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Presidential Documents

Title 3—

The President

Proclamation 10292 of October 18, 2021

Death of General Colin Powell

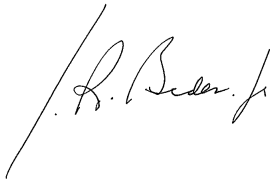
By the President of the United States of America

A Proclamation

General Colin Powell was a patriot of unmatched honor and dignity. The son of immigrants, born in New York City, raised in Harlem and the South Bronx, a graduate of the City College of New York, he rose to the highest ranks of the United States military and to advise four Presidents. He believed in the promise of America because he lived it. And he devoted much of his life to making that promise a reality for so many others. He embodied the highest ideals of both warrior and diplomat. He led with his personal commitment to the democratic values that make our country strong. He repeatedly broke racial barriers, blazing a trail for others to follow, and was committed throughout his life to investing in the next generation of leadership. Colin Powell was a good man who I was proud to call my friend, and he will be remembered in history as one of our great Americans.

As a mark of respect for General Powell and his life of service to our Nation, I hereby order, by the authority vested in me as President of the United States by the Constitution and the laws of the United States of America, that the flag of the United States shall be flown at half-staff at the White House and upon all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia and throughout the United States and its Territories and possessions until sunset on October 22, 2021. I also direct that the flag shall be flown at half-staff for the same length of time at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

IN WITNESS WHEREOF, I have hereunto set my hand this eighteenth day of October, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-sixth.



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Rules and Regulations

Federal Register

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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.

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1630

Privacy Act Exemptions

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule.

SUMMARY: In accordance with the Privacy Act of 1974 (the Act) the Federal Retirement Thrift Investment Board (FRTIB) is exempting five systems of records from certain requirements of the Act.

DATES: This final rule is effective October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Dharmesh Vashee, Senior Agency Official for Privacy and General Counsel, Federal Retirement Thrift Investment Board, Office of General Counsel, 77 K Street NE, Suite 1000, Washington, DC 20002, (202) 942–1600.

SUPPLEMENTARY INFORMATION: On August 13, 2021, FRTIB published a notice of proposed rulemaking in the **Federal Register**, 86 FR 44642, to amend FRTIB's Privacy Act regulations at 5 CFR part 1630 to exempt five of its systems of records, FRTIB–2, FRTIB–13, FRTIB–14, FRTIB–15, and FRTIB–23, from certain requirements of the Privacy Act, 5 U.S.C. 552a. The FRTIB promulgated exemptions to the Privacy Act for these five systems of records in accordance with subsection (k)(2) and subsection (k)(5).

Comments were invited on the notice of proposed rulemaking (NPRM) published on August 13, 2021. No comments were received regarding this proposed rulemaking. The FRTIB will implement the rulemaking as proposed.

Public Comments

FRTIB received no comments on the NPRM.

Regulatory Flexibility Act

FRTIB certifies that this regulation will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). This rule does not impose a requirement for small businesses to report or keep records on any of the requirements contained in this rule. The exemptions to the Privacy Act apply to individuals, and individuals are not covered entities under the Regulatory Flexibility Act.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501 1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of $100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under section 1532 is not required.

Submission to Congress and the Government Accountability Office

Pursuant to 5 U.S.C. 801(a)(1)(A), the Agency submitted 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 before publication of this rule in the **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 804(2).

List of Subjects in 5 CFR Part 1630

Privacy.

Ravindra Deo,

Executive Director, Federal Retirement Thrift Investment Board.

Accordingly, FRTIB amends 5 CFR part 1630 as follows:

PART 1630—PRIVACY ACT REGULATIONS

■ 1. The authority citation for part 1630 continues to read as follows:

Authority: 5 U.S.C. 552a.

■ 2. Amend § 1630.15 by revising paragraph (b) to read as follows:

§ 1630.15 Exemptions.

* * * * *

(b) Those designated systems of records which are exempt from the requirements of subsections (c)(3); (d); (e)(1); (e)(4)(G), (H), (I); and (f) of the Privacy Act, 5 U.S.C. 552a, include FRTIB–2, Personnel Security Investigation Files; FRTIB–13, Fraud and Forgery Records; FRTIB–14, FRTIB Legal Case Files; FRTIB–15, Internal Investigations of Harassment and Hostile Work Environment Allegations; and FRTIB–23, Insider Threat Program Records.

* * * * *

[FR Doc. 2021–22952 Filed 10–20–21; 8:45 am]

BILLING CODE 6760–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740, 772 and 774

[Docket No. 211013–0209]

RIN 0694–AH56

Information Security Controls: Cybersecurity Items

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Interim final rule, with request for comments.

SUMMARY: This interim final rule outlines the progress the United States has made in export controls pertaining to cybersecurity items, revised Commerce Control List (CCL) implementation, and requests from the public information about the impact of these revised controls on U.S. industry and the cybersecurity community. Specifically, this rule establishes a new control on these items for National Security (NS) and Anti-terrorism (AT) reasons, along with a new License Exception Authorized Cybersecurity Exports (ACE) that authorizes exports of these items to most destinations except in the circumstances described. These items warrant controls because these tools could be used for surveillance, espionage, or other actions that disrupt, deny or degrade the network or devices on it.

DATES: Effective date: This rule is effective January 19, 2022. Comments must be received by BIS no later than December 6, 2021.

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal (*www.regulations.gov*). The *regulations.gov* ID for this rule is: BIS–2020–0038. Please refer to RIN 0694–AH56 in all comments.

All filers using the portal should use the name of the person or entity submitting the comments as the name of their files, in accordance with the instructions below. 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 also provide a non-confidential version of the submission.

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 corresponding non-confidential version of those comments must be clearly marked ''PUBLIC.'' The file name of the non-confidential version should begin with the character ''P.'' Any submissions with file names that do not begin with either a ''BC'' or a ''P'' will be assumed to be public and will be made publicly available through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For questions regarding the Export Control Classification Numbers (ECCNs) included in this rule or License Exception ACE, contact Aaron Amundson at 202–482–0707 or email *Aaron.Amundson@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

In 2013, the Wassenaar Arrangement (WA) added cybersecurity items to the WA List, including a definition for ''intrusion software.'' The controls included hardware and software controls on the command and delivery platforms for ''intrusion software,'' the technology for the ''development,'' ''production'' or ''use'' of the command and delivery platforms, and the technology for the ''development'' of ''intrusion software.'' On May 20, 2015, the Bureau of Industry and Security (BIS) published a proposed rule describing how these new controls would fit into the Export Administration Regulations (EAR) and requested information from the public about the impact on U.S. industry. The public comments on the proposed rule revealed serious issues concerning scope and implementation regarding these controls. Based on these comments, as well as substantial commentary from Congress, the private sector, academia, civil society, and others on the potential unintended consequences of the 2013 controls, the U.S. government returned to the WA to renegotiate the controls.

In response to the proposed rule, BIS received almost 300 comments that raised substantial concerns about the proposed rule's scope and the impact the proposed rule would have on legitimate cybersecurity research and incident response activities. BIS also conducted extensive outreach with the security industry, financial institutions, and government agencies that manage cybersecurity.

Comments on the previously published proposed rule focused on three main issues. First, many commenters asserted that the entries were overly broad, captured more than was intended, and, as a technical matter, failed to accurately describe the items intended for control. Second, many commenters asserted that the rule as written imposed a heavy and unnecessary licensing burden on legitimate transactions that contribute to cybersecurity. Third, many commenters suggested that the proposed rule's control on technology for the ''development'' of ''intrusion software'' could cripple legitimate cybersecurity research.

Based on these comments, the United States decided against amending the proposed rule and instead returned to the WA in 2016 and 2017 to negotiate changes to the text. In December 2017, the WA published the changes that resulted from those negotiations. There were three significant changes: First, using ''command and control'' in the control language for both hardware and software addressed concerns from cybersecurity companies to more specifically control tools that can be used maliciously. Second, adding a note to the control entry for technology for the ''development'' of ''intrusion software'' that excludes from the entry ''technology'' that is exchanged for 'vulnerability disclosure' or 'cyber incident response'. Third, adding a note to the ''software'' generation, command and control, or delivery entry that excludes from this entry products designed and limited to providing basic software updates and upgrades.

BIS publishes this interim final rule to implement the WA 2017 decisions related to cybersecurity. The rule creates a new License Exception Authorized Cybersecurity Exports (ACE) that authorizes exports, reexports and transfers (in-country) of cybersecurity items, as described in more detail below, which are not also controlled in Category 5—Part 2 of the CCL or for Surreptitious Listening (SL) reasons.

In addition, BIS authorizes certain IP network surveillance products under the same License Exception ACE. These items were also part of the May 20, 2015 proposed rule but received far fewer comments than the other items in that proposed rule. BIS believes that making these products eligible for License Exception ACE addresses concerns raised in the comments on the previously published proposed rule.

