCB no more than six months after the initiation of the EBB Program, with

updates submitted as necessary to capture additional information about the EBB Program and participating households obtained after the submission of the report.

109. *Program Sunsetting.* The Commission goal is to provide an informed projection of the exhaustion of funds for the EBB Program so USAC and the Commission can effectively manage the disbursement of the remaining funds and ample notice is provided to households, providers and other stakeholders. The Commission is especially concerned about the elimination of the benefit and the impact it could have on households, including unexpected or larger bills, and disruption or even termination of the broadband service. Accordingly, the Commission adopts procedures designed to ensure that households are informed that the program is temporary and the benefit will terminate at the end of the program, to provide notice to all stakeholders of the forecasted end of the program, and to manage the program to ensure that the remaining funds are disbursed equally to providers and allow for a transition for households off the EBB Program.

110. The first step in administering the end of the EBB Program is to predict fund exhaustion based on enrollment activity, disbursement levels, and other relevant information. Commenters argued that stakeholders will require advanced notice of the end of the program, in addition to the EBB Program activity posted on a tracker, to prepare their customer service representatives, billing systems, and customers for the elimination of the subsidy. The Commission cannot predict at this time when the Emergency Broadband Connectivity Fund will be depleted, but as households enroll in the EBB Program and providers begin to submit claims for reimbursement, the Commission anticipates a clearer picture of the interest in the program and the rate at which funds will be withdrawn. The Commission recognizes that a greater understanding of the timing of the end of the EBB Program and the procedures the Commission and USAC will employ to manage the remaining funds and reimbursement claims will create greater confidence in the EBB Program and help households navigate the end of the subsidy.

111. First, the Commission directs USAC to develop a method, subject to the oversight of the Office of Managing Director, the Office of Economics and Analytics, and the WCB, to forecast when the Fund will be able to pay out reimbursement claims only for another 75 to 90 days. The forecast shall take into account the Commission commitment that in the final month of disbursements, the remaining balance in the Fund will be able to provide at least 50% of each claim for service or connected devices to assist households and providers with the transition. Once USAC has identified when the Fund will be depleted using submitted claims and other relevant information, USAC will notify providers and the public of the expected exhaustion of the Fund and the month in which USAC expects to pay out final claims. Administering this finite Fund presents administrative challenges, particularly given that the Commission is unable to predict at this time the demand in the EBB Program and the rate of at which households will enroll in the program in the beginning weeks of the program. Given these challenges, the Commission has endeavors to provide at least 60 days' notice before the end of the Program. This notice will be posted on the USAC and Commission websites at least 60 days prior to the final snapshot date that coincides with the forecasted final month of the Program. This notice should be sufficient to allow providers to make an informed decision about whether to plan to claim their EBB Program subscribers in the final month and possibly receive a partial reimbursement claim for the service provided, or to transition those subscribers off their service.

112. Some commenters suggested 30 days' notice of the end of the program would be adequate whereas others argued that 90 days are needed to ensure that providers have ample time to provide notice to their customers. CTIA suggested that providers have at least 60 days' notice to wind down their participation in the EBB Program. The Commission finds that 60 days' notice of the termination of the EBB Program strikes a balance between the need for USAC to have enough data to accurately forecast the end of the program with the need to offer enough time for providers to notify their customers and work with them on a post-program broadband solution. This is an emergency program and as such, requires all stakeholders to work expeditiously in ensuring that the Commission is serving low-income households and helping to meet their broadband needs during the pandemic. Moreover, the Commission finds that 60 days' notice is reasonable given other existing Commission requirements for service providers to notify their subscribers in advance of a possible change or disruption in their service, and the Commission expects that providers will be able to adjust their systems as necessary to provide such notice just as they would need to in these other contexts.

113. Second, in the event that reimbursement claims in the final month exceed the amount of remaining funds, reimbursements for both service and connected device claims will be paid out on a reduced, pro-rata basis, but in no circumstances will the reimbursement be less than 50% of the provider's claim for that final month. For example, if the remaining balance in the Fund is sufficient to pay 80% of each reimbursement claim submitted in that final month, the Fund will pay out 80% of each claim on a pro-rata basis, thus depleting the Fund and ending the EBB Program. In this scenario, a provider can expect to receive a $40 disbursement if they would otherwise submit a service claim for $50, and the subscriber would be responsible for payment of the additional $10 for that service month. While the Commission took steps in the RO to ensure that USAC has the most up-to-date claims information available to support its projection analysis and to avoid a scenario where the amount in the Fund will be insufficient to offer a reimbursement of at least 50% on claims in that final month, the Commission recognizes that in order to responsibly manage the Fund, the Commission must prepare for this scenario. In the final months of the EBB Program, after the end date has been forecast, the Commission directs USAC to continue to monitor Program activity to determine whether the Fund will be able to support at least 50% of the claims, paid out on a pro-rata basis, in the expected final month of the EBB Program. If USAC's analysis indicates that the Fund will not be able to meet this 50% threshold, USAC shall immediately notify the WCB, the Office of Economics and Analytics, and the Office of Managing Director. If Commission staff agrees with USAC's analysis, the WCB will direct USAC to pause the reimbursement process for that final month. For example, in the event that the remaining balance in the Fund could only pay 30% of each anticipated claim for support, the Fund will not issue any disbursements in that month. In that situation where the remaining funds cannot guarantee at least a 50% disbursement on claims in that final month, the Commission will determine how best to use the remaining funds consistent with the CAA.

114. The Commission recognizes that uncertainty in the subsidy amount for the final month presents challenges for households and for providers as they

manage their participation in the EBB Program and as providers communicate to households regarding expectations for the final month. By establishing a 50% floor for the final month of reimbursement, the Commission balances the compelling interest in avoiding extreme price increases for eligible households while transitioning households off the subsidy, with its obligation to maximize the effectiveness of EBB Program funds by ensuring that as much of the Fund supports services to the greatest number of low-income households. Reimbursing each claim on a pro-rata basis in the final month of the program, regardless of the amount the provider would be entitled to, helps the Commission fulfill that mandate. The Commission recognizes the 50% floor could result in some funds being left unspent for a short while, and would require additional Commission direction on the use of the remaining funds, but by implementing this approach it is ensuring that the final month of the program provides a substantial subsidy to help households transition off the program. The Commission also anticipates that USAC's projections will provide enough advance notice of this possibility to allow both households and providers to plan accordingly.

115. The Commission declines to adopt a policy suggested by commenters that would structure the subsidy so eligible households would receive the benefit for a determined time period. The Commission finds that such a mechanism would restrict household participation in the EBB Program in order to guarantee benefits to a more limited number of households for the set period, and would also require USAC to deny enrollment to otherwise eligible households. Given its obligation to maximize the effectiveness of the EBB Program, the Commission finds it could not adopt a regime that would limit the low-income households benefitting from this program. Maximizing the number of households while guaranteeing at least a 50% benefit in the final month balanced the need to serve as many households as possible while ensuring that households can rely on a substantial benefit in the final month of the EBB Program.

116. Relatedly, several commenters suggested that the Commission reserve a portion of the funding for households that do not already have broadband service connections. Education Super Highway noted that funding is unlikely to meet the demand for the EBB Program, and that those without a broadband connection may have a more difficult path and be at a disadvantage in applying for the program given the provider-centric design of the EBB Program. While the Commission understands these concerns, the Commission declines to set aside any portion of the funding for unconnected households. The CAA does not include any prioritization for how funding should be distributed to eligible households, and the Commission finds that it is appropriate to provide the benefit to eligible households without regard to their current level of broadband service. Moreover, the Commission expects the outreach efforts discussed in the following would help unconnected households enroll in the EBB Program.

117. Because of the uncertainty in the reimbursement amount for the final month, once notice of the projected end date has been issued, the Commission must limit volatility in the program claims that could materially change the projected end date. As a result, the Commission will freeze enrollments of new households at the time the notice is issued. To more smoothly administer the end of the program, providers and households must have confidence that the Fund can support claims made up until the forecasted end date. The Commission recognizes that this enrollment freeze will restrict access to the program for households wishing to enroll in the program's waning weeks, but the Commission notes that the EBB Program will operate without any cap on the number of eligible households that will be able to enroll before that time. The Commission finds that an enrollment freeze at the end of the program allows the Commission to serve the greatest number of eligible low-income households while responsibly managing the remaining funds in the final weeks of the program. Therefore, the Commission directs USAC, under the oversight of the OMD and the WCB, to develop procedures for implementing this enrollment freeze.

118. *Notice to consumers.* In the *Public Notice,* DA 21–6, the WCB acknowledged that customers will need to be notified prior to or upon enrollment in the EBB Program of the temporary nature of the program and that they will be subject to the general terms and conditions of the broadband service they receive through the EBB Program if they continue to take that service after the program's conclusion.

119. Commenters agreed that notice at the time of enrollment is essential especially given that no one can state with confidence at the outset how long the program will last. Public Knowledge stated that providers must be ''fully transparent with consumers, at the time of sign-up, about these factors.'' Hughes Network Systems agreed that providers must have a responsibility in notifying subscribers at the time of enrollment that the program will end when the funds are depleted or when the emergency period ends. To ensure that customers are given notice at or before initial enrollment that the EBB Program benefit provides a temporary discount on their broadband service bill, that discount will not be applied to their bill, the Commission directs USAC, in consultation with the WCB, to publish language describing the limited duration of the benefit and the potential impact on the customer's bill at the end of the program on USAC's relevant consumer-facing websites, any USAC-provided application and the National Verifier, and other educational materials.