BIS believes this rule implements the WA decision of 2013, as amended in 2017, with regard to cybersecurity items and addresses the concerns expressed by industry and others about the previously published proposed rule. Further, because of the limited scope of this rule, BIS believes the impact would be minimal. However, to ensure full consideration of the potential impact of this rule, BIS seeks public comment on this interim final rule, including comments on the potential cost of complying with this rule, and any impacts this rule has on legitimate cybersecurity activities.

No items subject to the International Traffic in Arms Regulations (ITAR) are being transferred to the EAR by this rule. Items and services described on the U.S. Munitions List (USML) at ITAR § 121.1, including military training, technical data directly related to a defense article, and certain hardware and software specially designed for intelligence purposes, remain subject to the ITAR. For software directly related to a defense article, see ITAR § 120.10(a)(4) and the applicable technical data entry in each USML category. See EAR § 734.3(b) and ITAR § 120.5(a) for more on the relationship between the ITAR and EAR.

Specific Revisions

ECCNs 4A005 (new), 4D004 (new), 4E001.a and 4E001.c (new)

ECCNs 4A005 and 4D004 are added, as well as a new paragraph 4E001.c, as set forth in the amendments described below. In addition, the existing definition for ''intrusion software'' found in § 772.1 of the EAR applies to the new ECCNs. The entries include the 2017 WA notes: An exclusion Note in 4D004 for software specially designed

and limited to providing basic updates and upgrades and an exclusion Note for 4E001.c (as well as existing 4E001.a) for ''vulnerability disclosure'' or ''cyber incident response.'' These terms are added to part 772 and are further explained elsewhere in this preamble. This rule also adds a Note 2 to 4E001.a and .c to clarify that BIS can request information on items decontrolled by Note 1 to ensure compliance with the controls. BIS does not intend this note to require any additional compliance measures beyond what is otherwise required by the EAR. ''Software'' and ''technology'' ''published'' in the public domain and meeting the requirements of § 734.7 of the EAR are not subject to the EAR.

ECCN 5A001.j ''IP network communications surveillance systems or equipment . . .''

Paragraph 5A001.j ''IP network communications surveillance systems or equipment . . .'' is added to ECCN 5A001. License Exception ACE eligibility is added for 5A001.j in part 740 ''License Exception.'' License Exception STA conditions are revised to remove eligibility for 5A001.j to destinations listed in Country Groups A:5 and A:6 (see Supplement No. 1 to part 740 of the EAR for Country Groups). License Exceptions GBS and LVS are also revised to remove eligibility for those license exceptions.

Overlap With Category 5—Part 2 (''Information Security'')

When a cybersecurity item also incorporates particular ''information security'' functionality specified in ECCNs 5A002.a, 5A004.a, 5A004.b, 5D002.c.1, or 5D002.c.3 Category 5—Part 2 of the CCL in Supplement No. 1 to part 774 of the EAR, these Category 5—Part 2 ECCNs prevail, provided the controlled ''information security'' functionality remains present and usable within the cybersecurity end item or executable ''software.'' Category 5—Part 2 does not apply to elements of source code or ''technology'' that implement functionality controlled in another Category, or to any item subject to the EAR where Encryption Item (EI) functionality is absent, removed or otherwise non-existent.

Surreptitious Listening (SL) Controls

All items subject to the EAR that are controlled for Surreptitious Listening (SL) reasons under another ECCN not added by this rule will continue to be classified under the SL ECCN. The WA control list changes related to ''intrusion software'' and IP network communications surveillance systems do not affect or change any EAR provision regarding communications intercepting devices, ''software'' or ''technology'', or any SL control (see § 742.13 of the EAR). If a circumstance arises where the item meets the control for national security (NS) because it meets the cybersecurity parameters, encryption item (EI) parameters, and SL parameters, then the control with the most restrictive licensing requirements applies, which would be SL control, because SL has worldwide control.

§ 740.22 License Exception Authorized Cybersecurity Exports (ACE)

BIS is also establishing a new License Exception Authorized Cybersecurity Exports (ACE). This license exception, will appear in new § 740.22 of the EAR, is necessary to avoid impeding legitimate cybersecurity research and incident response activities. Cybersecurity items in the wrong hands raise both national security and foreign policy concerns. This license exception starts with a definition section that defines cybersecurity items, digital artifacts, favorable treatment cybersecurity end user, and government end user (for the purpose of § 740.22 only). 'Cybersecurity Items' are defined in § 740.22 as ECCNs 4A005, 4D001.a (for 4A005 or 4D004), 4D004, 4E001.a (for 4A005, 4D001.a (for 4A005 or 4D004) or 4D004), 4E001.c, 5A001.j, 5B001.a (for 5A001.j), 5D001.a (for 5A001.j), 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)), and 5E001.a (for 5A001.j or 5D001.a (for 5A001.j)).

License Exception ACE allows the export, reexport and transfer (in-country) of 'cybersecurity items' to most destinations, except to destinations listed in Country Groups E:1 and E:2 of supplement no. 1 to part 740.

There are two types of end-user restrictions. Restricted end users include a 'government end user,' as defined in § 740.22, of any country listed in Country Group D:1, D:2, D:3, D:4 or D:5 in supplement no. 1 to part 740, or a non-government end user located in a country listed in Country Group D:1 or D:5. For deemed exports, the 'government end user' restriction applies, but not the 'non-government end user' restriction.

There are exclusions to the end-user restrictions. The restriction on 'government end users' does not apply to exports, reexports, and transfers (in-country) to Country Group D countries that are also listed in Country Group A:6, which includes Cyprus (A:6 and D:5), Israel (A:6 and D:2–4), and Taiwan (A:6 and D:3), of 'digital artifacts' that are related to a cybersecurity incident involving information systems owned or operated by a 'favorable treatment cybersecurity end user,' or to police or judicial bodies in Country Group D countries that are also listed in Country Group A:6 for purposes of criminal or civil investigations or prosecutions of such cybersecurity incidents. In addition, the restriction does not apply to exports, reexports, and transfers (in-country) to national computer security incident response teams in Country Group D countries that are also listed in Country Group A:6 of 'cybersecurity items' for purposes of responding to cybersecurity incidents, for purposes of 'vulnerability disclosure', or for purposes of criminal investigations or prosecutions of such cybersecurity incidents. For exports, reexports, or transfers (in-country) to 'government end-users' under License Exception ACE, there is no exclusion for activities related to ''vulnerability disclosure'' and ''cyber incident response.'' However, Note 1 to ECCN 4E001 in the CCL (supplement no. 1 to part 774 of the EAR) excludes ''vulnerability disclosure'' and ''cyber incident response'' from control under 4E001.a or .c. The 4E001 exclusion note applies regardless of the type of end user and is unaffected by the restrictions in License Exception ACE.

The restriction on non-government end users in Country Group D:1 or D:5 does not apply to exports, reexports or transfers (in-country) of cybersecurity items classified under ECCNs 4A005, 4D001.a (for 4A005 or 4D004), 4D004, 4E001.a (for 4A005, 4D001.a (for 4A005 or 4D004) or 4D004) and 4E001.c to any 'favorable treatment cybersecurity end user.' In addition, this restriction does not apply to ''vulnerability disclosure'' or ''cyber incident response.''

Lastly, License Exception ACE has an end-use restriction. License Exception ACE is not authorized if the exporter, reexporter, or transferor knows or has reason to know at the time of export, reexport, or transfer (in-country), including a deemed export or reexport, that the 'cybersecurity item' will be used to affect the confidentiality, integrity or availability of information or information systems, without authorization by the owner, operator, or administrator of the information system (including the information and processes within such systems).

Part 772—Definitions of Terms

BIS adds to § 772.1 the WA definitions for ''cyber incident response,'' and ''vulnerability disclosure'', which are used in Category 4, new paragraph 4E001.c.

Conforming Changes

Because of the addition of the cybersecurity items to the CCL, some conforming changes need to occur. Notes are added to Category 4 and Category 5—Part 1 to address the overlap between these entries and other entries on the CCL, as further explained below.

Notes 3 and 4 to Category 4

To clarify the scope of existing entries in Category 5, Notes 3 and 4 are added to Category 4 stating that cybersecurity items that are specified by certain ECCNs in Category 5—Part 2 or in an ECCN controlled for SL reasons in Category 5—Part 1 would continue to be classified in those ECCNs instead of the new cybersecurity ECCN. In addition, these cybersecurity items are eligible for the license exceptions and are subject to the licensing policies applicable to those entries in Category 5—Part 2 or in the SL-controlled ECCNs.

ECCN 4D001 ''Software''

Paragraph 4D001.a is revised to include 4A005. License Exception ACE eligibility is added for 4D001.a and License Exception STA special conditions are revised to include the ineligibility of software specified in 4D001.a ''specially designed'' for the ''development'' or ''production'' of equipment specified by ECCN 4A005 to Country Groups A:5 and A:6.

ECCN 4E001 ''Technology''

In addition to the revision that adds 4E001.c, License Exception ACE eligibility is added for 4E001.a (for 4A005 and 4D004) and 4E001.c. License Exception STA ineligibility is added for 4E001.a (for 4A005 and 4D004) and 4E001.c to destinations listed in Country Groups A:5 and A:6.

Notes 3 and 4 to Category 5—Part 1

To clarify the scope of these entries and existing entries in Category 5 Parts 1 and 2, Notes 3 and 4 are added to Category 5—Part 1 identifying that cybersecurity items controlled in certain Category 5—Part 2 ECCNs will remain controlled in Category 5—Part 2 and are eligible for the license exceptions and are subject to the licensing policies applicable to those ECCNs. In addition, cybersecurity items specified in an ECCN controlled for SL reasons in Category 5—Part 1 continue to be classified in those ECCNs instead of the new cybersecurity ECCN.

ECCN 5B001 Telecommunication Test, Inspection and Production Equipment, ''Components'' and ''Accessories''

License Exception ACE eligibility is added for 5B001.a (for equipment and ''specially designed'' ''components'' or ''accessories'' therefor, ''specially designed'' for the ''development'' or ''production'' of equipment, functions or features, controlled by 5A001.j). License Exception STA conditions are revised to remove eligibility for 5B001.a (for equipment and ''specially designed'' ''components'' or ''accessories'' therefor, ''specially designed'' for the ''development'' or ''production'' of equipment, functions or features, controlled by 5A001.j) to destinations listed in Country Groups A:5 and A:6 (See Supplement No. 1 to part 740 of the EAR for Country Groups). License Exceptions LVS and GBS are revised to remove eligibility for 5B001.a (for 5A001.j).

ECCN 5D001 ''Software''

License Exception ACE eligibility is added for 5D001.a (for equipment, functions or features specified by 5A001.j) and 5D001.c (for equipment specified by 5A001.j or 5B001.a). License Exception STA conditions are revised to remove eligibility for 5D001.a (for equipment, functions or features specified by 5A001.j) and 5D001.c (for equipment specified by 5A001.j or 5B001.a) to destinations listed in Country Groups A:5 and A:6 (See Supplement No. 1 to part 740 of the EAR for Country Groups). License Exception TSR is revised to remove eligibility for ''software'' classified under ECCN 5D001.a (for 5A001.j) or 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)).

ECCN 5E001 ''Technology''

License Exception ACE eligibility is added for 5E001.a (for 5A001.j, 5B001.a (for 5A001.j), 5D001.a (for 5A001.j), or 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)). License Exception STA conditions is revised to remove eligibility for 5E001.a (for 5A001.j, 5B001.a (for 5A001.j), 5D001.a (for 5A001.j), or 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)) to destinations listed in Country Groups A:5 and A:6 (See Supplement No. 1 to part 740 of the EAR for Country Groups). License Exception TSR is revised to remove eligibility for ''technology'' classified under ECCN 5E001.a for 5A001.j, 5B001.a (for 5A001.j), ECCN 5D001.a (for 5A001.j), or 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)).

ECCN 5A004 ''Systems,'' ''Equipment'' and ''Components'' for Defeating, Weakening or Bypassing ''Information Security''

This rule also amends ECCN 5A004 to add 4A005 to 5A004.b. This is done to harmonize with the WA Dual-Use List now that ECCN 4A005 has been added to the CCL.

§ 740.11 Governments, International Organizations, International Inspections Under the Chemical Weapons Convention, and the International Space Station (GOV)

License Exception GOV is amended to exclude cybersecurity items, as defined in § 740.22 License Exception ACE, from paragraph (c) of License Exception GOV. As such, this rule revises paragraph (c)(3)(vi) to remove ''or'' and to revise paragraph (c)(3)(vii) to replace the period with a semi-colon and ''or.'' Lastly, paragraph (c)(3)(viii) is added to exclude ''cybersecurity items as defined in § 740.22(b)(1) of the EAR.''

Export Control Reform Act of 2018

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

Executive Order Requirements

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This interim final rule has been designated a ''significant regulatory action'' under Executive Order 12866.

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

Paperwork Reduction Act Requirements

This rule involves collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) under the following information collection approved by the Office of

Management and Budget (OMB): 0694–0088, ''Multi-Purpose Application,'' and carries a burden hour estimate of 29.6 minutes for a manual or electronic submission. BIS will be updating this information collection to account for the increase in burden hours.

For the existing ECCNs included in this rule (4D001, 4E001, 5A001, 5A004, 5D001, 5E001), the 2020 data from the Automated Export System (AES) shows 980 shipments valued at $39,146,164. Of those shipments, 120 shipments valued at $1,864,699 went to Country Group D:1 or D:5 countries, which would make them ineligible for License Exception ACE. There were no shipments to Country Group E:1 or E:2. Under the provisions of this rule, the 120 shipments require a license application submission to BIS.

As there is no specific ECCN data in AES for the new export controls in new ECCNs 4A005 and 4D004 or new paragraph 4E001.c, BIS uses other data to estimate the number of shipments of these new ECCNs that will require a license. Bureau of Economic Analysis (BEA) data from 2019 show a total dollar value of $55,657 million for Telecom, Computer, and Information Technology Services exports. Multiplying this value by 12.1% (the percentage of all exports that are subject to an EAR license requirement as determined by using AES data) suggests that $6,734,497,000 of Telecom/Computer/IT exports are now subject to EAR license requirements. Based on AES data on the existing ECCNs affected by this rule, BIS estimates the average value of each shipment for the new ECCNs at about $40,000, and further estimates that 0.6% of all new ECCN shipments (1,010 shipments) are now eligible for License Exception ACE and 0.03% of all new ECCN shipments (50 shipments) require a license application submission.

Therefore, the annual total estimated cost associated with the paperwork burden imposed by this rule (that is, the projected increase of license application submissions based on the additional shipments requiring a license) is estimated to be 170 new applications × 29.6 minutes = 5,032/60 min = 84 hours × $30 = $2,520.

There is no paperwork submission to BIS associated with using License Exception ACE, and therefore there is no increase to any paperwork burden or information collection cost associated with License Exception ACE requirements in this rule.

Any comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, may be submitted online at *https://www.reginfo.gov/public/do/PRAMain.* Find the particular information collection by using the search function and entering either the title of the collection, ''Multi-Purpose Application,'' or the OMB Control Number, 0694–0088.

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

Administrative Procedure Act and Regulatory Flexibility Act Requirements

Pursuant to Section 4821 of ECRA, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking and opportunity for public participation.

Further, no other law requires notice of proposed rulemaking or opportunity for public comment for this interim final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Notwithstanding, BIS believes this interim final rule would benefit from public comment on the impact of the control text and the usefulness of the new License Exception ACE.

List of Subjects

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 772

Exports.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, parts 740, 772, and 774 of the Export Administration Regulations (15 CFR parts 730 through 774) are amended as follows:

PART 740—[AMENDED]

■ 1. The authority citation for part 740 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 7201 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 2. Section 740.11 is amended by revising paragraphs (c)(3)(vi) and (vii) and adding paragraph (c)(3)(viii) to read as follows:

§ 740.11 Governments, international organizations, international inspections under the Chemical Weapons Convention, and the International Space Station (GOV).

* * * * *

(c) * * *

(3) * * *

(vi) Items controlled for nuclear nonproliferation (NP) reasons;

(vii) Items listed as not eligible for License Exception STA in § 740.20(b)(2)(ii) of the EAR; or

(viii) Cybersecurity items as defined in § 740.22(b)(1) of the EAR.

* * * * *

■ 3. Section 740.22 is added to read as follows:

§ 740.22 Authorized Cybersecurity Exports (ACE).

(a) *Scope.* License Exception ACE authorizes export, reexport, and transfer (in-country), including deemed exports and reexports, of 'cybersecurity items,' as set forth in paragraph (b) of this section, subject to the restrictions set forth in paragraph (c) of this section. Deemed exports and reexports are authorized under this license exception, except for deemed exports or reexports to E:1 and E:2 nationals as described in paragraph (c)(1)(i) of this section, to certain 'government end-users' as described in paragraph (c)(1)(ii) of this section, and subject to the end-use restrictions described in paragraph (c)(2) of this section. Even if License Exception ACE is not available for a particular transaction, other license exceptions may be available. For example, License Exception GOV (§ 740.11 of the EAR) authorizes certain exports to U.S. government agencies and personnel. License Exception TMP (§ 740.9(a)(1) of the EAR) authorizes the export, reexport, and transfer (in country) of tools of the trade in certain situations.