120. Providers also play an important role in ensuring that their customers are informed about the temporary nature of the EBB Program. Providers will have a direct relationship with their customers, and as such, have a responsibility to ensure that these customers have the information they need to make an informed decision about the broadband service product they subscribe to supported by the EBB Program. Accordingly, the Commission directs USAC and providers to include on their EBB Program consumer applications a certification for the household to affirm that they understand that the EBB Program is a temporary Federal Government subsidy that reduces the customer's broadband internet access service bill and at the conclusion of the EBB Program, the household will be subject to the provider's undiscounted general rates, terms, and conditions if the household continues to subscribe to the service.

121. The Commission also requires providers to include information about the limited duration of the Program and the impact of its termination on any EBB Program advertising materials, including, but not limited to billing inserts; websites; flyers; television, radio, and newspaper advertising; mailers; and posters. The Commission directs providers to use their best judgment in developing language that will clearly communicate the duration and impact of the program's end to the prospective low-income households, but at a minimum that language should comply with the relevant EBB Program rules the Commission adopts herein. Providers have an interest in communicating the terms of the Program clearly to their customers to manage expectations and to preserve the relationship. It is important as both a consumer protection measure and to

ensure that low-income consumers continue to have access to broadband services during this pandemic, that providers assist customers by transitioning them to other available products in the event that the broadband service plan they were subscribing to becomes unaffordable after the EBB Program ends and the benefit is eliminated.

122. The Commission is persuaded by commenters' arguments that customer bills offer an opportunity to communicate the limited duration of the EBB Program and the impact on the monthly bill when the subsidy ends. Commenters representing aging and public housing advocacy groups recommended that providers submit notices on consumer bills that provides ''information on billing after the conclusion of the EBB Program, when the first bill at a higher rate will be due, an explanation of any partial month charges and information on any additional resources.'' The San Francisco Department of Technology contended that the temporary discount should be clearly characterized as such on consumer bills, and the Benton Institute for Broadband and Society urged the Commission to adopt requirements that providers be in clear communication with consumers about the end of the subsidy and the amount of the monthly bill that a customer is responsible for. MMTC NUL recommended that providers should inform customers that ''they will be eligible to transition to an alternative, lower-priced broadband plan at the conclusion of the emergency program, making clear the price, service levels, and other terms and conditions that will apply.''

123. The Commission agrees that provider-supplied communication is important and will help guard against unexpected bill-shock and confusion throughout the EBB Program. Therefore, the Commission requires providers participating in the EBB Program to deliver at the time of enrollment and on a monthly basis, either in the form of a monthly bill, or other monthly communication if the benefit covers the entire rate of the qualified plan, to its EBB Program household, documentation that prominently and clearly states in easy to understand terms that the EBB Program is a temporary subsidy that reduces the customer's broadband internet access service bill and at the conclusion of the benefit, the customer will be subject to the provider's general rates, terms, and conditions if the customer continues to subscribe to that broadband service. This initial disclosure, monthly bill or communication must also prominently and clearly set forth the rate that the customer should be expected to pay, including fees, taxes, and equipment rental charges once the EBB Program ends and the benefit expires. Once USAC and the WCB announce a forecasted end of the EBB Program, the provider must provide notice to its customer in a prominent manner on the customer's bill, or other monthly communication if the benefit covers the entire rate of the qualified plan, about the last date or service month that the full benefit will apply to their bill, the last date or service month that the partial, final-month benefit will apply to their bill, and the expected rate of the broadband service once the benefit expires.

124. The Commission recognizes that providers will need some time to adjust their billing and other systems in order to communicate the EBB Program end date to their customers. Therefore, providers should send this notice to their customers as soon as practicable after the notice is posted on USAC and the Commission websites, but no less than 15 days after the notice from USAC and the Commission is posted. The Commission encourages providers to send this notification to households electronically, consistent with any consumer expressed preferences for receiving electronic notices and other communications and to the same email or phone number that bills or other monthly communications are sent, in addition to a mailed notice to ensure that customers have multiple opportunities to receive information regarding the end of the EBB Program and alternative broadband plans if it will be unaffordable without the benefit. Commenters recognized that advance notice to households is important so they can make informed choices regarding broadband service for their household. The Commission finds that providers are in the best position to explain to their customers what will happen to their bill once the benefit is exhausted.

125. *Household transition to other services or discounts.* The Commission recognizes that the end of the EBB Program means that households will need to evaluate available options to determine how their household can continue to subscribe to broadband services. Rather than limit participation in the program to a predetermined number of customers, as some commenters suggest, the Commission structures the EBB Program to ensure that it serves the greatest number of households possible. But this more inclusive approach presents some administrative challenges. For example, the Commission cannot predict at this time how long the EBB Program will last and when a customer's last month of EBB Program-discounted service will be. The Commission commits to ensuring that the Commission is transparent about the enrollment and disbursement activity in the EBB Program. The Commission knows that there is a connection between a household's income level and whether they have a home broadband connection, and EBB Program customers will need a smooth transition to affordable broadband options at the conclusion of the EBB Program if they wish to maintain broadband service. Commenters noted that it is vital that consumers be transitioned to affordable broadband services at the conclusion of the EBB Program. Ensuring that these households can continue accessing the broadband they need to participate in virtual learning, complete their homework, and communicate with employers and healthcare providers will be a group effort. The Commission encourages providers and community groups to communicate the availability of affordable broadband options, including any broadband adoption initiatives in their communities.

126. The Commission also hopes that providers consider ways in which they can financially support their customers as the benefit ends and the households look to transition to comparable broadband services or continue with the same broadband service offered at a discounted rate subsidized by the provider. The Commission also recognizes that requiring providers to directly subsidize a household's broadband service, either fully or partially, once the Emergency Broadband Connectivity Fund is depleted would likely be considered to be to an unfunded mandate. While the Commission cannot and does not require that providers offer a discount to households at that time, the Commission hopes that providers are able to identify the ways in which they can use their experience with the EBB Program and the Federal support they received to help households continue to access high quality, low-cost broadband service during the course of this public health emergency. At a minimum, providers with existing low-cost and income restricted programs should not preclude EBB Program recipients from enrolling in those programs based on current or recent customer (for example, service within the last 90 days) eligibility restrictions. Consumers previously in an existing low-cost

program and using the EBB Program benefit to receive a higher tier of service should be allowed to transition back to the low-cost offering at the conclusion of the benefit program.

127. Due to their relationship with their EBB Program customers, providers play an essential role in helping to protect households from bill shock and to ensure that households understand that they ''shall be subject to a participating provider's generally applicable terms and conditions'' after the expiration of the EBB Program. Therefore, the Commission requires that providers obtain an affirmative opt-in from households at any time while the household is participating in the EBB Program and before they can be charged an amount higher than they would pay under the full EBB Program reimbursement amount permitted by the Commission rules, including any potential increased payment as a result of a partial reimbursement during the EBB Program's final month. The Commission agrees with commenters that an opt-in from households will help guard against unexpected charges by reducing the likelihood that households will receive broadband service absent the EBB Program benefit without their permission. To that end, consistent with the notice requirements the Commission adopts in the RO, with respect to provider communications to households, the provider shall clearly state that it will stop providing broadband service to the household at the conclusion of the EBB Program unless the household agrees to continue to receive broadband service. At least 30 days before the end of the EBB Program, the provider must also notify households of the upcoming increase to their monthly bills (or as soon as practicable if there is a scenario in which providers do not have 30 days' notice prior to the expiration of the program). The Commission encourages providers to ensure that households have the opportunity to make an informed decision about the continuation of broadband service absent the EBB Program benefit. EBB Program households that subscribed to the provider's broadband service before the commencement of the EBB Program must also opt-in to the continuation of broadband service. The Commission finds that requiring providers to obtain permission from households before continuing to provide broadband service after the end of the EBB Program is another tool that helps ensure that households have the information they need to make decisions about their broadband services and to ensure that the same households are protected from unexpected bills related to their broadband services.

128. *Promoting Awareness.* The Commission recognizes that for the EBB Program to achieve its full potential and serve as many eligible households as possible during the COVID–19 pandemic, low-income households must be clearly informed of the program's existence, benefits, eligibility qualifications, and how to apply. Participating providers, some of whom may not have experience with the Lifeline program, USAC, and USAC's processes, will also require information both on how to participate in the EBB Program and on how to educate consumers. The record overwhelmingly reflected the importance of publicizing the program to new and existing consumers through national and local campaigns that use diverse spokespeople and languages. For the EBB Program to reach as many eligible consumers as possible, including disconnected low-income consumers, individuals with disabilities, and households of color, it is important to implement a broad, collaborative outreach, including the Federal Government, state, local, and Tribal governments, broadband internet access providers, community groups, trade associations, Tribal communities, philanthropists, educators, and other trusted institutions. The record also recognized the importance of educating participating providers on the EBB Program. To this end, the Commission encourages EBB Program participating providers to engage in consumer marketing with basic requirements and encourage them to consider communications strategies proposed in the record. The Commission also directs the Commission staff and USAC to develop comprehensive provider education and training programs, as well as consumer outreach plans. Finally, the Commission strongly encourages other civic entities to publicize the EBB Program to eligible households.

129. The Commission next encourages providers that file an election notice with USAC to publicize the availability of the EBB Program service in a manner reasonably designed to reach those consumers likely to qualify and in a manner that is accessible to individuals with disabilities. The record overwhelmingly confirmed that participating providers should publicize, including in languages other than English, the availability of the EBB Program. To ensure that consumers receive comprehensive information explaining the EBB Program, the Commission recommends that provider marketing materials describe in clear, easily-understandable language in, if feasible, the dominant languages of the communities that the provider serves: (1) The eligibility requirements for consumer participation; (2) the monetary charges to the customer; (3) the available upload/download speeds, data caps, and connected devices, if any, with descriptions; (4) a provider customer service number, prominently displayed on all promotional materials, that is associated with an adequately staffed phone line; and (5) that the EBB Program is a temporary emergency Federal Government benefit program operated by the FCC and, upon its conclusion, customers will be subject to the provider's regular rates, terms, and conditions.

130. The Commission declines to mandate that providers engage in more prescriptive forms of EBB Program promotion. Instead, the Commission grants providers the flexibility to develop their own marketing plans. The Commission finds that providers are in the best position to understand how to market a new program to the communities they serve. However, the Commission encourages participating providers to consider and implement some of the numerous consumer outreach strategies described in the record. For instance, many commenters urged providers to engage in outreach and partner with local government agencies, through institutions providing basic needs to eligible populations, such as housing, food and transportation and healthcare, schools eligible for free or reduced lunch, school breakfast, and E-Rate, libraries, and Tribal organizations. The City of Seattle, Washington State Broadband Office, Seattle Public Schools District and Seattle Housing Authority recommended that providers without retail locations where they serve low-income customers partner with a commercial, nonprofit, or other community organizations to offer site-based information about low-cost offers for low-income communities. Additionally, some commenters, recognizing that eligible households may not currently have access to broadband, encouraged providers to use a variety of media outlets that target minority and low-income populations—including newspapers, television and radio stations, billboards, and internet advertisements—to promote the EBB Program through Public Service Announcements and crawls that direct listeners and viewers specifically to where they can find local information

on the program, learn which local providers are participating, and ways to contact those providers. Partnerships with disability organizations and other entities that frequently provide internet access and technical assistance to people with disabilities are further encouraged by other commenters to publicize the EBB Program.

131. The Commission also directs the Consumer and Governmental Affairs Bureau (CGB) to both to educate service providers on the EBB Program and to engage in consumer outreach to the largest possible number of eligible consumer participants. The Commission further directs CGB and the Office of Native Affairs and Policy (ONAP) to coordinate to develop educational and informational communications and materials to advertise the EBB Program, such as a web page and digital toolkit, in a printable format and translated into other languages, that can easily be accessed by service providers, organizations, and the public. The record demonstrated support for Commission-developed marketing materials—including charts, posters, flyers and messaging—that providers and other organizations can customize and share through email, social media and other channels. The Commission also supports the idea raised by commenters that to promote the EBB Program, the Commission should work closely with, among others, Congressional offices, other Federal agencies, state and local governments, community organizations, schools, and libraries.

132. The Commission also directs USAC to develop and implement a communications strategy, under the oversight of the WCB and CGB, to provide training and information necessary to successfully participate in the EBB Program to service providers—both ETCs and non-ETCs, Tribal communities and organizations, associations and consumer advocates, the E-Rate community, potential eligible consumers, and the public at large. The objective for the communications plan should be to ensure that both current and new stakeholders can learn about and successfully participate in the EBB Program and ensure discounts on broadband service and connected devices are efficiently and effectively provided to eligible consumers. The Commission anticipates that USAC's communications strategy will include a dedicated, regularly updated web page and other outreach methods including webinars, bulletins, email campaigns, and direct outreach to providers, eligible consumers, Tribal communities, schools, libraries, and other organizations that serve EBB Program eligible populations. The record overwhelmingly supported such wide-ranging communications efforts. To help ensure that households are aware of affordable broadband services for which they may likely qualify, the Commission directs USAC to coordinate with state and Federal partners, and community support organizations such as food banks to promote the availability of Lifeline as a supplement to the EBB Program or as an option when the benefit is eliminated. Indeed, commenters urged the Commission and USAC to work closely with congressional offices, coordinate with other Federal agencies, state and local organization, Tribes, consumer-facing agencies, trade associations, schools, libraries, and hospitals that could assist with educating low-income consumers about the program and the provider options that are available as a result. The Commission strongly encourages CGB, WCB, and USAC to incorporate these recommendations into their outreach efforts.

133. Lastly, the Commission strongly encourages other Federal agencies, state and local governments, groups, and broadband offices, youth groups and organizations, schools and libraries to promote the EBB Program to eligible households. The Colorado Communications and Utility Alliance (CCUA) emphasized that ''local governments have ability to promote the EBBP through bill inserts, electronic notification to customers, company websites and social media.'' The CCUA, as well as the National Association of Telecommunications Officers and Advisors, pointed to the recent success of local governments and community organizations to provide a wide range of pandemic related information to citizens. Similarly, the City of Longmont, Colorado reported that it ''has an arsenal of tools at its disposal to promote the availability of the EBBP, and is prepared to utilize them to the fullest extent.'' Therefore, the Commission agrees with commenters that these entities that work with program eligible populations would be highly effective in raising awareness about the EBB Program.

134. *Audits.* The CAA requires the Commission to adopt audit requirements to ensure that participating providers are in compliance with the program rules and to prevent waste, fraud, and abuse in the EBB Program. A finding of waste, fraud, or abuse or an improper payment identified by the Commission or the Inspector General of the Commission must include (1) the name of the participating provider; (2) the amount of funding made available from the EBB Program to the provider; (3) the amount of funding determined to be an improper payment to the provider; (4) a description of to what extent funding made available from the EBB Program that was an improper payment was used for a reimbursement for a connected devise or a reimbursement for an internet service offering; (5) whether, in the case of a connected device, such device, or the value thereof, has been recovered; (6) whether any funding from the EBB Program was made available to a participating provider for an emergency broadband benefit for a person outside the eligible household; and (7) whether any funding from the EBB Program was made available to reimburse a participating provider for an emergency broadband benefit made available to an eligible household in which all members of such household necessary to satisfy the eligibility requirements were deceased. Within one year of the date of the enactment of the CAA, the Commission's Office of Inspector General must conduct an audit of the disbursements made to a representative sample of participating providers. The record generally supported the use of audits to ensure compliance and accountability in the EBB Program. Multiple commenters urged the Commission to adopt audit requirements similar to those procedures used in the Lifeline program ''to ensure compliance and to prevent waste, fraud, and abuse,'' and to focus its audit and fraud-prevention efforts on rule violations that occur at scale and that impact the largest number of consumers.'' Others contend that the current Lifeline audit process requires substantial reform or support a more simplified version of the process that does not impede participation by households and providers or have an adverse impact on customer privacy and data security. Commenters agreed that participating providers should be required to collect and retain documentation sufficient to support compliance with any certifications and that such record keeping requirements should be clearly defined.

135. The Commission agrees with the commenters that it is imperative to require audits to confirm the integrity of the EBB Program and prevent fraud, waste, and abuse in the program. To that end, the Commission delegates authority to the OMD to develop and implement an audit process of participating providers that complies with all requirements in sections 904(b)(7) and (8) of the CAA. OMD may

obtain the assistance of third parties, including but not limited to USAC, in carrying out this effort. Consistent with the Commission experience regarding the Universal Service Fund, the Commission finds that audits are the most effective way to ensure compliance with the Commission rule requirements.

136. *Enforcement.* The CAA provides that a violation of its section 904, which establishes the EBB Program, or any regulation promulgated under that section ''shall be treated as a violation of the Communications Act of 1934 or a regulation promulgated under such Act.'' The Commission is compelled to enforce this section and the associated regulations ''in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Communications act of 1934 were incorporated into and made a part of this section.'' In the *Public Notice,* DA 21–6, the WCB sought comment on the authority of the Commission to impose administrative forfeitures and other penalties on program participants found to be in violation of the program rules and requirements. The record largely supported the application of the Commission's existing enforcement powers, including imposing administrative forfeitures and other penalties on participating providers that violate the program rules and requirements, to protect the integrity of the EBB Program. The National Lifeline Association urged that ''[a]ny proposed forfeitures under the [EBB Program] rules should be based on reasonable recoveries for rule violations and three times the amount of harm to the [EBB Program] (treble damages) for cases of actual fraud.'' T-Mobile argued that in order to avoid discouraging providers from participating in the EBB Program, the Commission should not treat a violation of its other rules as a basis for withholding EBB Program funding from participants. Consistent with this statutory direction and the record, the Commission decides to use the Commission's existing, statutorily permitted enforcement powers to initiate investigations and impose administrative forfeitures. In addition, the Commission would apply the Commission's suspension and debarment rules currently applicable to the USF program to EBB Program participating providers. The Commission would also withhold EBB Program funds from participants found to be in violation of the EBB Program rules, if appropriate, and will also seek to recoup improperly disbursed funds, in addition to appropriate enforcement penalties. The Commission finds that these enforcement mechanisms sufficiently balance the need for widespread participation in the EBB Program with the importance of maintaining the program's integrity.