(b) *Definitions.* The following terms and definitions are for the purpose of License Exception ACE only.

(1) *Cybersecurity Items* are ECCNs 4A005, 4D001.a (for 4A005 or 4D004), 4D004, 4E001.a (for 4A005, 4D001.a (for 4A005 or 4D004) or 4D004), 4E001.c, 5A001.j, 5B001.a (for 5A001.j), 5D001.a (for 5A001.j), 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)), and 5E001.a (for 5A001.j or 5D001.a (for 5A001.j)).

(2) *Digital artifacts* are items (*e.g.,* ''software'' or ''technology'') found or discovered on an information system that show past or present activity pertaining to the use or compromise of,

or other effects on, that information system.

(3) *Favorable treatment cybersecurity end user* is any of the following:

(i) A ''U.S. subsidiary'';

(ii) Providers of banking and other financial services;

(iii) Insurance companies; or

(iv) Civil health and medical institutions providing medical treatment or otherwise conducting the practice of medicine, including medical research.

(4) *Government end user,* for the purpose of § 740.22, is a national, regional or local department, agency or entity that provides any governmental function or service, including international governmental organizations, government operated research institutions, and entities and individuals who are acting on behalf of such an entity. This term includes retail or wholesale firms engaged in the manufacture, distribution, or provision of items or services, controlled on the Wassenaar Arrangement Munitions List.

(c) *Restrictions.* License Exception ACE exports, reexports, or transfers (in-country) of 'cybersecurity items' are subject to the restrictions of this paragraph (c).

(1) *Destination or end-user restrictions.* License Exception ACE does not authorize deemed exports under paragraph (c)(1)(i) or (ii) of this section.The restrictions in paragraphs (c)(1)(i) and (ii) apply to activities, including exports, reexports, and transfers (in-country), related to ''vulnerability disclosure'' and ''cyber incident response.'' However, Note 1 to ECCN 4E001 in the CCL (supplement no. 1 to part 774 of the EAR) excludes ''vulnerability disclosure'' and ''cyber incident response'' from control under 4E001.a or .c.

(i) A destination that is listed in Country Group E:1 or E:2 in supplement no.1 to part 740 of the EAR.

(ii) A *government end user,* as defined in this section, of any country listed in Country Group D:1, D:2, D:3, D:4 or D:5 in supplement no. 1 to part 740. This restriction does not apply to:

(A) Exports, reexports, and transfers (in-country) to Country Group D countries that are also listed in Country Group A:6 of 'digital artifacts' that are related to a cybersecurity incident involving information systems owned or operated by a 'favorable treatment cybersecurity end user', or to police or judicial bodies in Country Group D countries that are also listed in Country Group A:6 for purposes of criminal or civil investigations or prosecutions of such cybersecurity incidents; or

(B) Exports, reexports, and transfers (in-country) to national computer security incident response teams in Country Group D countries that are also listed in Country Group A:6 of 'cybersecurity items' for purposes of responding to cybersecurity incidents, for purposes of 'vulnerability disclosure', or for purposes of criminal or civil investigations or prosecutions of such cybersecurity incidents.

(iii) A non-government end user located in any country listed in Country Group D:1 or D:5 of Supplement No. 1 to part 740 of the EAR. This restriction does not apply to:

(A) Exports, reexports or transfers (in-country) of cybersecurity items classified under ECCNs 4A005, 4D001.a (for 4A005 or 4D004), 4D004, 4E001.a (for 4A005, 4D001.a (for 4A005 or 4D004) or 4D004) and 4E001.c, to any 'favorable treatment cybersecurity end user;'

(B) ''Vulnerability disclosure'' or ''cyber incident response;''or

(C) Deemed exports.

(2) *End-use restrictions.* License Exception ACE is not authorized if the exporter, reexporter, or transferor ''knows'' or has ''reason to know'' at the time of export, reexport, or transfer (in-country), including deemed exports and reexports, that the 'cybersecurity item' will be used to affect the confidentiality, integrity or availability of information or information systems, without authorization by the owner, operator or administrator of the information system (including the information and processes within such systems).

PART 772—[AMENDED]

■ 4. The authority citation for part 772 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 5. Section 772.1 is amended by adding the definitions for ''cyber incident response'', and ''vulnerability disclosure'' to read as follows:

§ 772.1 Definitions of terms as used in the Export Administration Regulations (EAR).

* * * * *

Cyber incident response. (§ 740.22, Cat 4) means the process of exchanging necessary information on a cybersecurity incident with individuals or organizations responsible for conducting or coordinating remediation to address the cybersecurity incident.

* * * * *

Vulnerability disclosure. (§ 740.22, Cat 4) means the process of identifying, reporting, or communicating a vulnerability to, or analyzing a vulnerability with, individuals or organizations responsible for conducting or coordinating remediation for the purpose of resolving the vulnerability.

* * * * *

PART 774—[AMENDED]

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

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824a; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

Supplement No. 1 to Part 774—[Amended]

■ 7. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 4 is amended by adding Notes 3 and 4 to the beginning of the category to read as follows:

Category 4—Computers

* * * * *

Note 3: *Commodities and ''software'' in ECCNs 4A005 and 4D004 that are also controlled in ECCNs 5A002.a, 5A004.a, 5A004.b, 5D002.c.1, or 5D002.c.3, remain controlled in Category 5—Part 2 by those entries. Category 5—Part 2 does not apply to elements of source code that implement functionality controlled by these Category 4 ECCNs, or to any item subject to the EAR where Encryption Item (EI) functionality is absent, removed or otherwise non-existent.*

Note 4: *Items in ECCNs 4A005, 4D001.a (for 4A005 or 4D004), 4D004, and ''technology'' specified in ECCN 4E001.a (for 4A005, 4D001.a (for 4A005 or 4D004) or 4D004) and 4E001.c that are also controlled for Surreptitious Listening (SL) reasons under another ECCN, will continue to be classified under the SL ECCN.*

■ 8. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 4 is amended by adding ECCN 4A005 after ECCN 4A004 to read as follows:

Supplement No. 1 to Part 774—The Commerce Control List

* * * * *

4A005 ''Systems,'' ''equipment,'' and ''components'' therefor, ''specially designed'' or modified for the generation, command and control, or delivery of ''intrusion software''.

License Requirements

Reason for Control: NS, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
NS applies to entire entry.	NS Column 1.
AT applies to entire entry.	AT Column 1.

Reporting Requirements

See § 743.1 of the EAR for reporting requirements for exports under License Exceptions, and Validated End-User authorizations.

List Based License Exceptions (See Part 740 for a description of all license exceptions)

LVS: N/A
GBS: N/A
APP: N/A
ACE: Yes, except to Country Group E:1 or E:2. See § 740.22 of the EAR for eligibility criteria.

Special Conditions for STA

STA: License Exception STA may not be used to ship items specified by ECCN 4A005.

List of Items Controlled

Related Controls: Defense articles described in USML Category XI(b), and software directly related to a defense article, are ''subject to the ITAR''; see § 120.10(a)(4).
Related Definitions: N/A
Items: The list of items controlled is contained in the ECCN heading.

■ 9. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 4, ECCN 4D001 is revised to read as follows:

4D001 ''Software'' as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, CC, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
NS applies to entire entry.	NS Column 1.
CC applies to ''software'' for computerized finger-print equipment controlled by 4A003 for CC reasons.	CC Column 1.
AT applies to entire entry.	AT Column 1.

Reporting Requirements

See § 743.1 of the EAR for reporting requirements for exports under License Exceptions, and Validated End-User authorizations.

List Based License Exceptions (See Part 740 for a description of all license exceptions)

TSR: Yes, except for ''software'' for the ''development'' or ''production'' of the following:
(1) Commodities with an ''Adjusted Peak Performance'' (''APP'') exceeding 29 WT; or
(2) Commodities controlled by 4A005 or ''software'' controlled by 4D004.
APP: Yes to specific countries (see § 740.7 of the EAR for eligibility criteria).
ACE: Yes for 4D001.a (for the ''development'', ''production'' or ''use'' of equipment or ''software'' specified in ECCN 4A005 or 4D004), except to Country Group E:1 or E:2. See § 740.22 of the EAR for eligibility criteria.

Special Conditions for STA

STA: License Exception STA may not be used to ship or transmit ''software'' ''specially designed'' or modified for the ''development'' or ''production'' of equipment specified by ECCN 4A001.a.2 or for the ''development'' or ''production'' of ''digital computers'' having an 'Adjusted Peak Performance' ('APP') exceeding 29 Weighted TeraFLOPS (WT) to any of the destinations listed in Country Group A:6 (See Supplement No.1 to part 740 of the EAR); and may not be used to ship or transmit ''software'' specified in 4D001.a ''specially designed'' for the ''development'' or ''production'' of equipment specified by ECCN 4A005 to any of the destinations listed in Country Group A:5 or A:6.