137. *Application of Other Part 54 Regulations.* The Commission uses the authority granted by the CAA to apply portions of 47 CFR part 54—pertaining to definitions, de-enrollment, program integrity, and the use of USAC—to the EBB Program.

138. *Subpart E.* Due to similarities between the programs and the use of certain USAC Lifeline systems to administer the EBB Program, the Commission elects to apply select portions of the regulations that control the Lifeline program to the EBB Program. Specifically, the Commission applies the following definitions in § 54.400 of the Commission's rules to the EBB Program, subject to the further interpretations expounded upon in the RO: (f) Income; (g) duplicative support; (h) household; (i) National Lifeline Accountability Database of Database; (j) Qualifying assistance program; (k) Direct service; (l) Broadband internet access service; (o) National Lifeline Eligibility Verifier; and (p) Enrollment representatives. Maintaining uniform definitions across the two programs will facilitate a quick launch and efficient administration for the Commission, USAC, and participating providers. What is more, the Commission limits application of the Lifeline rules to those specifically enumerated in the Order to balance the need of ensuring that the EBB Program has adequate guidelines and parameters with the concern of chilling participation by providing a complex framework that may be unfamiliar to new providers or serve as a bar to participation in this temporary program.

139. The Commission also elects to apply relevant subsections of § 54.404 of the Commission's rules, outlining carrier interactions with the NLAD, and portions of § 54.405 of the Commission's rules to the EBB Program concerning carrier obligations and de-enrollment. Specifically, the Commission applies § 54.405(e)(1), (2), and (5) of the Commission's rules, for de-enrollments generally, de-enrollments for duplicative support, and de-enrollments requested by the subscriber, respectively. In the definition for de-enrollment requested by the subscriber, the Commission directs USAC to accept and process de-enrollment requests directly from EBB Program subscribers, and to notify the subscriber's provider when such a de-enrollment occurs. This additional method for de-enrollment by subscribers will assist in administering funds efficiently and provide further certainty to participants regarding their ability to transition out of this temporary program.

140. For de-enrollment for non-usage, however, the Commission adopts a modified requirement—as permitted by the CAA—to adapt to the unique circumstances provided by the pandemic, the limited duration of the EBB Program, and the participation of non-ETC providers that may not have already designed processes to comport with the specific Lifeline usage requirements. Accordingly, the Commission requires that providers submit a certification in their reimbursement claim that every subscriber claimed has used their supported service, as defined in § 54.407(c)(2) of the Commission's rules, at least once during the service month being claimed. Providers must retain documentation demonstrating the subscriber monthly usage amounts to support this certification. The Commission does not adopt for the EBB Program the notice and de-enrollment process required in the Lifeline program rules, but participating providers that fail to resolve non-usage by households enrolled in the EBB Program will be unable to claim the program benefit for those households. This modification ensures that the limited funds provided by the CAA will reach those whose needs are greatest by protecting against supporting unused service.

141. Additionally, the Commission adopts for the EBB Program a modification of the subscriber eligibility determination and certification found in § 54.410 of the Commission's rules, and require all participating providers to implement policies and procedures for ensuring that their EBB Program households are eligible to receive the Emergency Broadband Benefit. Accordingly, a provider may not provide a consumer with an activated device that it represents enables use of Emergency Broadband Benefit-supported service, nor may it activate service that it represents to be Emergency Broadband Benefit-supported service, unless and until it has: (1) Confirmed that the household is an eligible household pursuant to section III(B) of the RO, and; (2) Completed the eligibility determination and certification required by section III(B) of the RO, and any other necessary enrollment steps expounded upon in the RO. We find that these preventative measures provide a front-end guard against the improper use of the limited

funds provided by the CAA, and protect against waste, fraud, and abuse.

142. To further ensure program integrity, the Commission applies the following sections of the Lifeline rules to the EBB Program: § 54.407(a), (c)(2)(i) through (v), (d) and (e) of the Commission's rules, pertaining to the number of participants as of the first of the month (snapshot), the definition of service usage, reimbursement certifications, and records; § 54.417 of the Commission's rules, pertaining to recordkeeping requirements; and, § 54.419 of the Commission's rules, pertaining to the validity of e-signatures. The Commission notes that these rule sections, as applied to the EBB Program, are the subject of more detailed discussions in the RO. We also require participating providers that use enrollment representatives to comply with the Representative Accountability Database registration requirement established in §§ 54.400(p) and 54.406(a) of the Commission's rules. Requiring registration for employees, agents, contractors, or subcontractors of participating providers or their third-party entities prior to those personnel providing information to the USAC systems will bolster the security of the system and help monitor for suspected non-compliance in program activity. However, the Commission declines to apply § 54.406(b) of the Commission's rules to avoid discouraging provider participation and diminishing consumer choice in the EBB Program.

143. The record supports the use of these Lifeline rules in implementing the EBB Program, including the use of the National Verifier, NLAD, RAD, snapshot dates and process, and de-enrollment requirements and deadlines. The Commission agrees with commenters that these established processes will assist in the quick and efficient implementation of the EBB Program while protecting against waste, fraud, and abuse.

144. *Use of USAC.* The Commission also uses the authority granted by the CAA to avail ourselves of USAC's services to implement the EBB Program, including administering approvals and elections of participating providers and determinations of household eligibility, including whether a household resides on Tribal lands, by relying upon USAC-administrated processes and systems, including the National Verifier, NLAD, RAD, and LCS for the provider reimbursement process, call centers for program support, provider and consumer outreach, and conducting program integrity reviews. The record supported using USAC and its processes for the efficient and effective administration of the program, and the Commission believes USAC's experience administering the Lifeline program makes USAC uniquely situated to be the administrator of the EBB Program.

145. *Subpart H.* The Commission next applies § 54.702(c) of the Commission's rules to the EBB Program as well, preventing USAC from making policy, interpreting unclear statutes or rules relied upon to implement the EBB Program, or interpreting the intent of Congress. Additionally, the Commission grants USAC the authority to conduct program audits of contributors and providers, as provided in § 54.707 of the Commission's rules. This grant, however, is subject to the further direction as set forth in section III(G) of the RO.

146. *Subpart I.* Lastly, the Commission provides a path for recourse to parties aggrieved by decisions issued by USAC. Specifically, the Commission requires review of decisions issued by USAC to follow the requirements set forth in 47 CFR Subpart I. The Commission finds these existing processes sufficient to provide meaningful review of decisions issued by USAC during the EBB Program.

147. *Delegations to the Bureau and Office of Managing Director.* The Commission delegates authority to the WCB and OMD to make necessary adjustments to the program administration and to provide additional detail and specificity to the requirements of the EBB Program to conform with the intent of the RO and ensure the efficient functioning of the program.

148. In addition, the Commission delegates financial oversight of the EBB Program to the Commission's Managing Director and directs the OMD to work in coordination with the WCB to ensure that all financial aspects of the program have adequate internal controls. These duties fall within OMD's current delegated authority to ensure that the Commission operates in accordance with Federal financial statutes and guidance. Such financial oversight must be consistent with the rules adopted in the RO. OMD performs this role with respect to USAC's administration of the Commission's Universal Service programs, and the Covid–19 Telehealth program, and the Commission anticipates that OMD will leverage existing policies and procedures, to the extent practicable and consistent with section 904 of the CAA, to ensure the efficient and effective management of the program. Finally, the Commission notes that OMD is required to consult with the WCB on any policy matters affecting the program, consistent with § 0.91(a) of the Commission's rules. OMD, in coordination with the WCB, may issue additional directions to USAC and program participants in furtherance of its responsibilities.

149. In its administration of the EBB Program, USAC is directed to comply with, on an ongoing basis, all applicable laws and Federal government guidance on privacy and information security standards and requirements, such as the Privacy Act, relevant provisions in the Federal Information Security Modernization Act of 2014, National Institute of Standards and Technology publications, and Office of Management and Budget guidance.

150. The Commission recognizes that, once implementation of the EBB Program begins, the Commission or USAC may encounter unforeseen issues or problems with the administration that will need to be resolved. To achieve widespread participation by eligible households in the EBB Program, the Commission delegates this authority to Commission staff to address and resolve such issues.

III. Procedural Matters

A. Paperwork Reduction Act Analysis

151. Pursuant to section 904(h)(2) of the Consolidated Appropriations Act, the collection of information sponsored or conducted under the regulations promulgated in the Report and Order is deemed not to constitute a collection of information for the purposes of the Paperwork Reduction Act, 44 U.S.C. 3501–3521.

B. Congressional Review Act

152. The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), concurs, that the regulations implementing the EBB Program are a ''major rule'' under the Congressional Review Act, 5 U.S.C. 804(2). By exempting this rulemaking proceeding from the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), the Commission concludes that Congress has determined notice and public procedure under the Administrative Procedure Act to be impracticable, unnecessary, or contrary to the public interest. In addition, the exemption of this proceeding from the Administrative Procedure Act requirement that rules cannot become effective until 30 days after publication in the **Federal Register**, 5 U.S.C. 553(d), demonstrates Congressional intent that the rules the Commission adopt shall become effective without delay.

Accordingly, the Commission finds for good cause that notice and public procedure on the rules adopted herein are impracticable, unnecessary, or contrary to the public interest, and therefore the Report and Order would become effective April 13, 2021 pursuant to 5 U.S.C. 808(2). The Commission will send a copy of the Report and Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

C. Regulatory Flexibility Act

153. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that an agency prepare a final regulatory flexibility analysis ''whenever an agency promulgates a final rule under [5 U.S.C. 553], after being required by that section or any other law to publish a general notice of proposed rulemaking.'' Pursuant to the Consolidated Appropriations Act, section 553 does not apply to the rulemaking proceeding implementing the EBB Program. Accordingly, no Final Regulatory Flexibility Analysis was required for the Report and Order.

IV. Ordering Clauses

154. Accordingly, *it is ordered* that, pursuant to the authority contained in Section 904 of Division N, Title IX of the Consolidated Appropriations Act, 2021, Pub. L. No 116–260, 134 Stat. 1182, the Report and *order is adopted*.

155. *It is further ordered* that the Commission *shall send* a copy of the Report and Order to the Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 54

Communications common carriers, Health facilities, Infants and children, internet, Libraries, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone.

Federal Communications Commission

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 54 as follows:

PART 54—UNIVERSAL SERVICE

■ 1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 155, 201, 205, 214, 219, 220, 229, 254, 303(r), 403, 1004, 1302, and 1601–1609 unless otherwise noted.

■ 2. Add subpart P to read as follows:

Subpart P—Emergency Broadband Benefit Program

Sec.
54.1600 Definitions.
54.1601 Participating providers.
54.1602 Emergency Broadband Benefit.
54.1603 Emergency Broadband Benefit Program support amount.
54.1604 Participating provider obligation to offer Emergency Broadband Benefit Program.
54.1605 Household qualification for Emergency Broadband Benefit Program.
54.1606 Household eligibility determinations.
54.1607 Enrollment representative registration.
54.1608 Reimbursement for providing Emergency Broadband Benefit Program discount.
54.1609 De-enrollment from the Emergency Broadband Benefit Program.
54.1610 Expiration of Emergency Broadband Benefit Program.
54.1611 Recordkeeping requirements.
54.1612 Validity of electronic signatures.

Subpart P—Emergency Broadband Benefit Program

§ 54.1600 Definitions.

(a) *Broadband internet access service.* The term ''broadband internet access service'' has the meaning given such term in 47 CFR 8.1(b), or any successor regulation.

(b) *Broadband provider.* The term ''broadband provider'' means a provider of broadband internet access service.

(c) *Commission.* The term ''Commission'' means the Federal Communications Commission.

(d) *Connected device.* The term ''connected device'' means a laptop or desktop computer or a tablet.

(e) *Designated as an eligible telecommunications carrier.* The term ''designated as an eligible telecommunications carrier'', with respect to a broadband provider, means the broadband provider is designated as an eligible telecommunications carrier under section 214(e) of the Communications Act of 1934 (47 U.S.C. 214(e)).

(f) *Direct service.* As used in this subpart, direct service means the provision of service directly to the qualifying low-income consumer.

(g) *Duplicative support.* ''Duplicative support'' exists when an Emergency Broadband Benefit subscriber is receiving two or more Emergency Broadband Benefit services concurrently or two or more subscribers in a household have received a connected device with an Emergency Broadband Benefit discount

(h) *Eligible household.* The term ''eligible household'' means, regardless of whether the household or any member of the household receives support under subpart E of 47 CFR part 54 (or any successor regulation), and regardless of whether any member of the household has any past or present arrearages with a broadband provider, a household in which—

(1) At least one member of the household meets the qualifications 47 CFR 54.409(a) or (b) (or any successor regulation);

(2) At least one member of the household has applied for and been approved to receive benefits under the free and reduced price lunch program under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 *et seq.*) or the school breakfast program under section 4 of the Child Nutrition Act of 1966 (42 U.S.C. 1773);

(3) At least one member of the household has experienced a substantial loss of income since February 29, 2020, that is documented by layoff or furlough notice, application for unemployment insurance benefits, or similar documentation or that is otherwise verifiable through the National Verifier or National Lifeline Accountability Database;

(4) At least one member of the household has received a Federal Pell Grant under section 401 of the Higher Education Act of 1965 (20 U.S.C. 1070a) in the current award year, if such award is verifiable through the National Verifier or National Lifeline Accountability Database or the participating provider verifies eligibility under 47 CFR 54.1606(a)(2); or

(5) At least one member of the household meets the eligibility criteria for a participating provider's existing low-income or COVID–19 program, subject to the requirements of 47 CFR 54.1606(a)(2).

(i) *Emergency broadband benefit.* The term ''emergency broadband benefit'' means a monthly discount for an eligible household applied to the actual amount charged to such household, which shall be no more than the standard rate for an internet service offering and associated equipment, in an amount equal to such amount charged, but not more than $50, or, if an internet service offering is provided to an eligible household on Tribal land, not more than $75.

(j) *Emergency period.* The term ''emergency period'' means the period that—

(1) Begins on the date of the enactment of the Consolidated Appropriations Act; and

(2) Ends on the date that is 6 months after the date on which the determination by the Secretary of Health and Human Services pursuant to section

319 of the Public Health Service Act (42 U.S.C. 247d) that a public health emergency exists as a result of COVID–19, including any renewal thereof, terminates.

(k) *Enrollment representative.* An employee, agent, contractor, or subcontractor, acting on behalf of an eligible telecommunications carrier or third-party entity, who directly or indirectly provides information to the Administrator for the purpose of eligibility verification, enrollment, subscriber personal information updates, benefit transfers, or de-enrollment.

(l) *Household.* A ''household'' is any individual or group of individuals who are living together at the same address as one economic unit. A household may include related and unrelated persons. An ''economic unit'' consists of all adult individuals contributing to and sharing in the income and expenses of a household. An adult is any person eighteen years or older. If an adult has no or minimal income, and lives with someone who provides financial support to him/her, both people shall be considered part of the same household. Children under the age of eighteen living with their parents or guardians are considered to be part of the same household as their parents or guardians.

(m) *Income.* ''Income'' means gross income as defined under section 61 of the Internal Revenue Code, 26 U.S.C. 61, for all members of the household. This means all income actually received by all members of the household from whatever source derived, unless specifically excluded by the Internal Revenue Code, Part III of Title 26, 26 U.S.C. 101 *et seq.*

(n) *Internet service offering.* The term ''internet service offering'' means, with respect to a broadband provider, broadband internet access service provided by such provider to a household, offered in the same manner, and on the same terms, as described in any of such provider's offerings for broadband internet access service to such household, as on December 1, 2020.

(o) *Lifeline qualifying assistance program.* A ''Lifeline qualifying assistance program'' means any of the Federal or Tribal assistance programs the participation in which, pursuant to 47 CFR 54.409(a) or (b), qualifies a consumer for Lifeline service, including Medicaid; Supplemental Nutrition Assistance Program; Supplemental Security Income; Federal Public Housing Assistance; Veterans and Survivors Pension Benefit; Bureau of Indian Affairs general assistance; Tribally administered Temporary Assistance for Needy Families (Tribal TANF); Head Start (only those households meeting its income qualifying standard); or the Food Distribution Program on Indian Reservations (FDPIR).

(p) *National Lifeline Accountability Database.* The ''National Lifeline Accountability Database'' is an electronic system, with associated functions, processes, policies and procedures, to facilitate the detection and elimination of duplicative support, as directed by the Commission.

(q) *National Lifeline Eligibility Verifier or National Verifier.* The ''National Lifeline Eligibility Verifier'' or ''National Verifier'' is an electronic and manual system with associated functions, processes, policies and procedures, to facilitate the determination of consumer eligibility for the Lifeline program and Emergency Broadband Benefit Program, as directed by the Commission.

(r) *Participating provider.* The term ''participating provider'' means a broadband provider that—

(1)(i) Is designated as an eligible telecommunications carrier; or

(ii) Meets requirements established by the Commission for participation in the Emergency Broadband Benefit Program and is approved by the Commission under 47 CFR 54.1601(b); and

(2) Elects to participate in the Emergency Broadband Benefit Program.

(s) *Standard rate.* The term ''standard rate'' means the monthly retail rate for the applicable tier of broadband internet access service as of December 1, 2020, excluding any taxes or other governmental fees.

(t) *Tribal lands.* For purposes of this subpart, ''Tribal lands'' include any Federally recognized Indian tribe's reservation, pueblo, or colony, including former reservations in Oklahoma; Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688); Indian allotments; Hawaiian Home Lands—areas held in trust for Native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920 July 9, 1921, 42 Stat. 108, et seq., as amended; and any land designated as such by the Commission for purposes of subpart E of 47 CFR part 54 (or any successor regulation) pursuant to the designation process in 47 CFR 54.412.

§ 54.1601 Participating providers.

(a) *Eligible telecommunications carriers.* A broadband provider that is designated as an eligible telecommunications carrier may participate in the Emergency Benefit Broadband Program as a participating provider.

(b) *Other broadband providers.* A broadband provider that is not designated as an eligible telecommunications carrier may seek approval from the Wireline Competition Bureau to participate in the Emergency Broadband Benefit Program as a participating provider.

(1) The Wireline Competition Bureau shall review and act on applications to be designated as a participating provider on an expedited basis. Such applications shall contain:

(i) The states or territories in which the provider plans to participate;

(ii) The service areas in which the provider has the authority, if needed, to operate in each state or territory, but has not been designated an eligible telecommunications carrier; and,

(iii) Certifications and documentation of the provider's plan to combat waste, fraud, and abuse.