List of Items Controlled

Related Controls: Software described in USML Category XI(b), and software directly related to a defense article, is ''subject to the ITAR''; see § 120.10(a)(4).
Related Definitions: N/A
Items:

a. ''Software'' ''specially designed'' or modified for the ''development'' or ''production'', of equipment or ''software'' controlled by 4A001, 4A003, 4A004, 4A005 or 4D (except 4D980, 4D993 or 4D994).

b. ''Software'', other than that controlled by 4D001.a, ''specially designed'' or modified for the ''development'' or ''production'' of equipment as follows:

b.1. ''Digital computers'' having an ''Adjusted Peak Performance'' (''APP'') exceeding 15 Weighted TeraFLOPS (WT);

b.2. ''Electronic assemblies'' ''specially designed'' or modified for enhancing performance by aggregation of processors so that the ''APP'' of the aggregation exceeds the limit in 4D001.b.1.

■ 10. In Supplement No. 1 to Part 774, Category 4 is amended by adding ECCN 4D004 after ECCN 4D001 to read as follows:

4D004 ''Software'' ''specially designed'' or modified for the generation, command and control, or delivery of ''intrusion software.''

License Requirements

Reason for Control: NS, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
NS applies to entire entry.	NS Column 1.
AT applies to entire entry.	AT Column 1.

List Based License Exceptions (See Part 740 for a description of all license exceptions)

TSR: N/A
APP: N/A
ACE: Yes, except to Country Group E:1 or E:2. See § 740.22 of the EAR for eligibility criteria.

Special Conditions for STA

STA: License Exception STA may not be used to ship or transmit ''software'' specified by ECCN 4D004.

List of Items Controlled

Related Controls: Software described in USML Category XI(b), and software directly related to a defense article, is ''subject to the ITAR''; see § 120.10(a)(4).
Related Definitions: N/A
Items:

The list of items controlled is contained in the ECCN heading.

Note: *4D004 does not apply to ''software'' specially designed and limited to provide ''software'' updates or upgrades meeting all the following:*

a. The update or upgrade operates only with the authorization of the owner or administrator of the system receiving it; and

b. After the update or upgrade, the ''software'' updated or upgraded is not any of the following:

1. ''Software'' specified by 4D004; or

2. ''Intrusion software.''

■ 11. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 4, ECCN 4E001 is revised to read as follows:

4E001 ''Technology'' as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, MT, CC, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
NS applies to entire entry.	NS Column 1.
MT applies to ''technology'' for items controlled by 4A001.a and 4A101 for MT reasons.	MT Column 1.
CC applies to ''software'' for computerized finger-print equipment controlled by 4A003 for CC reasons.	CC Column 1.
AT applies to entire entry.	AT Column 1.

Reporting Requirements

See § 743.1 of the EAR for reporting requirements for exports under License Exceptions, and Validated End-User authorizations.

List Based License Exceptions (See Part 740 for a description of all license exceptions)

TSR: Yes, except for the following:
(1) ''Technology'' for the ''development'' or ''production'' of commodities with an ''Adjusted Peak Performance'' (''APP'') exceeding 29 WT or for the ''development'' or ''production'' of commodities controlled by 4A005 or ''software'' controlled by 4D004; or
(2) ''Technology'' for the ''development'' of ''intrusion software''.

APP: Yes to specific countries. See § 740.7 of the EAR for eligibility criteria.

ACE: Yes for 4E001.a (for the ''development'', ''production'' or ''use'' of equipment or ''software'' specified in ECCN 4A005 or 4D004) and for 4E001.c, except to Country Group E:1 or E:2. See § 740.22 of the EAR for eligibility criteria.

Special Conditions for STA

STA: License Exception STA may not be used to ship or transmit ''technology'' according to the General Technology Note for the ''development'' or ''production'' of any of the following equipment or ''software'': a. Equipment specified by ECCN 4A001.a.2; b. ''Digital computers'' having an 'Adjusted Peak Performance' ('APP') exceeding 29 Weighted TeraFLOPS (WT); or c. ''software'' specified in the License Exception STA paragraph found in the License Exception section of ECCN 4D001 to any of the destinations listed in Country Group A:6 (See Supplement No. 1 to part 740 of the EAR); and may not be used to ship or transmit ''software'' specified in 4E001.a (for the ''development'', ''production'' or ''use'' of equipment or ''software'' specified in ECCN 4A005 or 4D004) and 4E001.c to any of the destinations listed in Country Group A:5 or A:6.

List of Items Controlled

Related Controls: Military training of foreign units and forces (see ITAR § 120.9(a)(3)), and technical data (see ITAR § 120.10) directly related to a defense article, are ''subject to the ITAR.''

Related Definitions: N/A

Items:

a. ''Technology'' according to the General Technology Note, for the ''development'', ''production'', or ''use'' of equipment or ''software'' controlled by 4A (except 4A980 or 4A994) or 4D (except 4D980, 4D993, 4D994).

b. ''Technology'' according to the General Technology Note, other than that controlled by 4E001.a, for the ''development'' or ''production'' of equipment as follows:

b.1. ''Digital computers'' having an ''Adjusted Peak Performance'' (''APP'') exceeding 15 Weighted TeraFLOPS (WT);

b.2. ''Electronic assemblies'' ''specially designed'' or modified for enhancing performance by aggregation of processors so that the ''APP'' of the aggregation exceeds the limit in 4E001.b.1.

c. ''Technology'' for the ''development'' of ''intrusion software.''

Note 1: *4E001.a and 4E001.c do not apply to ''vulnerability disclosure'' or ''cyber incident response''.*

Note 2: *Note 1 does not diminish national authorities' rights to ascertain compliance with 4E001.a and 4E001.c.*

■ 12. In Supplement No. 1 to Part 774, Category 5—Part 1 is amended by adding Notes 3 and 4 to the beginning of the Category after Note 2 to read as follows:

Category 5—Telecommunications and ''Information Security''

Part 1—Telecommunications

Notes: * * *

3. Commodities in ECCN 5A001.j, and related ''software'' specified in 5D001.c (for 5A001.j) that are also controlled in ECCNs 5A002.a, 5A004.a, 5A004.b, 5D002.c.1, or 5D002.c.3, remain controlled in Category 5—Part 2 by those entries. Category 5—Part 2 does not apply to elements of source code that implement functionality controlled by these Category 5 Part 1 ECCNs, or to any item subject to the EAR where Encryption Item (EI) functionality is absent, removed or otherwise non-existent.

4. Items in ECCN 5A001.j, 5B001.a (for 5A001.j), related ''software'' specified in 5D001.a (for 5A001.j) and 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)) and related ''technology'' specified in ECCN 5E001.a (for 5A001.j and 5D001.a (for 5A001.j)) that are also controlled for Surreptitious Listening (SL) reasons under another ECCN, will continue to be classified under the SL ECCN.

* * * * *

■ 13. In Supplement No. 1 to Part 774, Category 5—Part 1, ECCN 5A001 is revised to read as follows:

5A001 Telecommunications systems, equipment, ''components'' and ''accessories,'' as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, SL, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
NS applies to 5A001.a, b.5, .e, .f.3, .h.	NS Column 1.
NS applies to 5A001.b (except .b.5), .c, .d, .f (except f.3), .g, and .j.	NS Column 2.
SL applies to 5A001.f.1.	A license is required for all destinations, as specified in § 742.13 of the EAR. Accordingly, a column specific to this control does not appear on the Commerce Country Chart (Supplement No. 1 to Part 738 of the EAR). **Note to SL paragraph:** *This licensing requirement does not supersede, nor does it implement, construe or limit the scope of any criminal statute, including, but not limited to the Omnibus Safe Streets Act of 1968, as amended.*
AT applies to entire entry.	AT Column 1.

Reporting Requirements

See § 743.1 of the EAR for reporting requirements for exports under License Exceptions, and Validated End-User authorizations.

List Based License Exceptions (See Part 740 for a description of all license exceptions)

LVS: N/A for 5A001.a, b.5, .e, f.3, .h and .j; $5000 for 5A001.b.1, .b.2, .b.3, .b.6, .d, f.2, f.4, and .g; $3000 for 5A001.c.

GBS: Yes, except 5A001.a, .b.5, .e, .h and .j.

ACE: Yes for 5A001.j, except to Country Group E:1 or E:2. See § 740.22 of the EAR for eligibility criteria

Special Conditions for STA

STA: License Exception STA may not be used to ship any commodity in 5A001.j to any of the destinations listed in Country Group A:5 or A:6 (See Supplement No. 1 to part 740 of the EAR), or any commodity in 5A001.b.3, .b.5 or .h to any of the destinations listed in Country Group A:6 (See Supplement No.1 to part 740 of the EAR).

List of Items Controlled

Related Controls: (1) See USML Category XI for controls on direction-finding ''equipment'' including types of ''equipment'' in ECCN 5A001.e and any other military or intelligence electronic ''equipment'' that is ''subject to the ITAR.'' (2) See USML Category XI(a)(4)(iii) for controls on electronic attack and jamming ''equipment'' defined in 5A001.f and .h that are subject to the ITAR. (3) See also ECCNs 5A101, 5A980, and 5A991.

Related Definitions: N/A

Items:

a. Any type of telecommunications equipment having any of the following characteristics, functions or features:

a.1. ''Specially designed'' to withstand transitory electronic effects or electromagnetic pulse effects, both arising from a nuclear explosion;

a.2. Specially hardened to withstand gamma, neutron or ion radiation;

a.3. ''Specially designed'' to operate below 218 K (−55 °C); *or*

a.4. ''Specially designed'' to operate above 397 K (124 °C);

Note: *5A001.a.3 and 5A001.a.4 apply only to electronic equipment.*

b. Telecommunication systems and equipment, and ''specially designed'' ''components'' and ''accessories'' therefor, having any of the following characteristics, functions or features:

b.1 Being underwater untethered communications systems having any of the following:

b.1.a. An acoustic carrier frequency outside the range from 20 kHz to 60 kHz;

b.1.b. Using an electromagnetic carrier frequency below 30 kHz; *or*

b.1.c. Using electronic beam steering techniques; *or*

b.1.d. Using ''lasers'' or light-emitting diodes (LEDs), with an output wavelength greater than 400 nm and less than 700 nm, in a ''local area network'';

b.2. Being radio equipment operating in the 1.5 MHz to 87.5 MHz band and having all of the following:

b.2.a. Automatically predicting and selecting frequencies and ''total digital transfer rates'' per channel to optimize the transmission; *and*

b.2.b. Incorporating a linear power amplifier configuration having a capability to support multiple signals simultaneously at an output power of 1 kW or more in the frequency range of 1.5 MHz or more but less than 30 MHz, or 250 W or more in the frequency range of 30 MHz or more but not exceeding 87.5 MHz, over an ''instantaneous bandwidth'' of one octave or more and with an output harmonic and distortion content of better than −80 dB;

b.3. Being radio equipment employing ''spread spectrum'' techniques, including ''frequency hopping'' techniques, not controlled in 5A001.b.4 and having any of the following:

b.3.a. User programmable spreading codes; *or*

b.3.b. A total transmitted bandwidth which is 100 or more times the bandwidth of any one information channel and in excess of 50 kHz;

Note: *5A001.b.3.b does not control radio equipment ''specially designed'' for use with any of the following:*

a. Civil cellular radio-communications systems; or

b. Fixed or mobile satellite Earth stations for commercial civil telecommunications.

Note: *5A001.b.3 does not control equipment operating at an output power of 1 W or less.*

b.4. Being radio equipment employing ultra-wideband modulation techniques, having user programmable channelizing codes, scrambling codes, or network identification codes and having any of the following:

b.4.a. A bandwidth exceeding 500 MHz; *or*

b.4.b. A ''fractional bandwidth'' of 20% or more;

b.5. Being digitally controlled radio receivers having all of the following:

b.5.a. More than 1,000 channels;

b.5.b. A 'channel switching time' of less than 1 ms;

b.5.c. Automatic searching or scanning of a part of the electromagnetic spectrum; *and*

b.5.d. Identification of the received signals or the type of transmitter; *or*

Note: *5A001.b.5 does not control radio equipment ''specially designed'' for use with civil cellular radio-communications systems.*

Technical Note: *'Channel switching time': the time (i.e., delay) to change from one receiving frequency to another, to arrive at or within ±0.05% of the final specified receiving frequency. Items having a specified frequency range of less than ±0.05% around their center frequency are defined to be incapable of channel frequency switching.*

b.6. Employing functions of digital ''signal processing'' to provide 'voice coding' output at rates of less than 700 bit/s.

Technical Notes:

1. For variable rate 'voice coding', 5A001.b.6 applies to the 'voice coding' output of continuous speech.

2. For the purpose of 5A001.b.6, 'voice coding' is defined as the technique to take samples of human voice and then convert these samples of human voice into a digital signal taking into account specific characteristics of human speech.

c. Optical fibers of more than 500 m in length and specified by the manufacturer as being capable of withstanding a 'proof test' tensile stress of 2×10^9 N/m^2 or more;

N.B.: *For underwater umbilical cables, see 8A002.a.3.*

Technical Note: *'Proof Test': on-line or off-line production screen testing that dynamically applies a prescribed tensile stress over a 0.5 to 3 m length of fiber at a running rate of 2 to 5 m/s while passing between capstans approximately 150 mm in diameter. The ambient temperature is a nominal 293 K (20°C) and relative humidity 40%. Equivalent national standards may be used for executing the proof test.*

d. ''Electronically steerable phased array antennae'' as follows:

d.1. Rated for operation above 31.8 GHz, but not exceeding 57 GHz, and having an Effective Radiated Power (ERP) equal to or greater than +20 dBm (22.15 dBm Effective Isotropic Radiated Power (EIRP));

d.2. Rated for operation above 57 GHz, but not exceeding 66 GHz, and having an ERP equal to or greater than +24 dBm (26.15 dBm EIRP);

d.3. Rated for operation above 66 GHz, but not exceeding 90 GHz, and having an ERP equal to or greater than +20 dBm (22.15 dBm EIRP);

d.4. Rated for operation above 90 GHz;

Note 1: *5A001.d does not control 'electronically steerable phased array antennae' for landing systems with instruments meeting ICAO standards covering Microwave Landing Systems (MLS).*

Note 2: *5A001.d does not apply to antennae specially designed for any of the following:*

a. Civil cellular or WLAN radio-communications systems;

b. IEEE 802.15 or wireless HDMI; or

c. Fixed or mobile satellite earth stations for commercial civil telecommunications.

Technical Note: *For the purposes of 5A001.d 'electronically steerable phased array antenna' is an antenna which forms a beam by means of phase coupling, (i.e., the beam direction is controlled by the complex excitation coefficients of the radiating elements) and the direction of that beam can be varied (both in transmission and reception) in azimuth or in elevation, or both, by application of an electrical signal.*

e. Radio direction finding equipment operating at frequencies above 30 MHz and having all of the following, and ''specially designed'' ''components'' therefor:

e.1. ''Instantaneous bandwidth'' of 10 MHz or more; and

e.2. Capable of finding a Line Of Bearing (LOB) to non-cooperating radio transmitters with a signal duration of less than 1 ms;

f. Mobile telecommunications interception or jamming equipment, and monitoring equipment therefor, as follows, and ''specially designed'' ''components'' therefor:

f.1. Interception equipment designed for the extraction of voice or data, transmitted over the air interface;

f.2. Interception equipment not specified in 5A001.f.1, designed for the extraction of client device or subscriber identifiers (*e.g.,* IMSI, TIMSI or IMEI), signaling, or other metadata transmitted over the air interface;

f.3. Jamming equipment ''specially designed'' or modified to intentionally and selectively interfere with, deny, inhibit, degrade or seduce mobile telecommunication services and performing any of the following:

f.3.a. Simulate the functions of Radio Access Network (RAN) equipment;

f.3.b. Detect and exploit specific characteristics of the mobile telecommunications protocol employed (*e.g.,* GSM); *or*

f.3.c. Exploit specific characteristics of the mobile telecommunications protocol employed (*e.g.,* GSM);

f.4. Radio Frequency (RF) monitoring equipment designed or modified to identify the operation of items specified in 5A001.f.1, 5A001.f.2 or 5A001.f.3.

Note: *5A001.f.1 and 5A001.f.2 do not apply to any of the following:*

a. Equipment ''specially designed'' for the interception of analog Private Mobile Radio (PMR), IEEE 802.11 WLAN;

b. Equipment designed for mobile telecommunications network operators; or

c. Equipment designed for the ''development'' or ''production'' of mobile telecommunications equipment or systems.

N.B. 1: *See also the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). For items specified by 5A001.f.1 (including as previously specified by 5A001.i), see also5A980 and the U.S. Munitions List (22 CFR part 121).*

N.B. 2: *For radio receivers see 5A001.b.5.*

g. Passive Coherent Location (PCL) systems or equipment, ''specially designed'' for detecting and tracking moving objects by measuring reflections of ambient radio frequency emissions, supplied by non-radar transmitters.