(2) Notwithstanding paragraph (b)(1) of this section, the Wireline Competition Bureau shall automatically approve as a participating provider a broadband provider that has an established program as of April 1, 2020, that is widely available and offers internet service offerings to eligible households and maintains verification processes that are sufficient to avoid fraud, waste, and abuse. Such applications seeking automatic approval shall contain:

(i) The states or territories in which the provider plans to participate;

(ii) The service areas in which the provider has the authority, if needed, to operate in each state or territory, but has not been designated an Eligible Telecommunications Carrier; and,

(iii) A description, supported by documentation, of the established program with which the provider seeks to qualify for automatic admission to the Emergency Broadband Benefit Program.

(c) *Election notice.* All participating providers must file an election notice with the Administrator. The election notice must be submitted in a manner and form consistent with the direction of the Wireline Competition Bureau and the Administrator. At a minimum the election notice should contain:

(1) The states or territories in which the provider plans to participate in the Emergency Broadband Benefit Program;

(2) A statement that, in each state or territory, the provider was a ''broadband provider'' as of December 1, 2020;

(3) A list of states or territories where the provider is an existing Eligible Telecommunications Carrier, if any;

(4) A list of states or territories where the provider received Wireline

Competition Bureau approval, whether automatic or expedited, to participate, if any;

(5) Whether the provider intends to distribute connected devices;

(6) A description of the internet service offerings for which the provider plans to seek reimbursement in each state or territory; and,

(7) Documentation demonstrating the standard rates for those services in each state; and any other information necessary to establish participating providers in the Administrator's systems.

(d) *Suspension and debarment.* The prohibition on participation and suspension and debarment rules established in 47 CFR 54.8, shall apply to activities associated with or related to the Emergency Broadband Benefit Program.

§ 54.1602 Emergency Broadband Benefit.

(a) The Emergency Broadband Benefit Program shall provide reimbursement to a participating provider for providing a discount on the price of broadband internet access service (and associated equipment), a connected device, or both, to an eligible household during the emergency period.

(b) Participating providers may allow consumers whose households qualify for the Emergency Broadband Benefit Program pursuant to 47 CFR 54.1605, to apply the Emergency Broadband Benefit to any residential service plan that includes broadband internet access service or a bundle of broadband internet access service along with fixed or mobile voice telephony service, text messaging service, or both.

§ 54.1603 Emergency Broadband Benefit Program support amount.

(a) The Emergency Broadband Benefit Program support amount for all participating providers shall equal the actual discount provided to an eligible household off of the actual amount charged to such household, which shall be no more than the standard rate for an internet service offering and associated equipment, but not more than $50.00 per month, if that provider certifies that it will pass through the full amount of support to the eligible household, or not more than $75.00 per month, if that provider certifies that it will pass through the full amount of support to the eligible household on Tribal lands, as defined in 47 CFR 54.1600(t).

(b) A participating provider that, in addition to providing the Emergency Broadband Benefit Program to an eligible household, supplies such household with a connected device may be reimbursed up to $100.00 for such connected device, if the charge to such eligible household is more than $10.00 but less than $50.00 for such connected device, except that a participating provider may receive reimbursement for no more than one (1) connected device per eligible household.

(c) If the amount of funding remaining in the Emergency Broadband Connectivity Fund is less than the total amount of valid reimbursement claims in the Emergency Broadband Benefit Program, the support amount for all participating providers submitting valid reimbursement claims for a month may be less than the full support amount permitted under this section.

§ 54.1604 Participating provider obligation to offer Emergency Broadband Benefit Program.

(a) All participating providers in the Emergency Broadband Benefit Program must make available the Emergency Broadband Benefit Program to qualifying low-income consumers.

(b) All participating providers in the Emergency Broadband Benefit Program are encouraged to:

(1) Publicize the availability of the Emergency Broadband Benefit Program in a manner reasonably designed to reach those likely to qualify for the service.

(2) Indicate on all materials describing the Emergency Broadband Benefit Program, using easily understood language in the dominant languages of the communities the provider serves:

(i) The eligibility requirements for consumer participation;

(ii) That the Emergency Broadband Benefit is non-transferable and is limited to one discount per household;

(iii) The monetary charges to the customer;

(iv) The available upload/download speeds and data caps for the covered services, and a list of connected devices, if any, with descriptions;

(v) The provider's customer service telephone number, which must be prominently displayed on all promotional materials and adequately staffed by customer service representatives; and

(vi) That the Emergency Broadband Benefit Program is a temporary emergency Federal Government benefit program operated by the Federal Communications Commission and, upon its conclusion, customers will be subject to the provider's regular rates, terms, and conditions.

§ 54.1605 Household qualification for Emergency Broadband Benefit Program.

(a) To constitute an eligible household:

(1) The household income as defined in 47 CFR 54.1600(m) must be at or below 135% of the Federal Poverty Guidelines for a household of that size; or

(2) At least one member of the household must receive benefits from one of the following Federal assistance programs: Medicaid; Supplemental Nutrition Assistance Program; Supplemental Security Income; Federal Public Housing Assistance; or Veterans and Survivors Pension Benefit; or

(3) At least one member of the household has applied for and been approved to receive benefits under the free and reduced price lunch program under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 *et seq.*) or the school breakfast program under section 4 of the Child Nutrition Act of 1966 (42 U.S.C. 1773); or

(4) At least one member of the household has experienced a substantial loss of income since February 29, 2020, that is documented by layoff or furlough notice, application for unemployment insurance benefits, or similar documentation or that is otherwise verifiable through the National Verifier; or

(5) At least one member of the household has received a Federal Pell Grant under section 401 of the Higher Education Act of 1965 (20 U.S.C. 1070a) in the current award year, if such award is verifiable through the National Verifier or the participating provider verifies eligibility under 47 CFR 54.1606(a)(2); or

(6) At least one member of the household meets the eligibility criteria for a participating provider's existing low-income or COVID–19 program, subject to the requirements of 47 CFR 54.1606(a)(2); or

(7) If the household is located on Tribal lands, at least one member of the household participates in one of the following Tribal-specific Federal assistance programs: Bureau of Indian Affairs general assistance; Tribally administered Temporary Assistance for Needy Families; Head Start (only those households meeting its income qualifying standard); or the Food Distribution Program on Indian Reservations.

(b) In addition to meeting the qualifications provided in paragraph (a) of this section, in order to constitute an eligible household, no member of the household may already be receiving an Emergency Broadband Benefit Program discount.

§ 54.1606 Household eligibility determinations.

(a) *Eligibility verification processes.* To verify whether a household is an eligible household, a participating provider shall—

(1) Use the National Verifier; or

(2) Rely upon an alternative verification process of the participating provider, if—

(i) The participating provider submits information as required by the Commission regarding the alternative verification process prior to seeking reimbursement; and

(ii) Not later than 7 days after receiving the information required under paragraph (a)(2)(i) of this section, the Wireline Competition Bureau—

(A) Determines that the alternative verification process will be sufficient to avoid waste, fraud, and abuse; and

(B) Notifies the participating provider of the determination under paragraph (a)(2)(ii)(A) of this section; or

(3) Rely on a school to verify the eligibility of a household based on the participation of the household in the free and reduced price lunch program or the school breakfast program as described in 47 CFR 54.1600(h)(2). The participating provider must retain documentation demonstrating the school verifying eligibility, the program(s) that the school participates in, the qualifying household, and the program(s) the household participates in.

(b) *Provider policies and procedures.* All participating providers must implement policies and procedures for ensuring that their Emergency Broadband Benefit Program households are eligible to receive the Emergency Broadband Benefit. A provider may not provide a consumer with service that it represents to be Emergency Broadband Benefit-supported service or seek reimbursement for such service, unless and until it has:

(1) Confirmed that the household is an eligible household pursuant to 47 CFR 54.1605;

(2) Completed any other necessary enrollment steps, and;

(3) Securely retained all information and documentation it receives related to the eligibility determination and enrollment, consistent with 47 CFR 54.1611.

(c) *One-Per-Household Worksheet.* If the prospective household shares an address with one or more existing Emergency Broadband Benefit Program subscribers according to the National Lifeline Accountability Database or National Verifier, the prospective subscriber must complete a form certifying compliance with the one-per-household rule prior to initial enrollment.

(d) *The National Lifeline Accountability Database.* In order to receive Emergency Broadband Benefit Program support, participating providers must comply with the following requirements:

(1) All participating providers must query the National Lifeline Accountability Database to determine whether a prospective subscriber is currently receiving an Emergency Broadband Benefit-supported service from another participating provider; and whether anyone else living at the prospective subscriber's residential address is currently receiving an Emergency Broadband Benefit-supported service.

(2) If the National Lifeline Accountability Database indicates that a prospective subscriber who is not seeking to transfer his or her Emergency Broadband Benefit, is currently receiving an Emergency Broadband Benefit-supported service, the participating provider must not provide and shall not seek or receive Emergency Broadband Benefit reimbursement for that subscriber.

(3) Participating providers may query the National Lifeline Accountability Database only for the purposes provided in paragraphs (e)(1) and (2) of this section, and to determine whether information with respect to its subscribers already in the National Lifeline Accountability Database is correct and complete.