Technical Note: *Non-radar transmitters may include commercial radio, television or cellular telecommunications base stations.*

Note: *5A001.g. does not control:*

a. Radio-astronomical equipment; or

b. Systems or equipment, that require any radio transmission from the target.

h. Counter Improvised Explosive Device (IED) equipment and related equipment, as follows:

h.1. Radio Frequency (RF) transmitting equipment, not specified by 5A001.f, designed or modified for prematurely activating or preventing the initiation of Improvised Explosive Devices (IEDs);

h.2. Equipment using techniques designed to enable radio communications in the same frequency channels on which co-located equipment specified by 5A001.h.1 is transmitting.

N.B.: *See also Category XI of the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130).*

i. [Reserved]

N.B.: *See 5A001.f.1 for items previously specified by 5A001.i.*

j. IP network communications surveillance systems or equipment, and ''specially

designed'' components therefor, having all of the following:

j.1. Performing all of the following on a carrier class IP network (*e.g.,* national grade IP backbone):

j.1.a. Analysis at the application layer (*e.g.,* Layer 7 of Open Systems Interconnection (OSI) model (ISO/IEC 7498–1));

j.1.b. Extraction of selected metadata and application content (*e.g.,* voice, video, messages, attachments); *and*

j.1.c. Indexing of extracted data; *and*

j.2. Being ''specially designed'' to carry out all of the following:

j.2.a. Execution of searches on the basis of ''hard selectors''; *and*

j.2.b. Mapping of the relational network of an individual or of a group of people.

Note: *5A001.j does not apply to ''systems'' or ''equipment'', ''specially designed'' for any of the following:*

a. Marketing purpose;

b. Network Quality of Service (QoS); *or*

c. Quality of Experience (QoE).

N.B.: *See also the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). Defense articles described in USML Category XI(b) are ''subject to the ITAR.''*

■ 14. In Supplement No. 1 to Part 774 (the CCL), Category 5—Part 1, ECCN 5B001 is revised to read as follows:

5B001 Telecommunication test, inspection and production equipment, ''components'' and ''accessories,'' as follows (See List of Items Controlled).

License Requirements

Reason for Control: NS, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
NS applies to entire entry.	NS Column 2.
AT applies to entire entry.	AT Column 1.

Reporting Requirements

See § 743.1 of the EAR for reporting requirements for exports under License Exceptions, and Validated End-User authorizations.

List Based License Exceptions (See Part 740 for a description of all license exceptions)

LVS: $5000, except N/A for 5B001.a (for 5A001.j)

GBS: Yes, except N/A for 5B001.a (for 5A001.j)

ACE: Yes for 5B001.a (for equipment and ''specially designed'' ''components'' or ''accessories'' therefor, ''specially designed'' for the ''development'' or ''production'' of equipment, functions or features, controlled by 5A001.j), except to Country Group E:1 or E:2. See § 740.22 of the EAR for eligibility criteria.

Special Conditions for STA

STA: License Exception STA may not be used to ship 5B001.a equipment and ''specially designed'' components or ''accessories'' therefor, ''specially designed'' for the ''development'' or ''production'' of equipment, functions or features specified by in ECCN 5A001.b.3, .b.5 or .h to any of the destinations listed in Country Group A:6 (See Supplement No.1 to part 740 of the EAR) and 5A001.j to any of the destinations listed in Country Group A:5 or A:6.

List of Items Controlled

Related Controls: See also 5B991.

Related Definition: N/A

Items:

a. Equipment and ''specially designed'' ''components'' or ''accessories'' therefor, ''specially designed'' for the ''development'' or ''production'' of equipment, functions or features, controlled by 5A001;

Note: *5B001.a does not apply to optical fiber characterization equipment.*

b. Equipment and ''specially designed'' ''components'' or ''accessories'' therefor, ''specially designed'' for the ''development'' of any of the following telecommunication transmission or switching equipment:

b.1. [Reserved]

b.2. Equipment employing a ''laser'' and having any of the following:

b.2.a. A transmission wavelength exceeding 1750 nm; or

b.2.b. [Reserved]

b.2.c. [Reserved]

b.2.d. Employing analog techniques and having a bandwidth exceeding 2.5 GHz; or

Note: *5B001.b.2.d. does not include equipment ''specially designed'' for the ''development'' of commercial TV systems.*

b.3. [Reserved]

b.4. Radio equipment employing Quadrature-Amplitude-Modulation (QAM) techniques above level 1,024.

■ 15. In Supplement No. 1 to Part 774 (the CCL), Category 5—Part 1, ECCN 5D001 is revised to read as follows:

5D001 ''Software'' as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, SL, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
NS applies to entire entry.	NS Column 1.
SL applies to the entire entry as applicable for equipment, functions, features, or characteristics controlled by 5A001.f.1.	A license is required for all destinations, as specified in § 742.13 of the EAR. Accordingly, a column specific to this control does not appear on the Commerce Country Chart (Supplement No. 1 to Part 738 of the EAR).
	Note to SL paragraph: *This licensing requirement does not supersede, nor does it implement, construe or limit the scope of any criminal statute, including, but not limited to the Omnibus Safe Streets Act of 1968, as amended.*
AT applies to entire entry.	AT Column 1.

Reporting Requirements

See § 743.1 of the EAR for reporting requirements for exports under License Exceptions, and Validated End-User authorizations.

List Based License Exceptions (See Part 740 for a description of all license exceptions)

TSR: Yes, except for exports and reexports to destinations outside of those countries listed in Country Group A:5 (See Supplement No. 1 to part 740 of the EAR) of ''software'' controlled by 5D001.a and ''specially designed'' for items controlled by 5A001.b.5 and 5A001.h, and N/A for ''software'' classified under ECCN 5D001.a (for 5A001.j) or 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)).

ACE: Yes for 5D001.a (for 5A001.j) and 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)), except to Country Group E:1 or E:2. See § 740.22 of the EAR for eligibility criteria.

Special Conditions for STA

STA: License Exception STA may not be used to ship or transmit 5D001.a ''software'' ''specially designed'' for the ''development'' or ''production'' of equipment, functions or features, specified by ECCN 5D001.a (for 5A001.j) and 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)) to any of the destinations listed in Country Group A:5 or A:6 (See Supplement No.1 to part 740 of the EAR); 5A001.b.3, .b.5 or .h; and for 5D001.b. for ''software'' ''specially designed'' or modified to support ''technology'' specified by the STA paragraph in the License Exception section of ECCN 5E001 to any of the destinations listed in Country Group A:6.

List of Items Controlled

Related Controls: See also 5D980 and 5D991.

Related Definitions: N/A

Items:

a. ''Software'' ''specially designed'' or modified for the ''development'', ''production'' or ''use'' of equipment, functions or features controlled by 5A001;

b. [Reserved]

c. Specific ''software'' ''specially designed'' or modified to provide characteristics, functions or features of equipment, controlled by 5A001 or 5B001;

d. ''Software'' ''specially designed'' or modified for the ''development'' of any of the following telecommunication transmission or switching equipment:

d.1.[Reserved]

d.2. Equipment employing a ''laser'' and having any of the following:

d.2.a. A transmission wavelength exceeding 1,750 nm; *or*

d.2.b. Employing analog techniques and having a bandwidth exceeding 2.5 GHz; *or*

Note: *5D001.d.2.b does not control ''software'' ''specially designed'' or modified for the ''development'' of commercial TV systems.*

d.3. [Reserved]

d.4. Radio equipment employing Quadrature-Amplitude-Modulation (QAM) techniques above level 1,024.

■ 16. In Supplement No. 1 to Part 774 (the CCL), Category 5—Part 1, ECCN 5E001 is revised to read as follows:

5E001 ''Technology'' as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, SL, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
NS applies to entire entry.	NS Column 1.
SL applies to ''technology'' for the ''development'' or ''production'' of equipment, functions or features controlled by 5A001.f.1, or for the ''development'' or ''production'' of ''software'' controlled by ECCN 5D001.a (for 5A001.f.1).	A license is required for all destinations, as specified in § 742.13 of the EAR. Accordingly, a column specific to this control does not appear on the Commerce Country Chart (Supplement No. 1 to Part 738 of the EAR). **Note to SL paragraph:** *This licensing requirement does not supersede, nor does it implement, construe or limit the scope of any criminal statute, including, but not limited to the Omnibus Safe Streets Act of 1968, as amended.*
AT applies to entire entry.	AT Column 1.

Reporting Requirements

See § 743.1 of the EAR for reporting requirements for exports under License Exceptions, and Validated End-User authorizations.

List Based License Exceptions (See Part 740 for a description of all license exceptions)

TSR: Yes, except for exports or reexports to destinations outside of those countries listed in Country Group A:5 (See Supplement No. 1 to part 740 of the EAR) of ''technology'' controlled by 5E001.a for the ''development'' or ''production'' of the following:

(1) Items controlled by 5A001.b.5, .h or .j;

(2) ''Software'' controlled by 5D001.a that is ''specially designed'' for the ''development'' or ''production'' of equipment, functions or features controlled by 5A001.b.5, 5A001.h, 5A001.j, or 5B001.a (for 5A001.j); or

(3) ''Software'' controlled by 5D001.c (for 5A001.j or 5B001.a (for 5A001.j)).