(4) Participating providers must transmit to the National Lifeline Accountability Database in a format prescribed by the Administrator each new and existing Emergency Broadband Benefit Program subscriber's full name; full residential address; date of birth; the telephone number associated with the Emergency Broadband Benefit Program service; the date on which the Emergency Broadband Benefit Program discount was initiated; the date on which the Emergency Broadband Benefit Program discount was terminated, if it has been terminated; the amount of support being sought for that subscriber; and the means through which the subscriber qualified for the Emergency Broadband Benefit Program.

(5) All participating providers must update an existing Emergency Broadband Benefit Program subscriber's information in the National Lifeline Accountability Database within ten business days of receiving any change to that information, except as described in paragraph (d)(7) of this section.

(6) All participating providers must obtain, from each new and existing subscriber, consent to transmit the subscriber's information. Prior to obtaining consent, the participating provider must describe to the subscriber, using clear, easily understood language, the specific information being transmitted, that the information is being transmitted to the Administrator to ensure the proper administration of the Emergency Broadband Benefit Program, and that failure to provide consent will result in subscriber being denied the Emergency Broadband Benefit.

(7) When a participating provider de-enrolls a subscriber from the Emergency Broadband Benefit Program, it must transmit to the National Lifeline Accountability Database the date of Emergency Broadband Benefit Program de-enrollment within one business day of de-enrollment.

(8) All participating providers must securely retain subscriber documentation that the participating provider reviewed to verify subscriber eligibility, for the purposes of production during audits or investigations or to the extent required by National Lifeline Accountability Database or National Verifier processes, which require, inter alia, verification of eligibility, identity, address, and age.

(9) A participating provider must not enroll or claim for reimbursement a prospective subscriber in the Emergency Broadband Benefit Program if the National Lifeline Accountability Database or National Verifier cannot verify the subscriber's status as alive, unless the subscriber produces documentation to demonstrate his or her identity and status as alive.

(e) *Connected device reimbursement and the National Lifeline Accountability Database.* In order to receive Emergency Broadband Benefit Program reimbursement for a connected device, participating providers must comply with the following requirements:

(1) Such participating provider must query the National Lifeline Accountability Database to determine whether a prospective connected device benefit recipient has previously received a connected device benefit.

(2) If the National Lifeline Accountability Database indicates that a prospective subscriber has received a connected device benefit, the participating provider must not seek a connected device reimbursement for that subscriber.

(3) Such participating provider shall not seek a connected device reimbursement for a subscriber that is not receiving the Emergency Broadband Benefit for service provided by the same participating provider.

(4) Where two or more participating providers file a claim for a connected device reimbursement for the same subscriber, only the participating provider whose information was received and processed by the National Lifeline Accountability Database or Lifeline Claims System first, as determined by the Administrator, will be entitled to a connected device reimbursement for that subscriber.

(5) All participating providers must obtain from each subscriber consent to transmit the information required under paragraph (e)(1) of this section. Prior to obtaining consent, the participating provider must describe to the subscriber, using clear, easily understood language, the specific information being transmitted, that the information is being transmitted to the Administrator to ensure the proper administration of the Emergency Broadband Benefit Program connected device benefit, and that failure to provide consent will result in the subscriber being denied the Emergency Broadband Benefit Program connected device benefit.

§ 54.1607 Enrollment representative registration.

Enrollment representative registration. A participating provider must require that enrollment representatives register with the Administrator before the enrollment representative can provide information directly or indirectly to the National Lifeline Accountability Database or the National Verifier.

(a) As part of the registration process, participating providers must require that all enrollment representatives provide the Administrator with identifying information, which may include first and last name, date of birth, the last four digits of his or her social security number, email address, and residential address. Enrollment representatives will be assigned a unique identifier, which must be used for:

(1) Accessing the National Lifeline Accountability Database;

(2) Accessing the National Verifier;

(3) Accessing any eligibility database; and

(4) Completing any Emergency Broadband Benefit Program enrollment or verification forms.

(b) Participating providers must ensure that enrollment representatives shall not use another person's unique identifier to enroll Emergency Broadband Benefit Program subscribers, recertify Emergency Broadband Benefit Program subscribers, or access the National Lifeline Accountability Database or National Verifier.

(c) Participating providers must ensure that enrollment representatives shall regularly recertify their status with the Administrator to maintain their unique identifier and maintain access to the systems that rely on a valid unique identifier. Participating providers must also ensure that enrollment representatives shall update their registration information within 30 days of any change in such information.

§ 54.1608 Reimbursement for providing Emergency Broadband Benefit Program discount.

(a) Emergency Broadband Benefit Program support for providing a qualifying broadband internet access service shall be provided directly to a participating provider based on the number of actual qualifying low-income households listed in the National Lifeline Accountability Database that the participating provider serves directly as of the first of the month.

(b) For each eligible household receiving Emergency Broadband Benefit-supported service, the reimbursement amount shall equal the appropriate support amount as described in 47 CFR 54.1603, except as otherwise provided by 47 CFR 54.1603(c). The participating provider's Emergency Broadband Benefit Program reimbursement shall not exceed the participating provider's standard rate for that offering.

(c) A participating provider offering an Emergency Broadband Benefit Program service with a standard rate that does not require the participating provider to assess and collect a monthly fee from its subscribers must certify that every subscriber claimed has used their supported service, as defined by 47 CFR 54.407(c)(2), at least once during the service month being claimed prior in order to claim that subscriber for reimbursement in that month.

(d) A participating provider that, in addition to providing the Emergency Broadband Benefit to an eligible household, provides such household with a connected device may be reimbursed up to $100.00 for such connected device, if the charge to such eligible household is more than $10.00 but less than $50.00 for such connected device, except that a participating provider may receive reimbursement for no more than one (1) connected device per eligible household.

(e) In order to receive Emergency Broadband Benefit Program reimbursement, an officer of the participating provider must certify, as part of each request for reimbursement, that:

(1) The officer is authorized to submit the request on behalf of the participating provider;

(2) The officer has read the instructions relating to reimbursements and the funds sought in the reimbursement request are for services and/or devices that were provided in accordance with the Emergency Broadband Benefit Program rules and requirements;

(3) The participating provider is in compliance with all of the rules in this subpart;

(4) The participating provider has obtained valid certification and application forms as required by the rules in this subpart for each of the subscribers for whom it is seeking reimbursement;

(5) The amount for which the participating provider is seeking reimbursement from the Emergency Broadband Connectivity Fund is not more than the standard rate;

(6) Each eligible household for which the participating provider is seeking reimbursement for providing an internet service offering—

(i) Has not been and will not be charged—

(A) For such offering, if the standard rate for such offering is less than or equal to the amount of the emergency broadband benefit for such household; or

(B) More for such offering than the difference between the standard rate for such offering and the amount of the emergency broadband benefit for such household;

(ii) Will not be required to pay an early termination fee if such eligible household elects to enter into a contract to receive such internet service offering if such household later terminates such contract;

(iii) Was not, after the date of the enactment of the Consolidated Appropriations Act, subject to a mandatory waiting period for such internet service offering based on having previously received broadband internet access service from such participating provider; and

(iv) Will otherwise be subject to the participating provider's generally applicable terms and conditions as applied to other customers.

(7) Each eligible household for which the participating provider is seeking reimbursement for supplying such household with a connected device was charged by the provider more than $10.00 but less than $50.00 for such connected device;

(8) That the connected device claimed meets the Commission's requirements, that the reimbursement claim amount reflects the market value of the device, and that the connected device has been delivered to the household;

(9) The process used by the participating provider to verify that a household is eligible for the Emergency Broadband Benefit Program, if the provider elects an alternative verification process and that such verification process was designed to avoid waste, fraud, and abuse.

(10) The provider has retained the relevant supporting documents that demonstrate the connected devices requested are eligible for reimbursement;

(11) All documentation associated with the reimbursement form, including all records for services and/or connected devices provided, will be retained for a period of at least six years after the last date of delivery of the supported services and/or connected devices provided through the Emergency Broadband Benefit Program, and are subject to audit;

(12) The provider neither received nor paid kickbacks, as defined by 41 U.S.C. 8701, in connection with the Emergency Broadband Benefit Program;

(13) The information contained in this form is true, complete, and accurate to the best of the officer's knowledge, information, and belief, and is based on information known to the officer or provided to officer by employees responsible for the information being submitted;

(14) The officer is aware that any false, fictitious, or fraudulent information, or the omission of any material fact, may subject the officer to criminal, civil, or administrative penalties for fraud, false statements, false claims, or otherwise. (18 U.S.C. 286–287, 1001, 1341, 31 U.S.C. 3729–3730, 3801–3812.); and

(15) No service costs or devices sought for reimbursement have been waived, paid, or promised to be paid by another entity, including any Federal program.

(f) In order to receive Emergency Broadband Benefit Program reimbursement, a participating provider must keep accurate records of the revenues it forgoes in providing Emergency Broadband Benefit-supported services. Such records shall be kept in the form directed by the Administrator and provided to the Administrator at intervals as directed by the Administrator or as provided in this subpart.

(g) In order to receive reimbursement, participating providers shall submit certified reimbursement claims through Lifeline Claims System by the 15th of each month, or the following business day in the event the 15th is a holiday or falls on a weekend. If the participating provider fails to submit a certified reimbursement claim by the deadline for that month, the reimbursement claim will not be processed.

§ 54.1609 De-enrollment from the Emergency Broadband Benefit Program.

(a) *De-enrollment generally.* If a participating provider has a reasonable basis to believe that an Emergency Broadband Benefit Program subscriber does not meet or no longer meets the criteria to be considered an eligible household under 47 CFR 54.1605, the participating provider must notify the subscriber of impending termination of his or her Emergency Broadband Benefit discount. Notification of impending termination must be sent in writing separate from the subscriber's monthly bill, if one is provided, and must be written in clear, easily understood language. The participating provider must allow a subscriber 30 days following the date of the impending termination letter to demonstrate continued eligibility. A subscriber making such a demonstration must present proof of continued eligibility to the National Verifier or the participating provider consistent with the participating provider's approved alternative verification process. A participating provider must de-enroll any subscriber who fails to demonstrate eligibility within five business days after the expiration of the subscriber's deadline to respond.

(b) *De-enrollment for duplicative support.* Notwithstanding paragraph (a) of this section, upon notification by the Administrator to any participating provider that a subscriber is receiving the Emergency Broadband Benefit discount from another participating provider, or that more than one member of a subscriber's household is receiving the Emergency Broadband Benefit discount and that the subscriber should be de-enrolled from participation in that provider's Emergency Broadband Benefit program, the participating provider must de-enroll the subscriber from participation in that provider's Emergency Broadband Benefit discount within five business days. A participating provider shall not claim any de-enrolled subscriber for Emergency Broadband Benefit reimbursement following the date of that subscriber's de-enrollment.

(c) *De-enrollment requested by subscriber.* If a participating provider receives a request from a subscriber to de-enroll, it must de-enroll the subscriber within two business days after the request.

§ 54.1610 Expiration of Emergency Broadband Benefit Program.

(a) Prior to the conclusion of the Emergency Broadband Benefit Program, the Administrator will notify participating providers of the projected final service month for which participating providers will be eligible to receive reimbursement for valid reimbursement claims submitted pursuant to 47 CFR 54.1608. In that final month when valid reimbursement claims exceed remaining funds, the amount disbursed for both service and connected device claims to participating providers will be reduced on a pro-rata basis but will be no less than 50% of the total support amount for timely filed claims for service and connected devices provided to households.

(b) Concurrent with release of the notice by the Administrator pursuant to paragraph (a) of this section, no new households shall be enrolled in the Emergency Broadband Benefit Program.

(c) No later than 15 days after the Administrator provides notice pursuant to paragraph (a) of this section, participating providers shall give notice to subscribers receiving the Emergency Broadband Benefit of the last date or service month that the full benefit will apply to the household's bill, the last date or service month that the partial, final-month benefit will apply to their bill, and the expected rate of the broadband service once the benefit expires.

(d) At least 30 days before the end of the Emergency Broadband Benefit Program, as indicated in the notice sent by the Administrator pursuant to paragraph (a) of this section, participating providers must notify households about the upcoming end to the Emergency Broadband Benefit Program and clearly state that the household will be subject to the participating provider's generally applicable terms and conditions at the conclusion of the Emergency Broadband Benefit Program if the household elects to continue receiving broadband service from the participating provider.

§ 54.1611 Recordkeeping requirements.

Participating providers must maintain records to document compliance with all Commission requirements governing the Emergency Broadband Benefit Program for the six full preceding calendar years and provide that documentation to the Commission or Administrator upon request.

Participating providers must maintain the documentation related to the eligibility determination and reimbursement claims for an Emergency Broadband Benefit Program subscriber for as long as the subscriber receives the Emergency Broadband Benefit discount from that participating provider, but for no less than the six full preceding calendar years.

§ 54.1612 Validity of electronic signatures.

(a) For the purposes of this subpart, an electronic signature, defined by the Electronic Signatures in Global and National Commerce Act, as an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record, has the same legal effect as a written signature.

(b) For the purposes of this subpart, an electronic record, defined by the Electronic Signatures in Global and National Commerce Act as a contract or other record created, generated, sent, communicated, received, or stored by electronic means, constitutes a record.

[FR Doc. 2021–07456 Filed 4–12–21; 8:45 am]

BILLING CODE 6712–01–P

Reader Aids

Federal Register

Vol. 86, No. 69

Tuesday, April 13, 2021

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, APRIL

17055–17270 1
17271–17492 2
17493–17674 5
17675–17892 6
17893–18170 7
18171–18422 8
18423–18882 9
18883–19126 12
19127–19566 13

CFR PARTS AFFECTED DURING APRIL

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
10163 17493
10164 17495
10165 17675
10166 17677
10167 17679
10168 17681
10169 17683
10170 17685
10171 17689
10172 17893
10173 18167
10174 18169
10175 18171

Executive Orders:
14022 17895

Administrative Orders:
Notices:
Notice of April 1, 2021 17673

5 CFR

870 17271
875 17271
890 17271
894 17271
2641 17691

7 CFR

271 18423
273 18423
1752 17274

Proposed Rules:
932 18216
986 19152

10 CFR

Proposed Rules:
37 18477
430 .....18478, 18901

12 CFR

262 18173
271 18423
360 18180
Ch. X 17699
1003 17692
1005 17693
1010 17694
1022 17695
1024 17897
1026 .....17693, 17697, 17698
1238 18431

Proposed Rules:
209 19152
1024 18840

14 CFR

39 .....17275, 17278, 17280, 17283, 17285, 17287, 17290, 17497, 17499, 17502, 17504, 17510, 17512, 17515, 17518, 17521, 17700, 17703, 17706, 17708, 17710, 17899, 17902, 17905, 18180, 18883, 18887, 19127
71 .....18432, 18890, 19129
97 .....17524, 17526
302 17292
399 17292

Proposed Rules:
39 .....17087, 17322, 17324, 17326, 17329, 17330, 17993, 17995, 17998, 18218, 18218, 18221, 18479, 18482, 18921, 19157, 19160
71 .....17333, 17553, 17754, 18484, 18485, 18487, 18488, 18490
73 17555

15 CFR

732 18433
736 18433
744 .....18433, 18437

16 CFR

1231 17296
1640 18440

Proposed Rules:
1640 18491

17 CFR

1 19324
4 19324
41 19324
190 19324
240 18595
242 18595
249 .....17528, 18595
274 17528

18 CFR

Proposed Rules:
101 17342

19 CFR

12 17055
208 18183
361 17058

20 CFR

Proposed Rules:
655 17343
656 17343

21 CFR

1 17059
207 17061
510 17061
520 17061
522 17061
524 17061

528 17061
558 17061
821 17065

22 CFR

212 18444

24 CFR

Proposed Rules:
5 17346

25 CFR

Proposed Rules:
1187 19162

29 CFR

4908 17066
Proposed Rules:
1910 18924

31 CFR

501 18895
Proposed Rules:
1010 17557

33 CFR

117 18445
165 ....17066, 17068, 18447, 18449, 18896
Proposed Rules:
96 17090
100 19169
110 17090
117 ....17096, 18925, 18927, 18929
165 ....17565, 17755, 18224, 19171

34 CFR

Ch. III 19135
Proposed Rules:
Ch. II 17757

36 CFR

230 17302
242 17713

38 CFR

Proposed Rules:
3 17098

39 CFR

3040 18451
Proposed Rules:
3030 ....17347, 19173
3050 17100

40 CFR

52 ....17071, 18457
62 17543
80 17073
180 ....17545, 17907, 17910, 17914, 17917, 19145
258 18185
1519 19149
Proposed Rules:
52 ....17101, 17106, 17567, 17569, 17762, 19174
60 19176
63 19176
81 ....17762, 18227
141 17571
152 18232
258 18237
271 17572

42 CFR

Proposed Rules:
412 ....19086, 19480

44 CFR

64 17078

46 CFR

Proposed Rules:
71 17090
115 17090
176 17090
520 18240

47 CFR

Ch. I 18459, 18898
0 17726
1 ....17920, 18124
2 17920
25 17311
27 17920
54 ....17079, 18124, 19532
64 17726
73 18898
Proposed Rules:
0 17575
1 18000
27 18000
54 18932
64 18934
73 ....17110, 17348, 18934

48 CFR

3001 17312
3002 17312
3003 17312
3004 17312
3005 17312
3006 17312
3007 17312
3009 17312
3010 17312
3011 17312
3012 17312
3013 17312
3015 17312
3016 17312
3017 17312
3018 17312
3019 17312
3022 17312
3023 17312
3024 17312
3025 17312
3027 17312
3028 17312
3030 17312
3031 17312
3032 17312
3033 17312
3034 17312
3035 17312
3036 17312
3037 17312
3042 17312
3046 17312
3047 17312
3052 17312
3053 17312

49 CFR

1 17292
5 17292
7 17292
106 17292
389 17292
553 17292
601 17292
1201 17548
1333 17735

50 CFR

17 ....17956, 18189
100 17713
217 ....17458, 18476
622 ....17080, 17318, 17751
648 ....17081, 17551
679 ....17320, 17752, 18476
Proposed Rules:
17 ....18014, 19184, 19186
648 17764
679 19207

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List March 31, 2021

Public Laws Electronic Notification Service (PENS)

PENS is a free email notification service of newly enacted public laws. To subscribe, go to *https://listserv.gsa.gov/cgi-bin/wa.exe?SUBED1=PUBLAWS-L&A=1*

Note: This service is strictly for email notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.