ACE: Yes for 5E001.a (for 5A001.j, 5B001.a (for 5A001.j), 5D001.a (for 5A001.j), or 5D001.c (for 5A001.j or 5B001.a (for 5A001.j))) except to Country Group E:1 or E:2. See § 740.22 of the EAR for eligibility criteria.

Special Conditions for STA

STA: License Exception STA may not be used to ship or transmit ''technology'' according to the General Technology Note for the ''development'' or ''production'' of equipment, functions or features specified by 5A001.b.3, .b.5 or .h; or for ''software'' in 5D001.a or .c, that is specified in the STA paragraph in the License Exception section of ECCN 5D001 to any of the destinations listed in Country Group A:6 (See Supplement No.1 to part 740 of the EAR); or ''technology'' specified in 5E001.a according to the General Technology Note for the ''development'' or ''production'' of equipment, functions or features specified by 5A001.j, 5B001.a (for 5A001.j), 5D001.a (for 5A001.j), 5D001.c (for 5A001.j or 5B001.a) to any destinations listed in Country Group A:5 or A:6.

List of Items Controlled

Related Controls: (1) See also 5E101, 5E980 and 5E991. (2) ''Technology'' for ''development'' or ''production'' of ''Monolithic Microwave Integrated Circuit'' (''MMIC'') amplifiers that meet the control criteria given at 3A001.b.2 is controlled in 3E001; 5E001.d refers only to that additional ''technology'' ''required'' for telecommunications.

Related Definitions: N/A

Items:

a. ''Technology'' according to the General Technology Note for the ''development'', ''production'' or ''use'' (excluding operation) of equipment, functions or features, controlled by 5A001 or ''software'' controlled by 5D001.a.

b. Specific ''technology'', as follows:

b.1. ''Technology'' ''required'' for the ''development'' or ''production'' of telecommunications equipment ''specially designed'' to be used on board satellites;

b.2. ''Technology'' for the ''development'' or ''use'' of ''laser'' communication techniques with the capability of automatically acquiring and tracking signals and maintaining communications through exoatmosphere or sub-surface (water) media;

b.3. ''Technology'' for the ''development'' of digital cellular radio base station receiving equipment whose reception capabilities that allow multi-band, multi-channel, multi-mode, multi-coding algorithm or multi-protocol operation can be modified by changes in ''software'';

b.4. ''Technology'' for the ''development'' of ''spread spectrum'' techniques, including ''frequency hopping'' techniques.

Note: *5E001.b.4 does not apply to ''technology'' for the ''development'' of any of the following:*

a. Civil cellular radio-communications systems; or

b. Fixed or mobile satellite Earth stations for commercial civil telecommunications.

c. ''Technology'' according the General Technology Note for the ''development'' or ''production'' of any of the following:

c.1. [Reserved]

c.2. Equipment employing a ''laser'' and having any of the following:

c.2.a. A transmission wavelength exceeding 1,750 nm;

c.2.b. [Reserved]

c.2.c. [Reserved]

c.2.d. Employing wavelength division multiplexing techniques of optical carriers at less than 100 GHz spacing; *or*

c.2.e. Employing analog techniques and having a bandwidth exceeding 2.5 GHz;

Note: *5E001.c.2.e does not control ''technology'' for commercial TV systems.*

N.B.: *For ''technology'' for the ''development'' or ''production'' of non-telecommunications equipment employing a ''laser'', see Product Group E of Category 6, e.g.,* 6E00x

c.3. Equipment employing ''optical switching'' and having a switching time less than 1 ms; *or*

c.4. Radio equipment having any of the following:

c.4.a. Quadrature-Amplitude-Modulation (QAM) techniques above level 1,024; *or*

c.4.b. Operating at input or output frequencies exceeding 31.8 GHz; *or*

Note: *5E001.c.4.b does not control ''technology'' for equipment designed or modified for operation in any frequency band which is ''allocated by the ITU'' for radio-communications services, but not for radio-determination.*

c.4.c. Operating in the 1.5 MHz to 87.5 MHz band and incorporating adaptive techniques providing more than 15 dB suppression of an interfering signal; *or*

c.5. [Reserved]

c.6. Mobile equipment having all of the following:

c.6.a. Operating at an optical wavelength greater than or equal to 200nm and less than or equal to 400nm; *and*

c.6.b. Operating as a ''local area network'';

d. ''Technology'' according to the General Technology Note for the ''development'' or ''production'' of ''Monolithic Microwave Integrated Circuit'' (''MMIC'') amplifiers ''specially designed'' for telecommunications and that are any of the following:

Technical Note: *For purposes of 5E001.d, the parameter peak saturated power output may also be referred to on product data sheets as output power, saturated power output, maximum power output, peak power output, or peak envelope power output.*

d.1. Rated for operation at frequencies exceeding 2.7 GHz up to and including 6.8 GHz with a ''fractional bandwidth'' greater than 15%, and having any of the following:

d.1.a. A peak saturated power output greater than 75 W (48.75 dBm) at any

frequency exceeding 2.7 GHz up to and including 2.9 GHz;

d.1.b. A peak saturated power output greater than 55 W (47.4 dBm) at any frequency exceeding 2.9 GHz up to and including 3.2 GHz;

d.1.c. A peak saturated power output greater than 40 W (46 dBm) at any frequency exceeding 3.2 GHz up to and including 3.7 GHz; *or*

d.1.d. A peak saturated power output greater than 20 W (43 dBm) at any frequency exceeding 3.7 GHz up to and including 6.8 GHz;

d.2. Rated for operation at frequencies exceeding 6.8 GHz up to and including 16 GHz with a ''fractional bandwidth'' greater than 10%, and having any of the following:

d.2.a. A peak saturated power output greater than 10W (40 dBm) at any frequency exceeding 6.8 GHz up to and including 8.5 GHz; or

d.2.b. A peak saturated power output greater than 5W (37 dBm) at any frequency exceeding 8.5 GHz up to and including 16 GHz;

d.3. Rated for operation with a peak saturated power output greater than 3 W (34.77 dBm) at any frequency exceeding 16 GHz up to and including 31.8 GHz, and with a ''fractional bandwidth'' of greater than 10%;

d.4. Rated for operation with a peak saturated power output greater than 0.1n W (-70 dBm) at any frequency exceeding 31.8 GHz up to and including 37 GHz;

d.5. Rated for operation with a peak saturated power output greater than 1 W (30 dBm) at any frequency exceeding 37 GHz up to and including 43.5 GHz, and with a ''fractional bandwidth'' of greater than 10%;

d.6. Rated for operation with a peak saturated power output greater than 31.62 mW (15 dBm) at any frequency exceeding 43.5 GHz up to and including 75 GHz, and with a ''fractional bandwidth'' of greater than 10%;

d.7. Rated for operation with a peak saturated power output greater than 10 mW (10 dBm) at any frequency exceeding 75 GHz up to and including 90 GHz, and with a ''fractional bandwidth'' of greater than 5%; or

d.8. Rated for operation with a peak saturated power output greater than 0.1 nW (−70 dBm) at any frequency exceeding 90 GHz;

e. ''Technology'' according to the General Technology Note for the ''development'' or ''production'' of electronic devices and circuits, ''specially designed'' for telecommunications and containing ''components'' manufactured from ''superconductive'' materials, ''specially designed'' for operation at temperatures below the ''critical temperature'' of at least one of the ''superconductive'' constituents and having any of the following:

e.1. Current switching for digital circuits using ''superconductive'' gates with a product of delay time per gate (in seconds) and power dissipation per gate (in watts) of less than 10^{-14} J; *or*

e.2. Frequency selection at all frequencies using resonant circuits with Q-values exceeding 10,000.

■ 17. In supplement no. 1 to part 774, Category 5—Part 2, ECCN 5A004 is revised to read as follows:

5A004 ''Systems,'' ''equipment'' and ''components'' for defeating, weakening or bypassing ''information security,'' as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, AT, EI

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
NS applies to entire entry.	NS Column 1.
AT applies to entire entry.	AT Column 1.
EI applies to entire entry.	Refer to § 742.15 of the EAR.

License Requirements Note: *See § 744.17 of the EAR for additional license requirements for microprocessors having a processing speed of 5 GFLOPS or more and an arithmetic logic unit with an access width of 32 bit or more, including those incorporating ''information security'' functionality, and associated ''software'' and ''technology'' for the ''production'' or ''development'' of such microprocessors.*

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: Yes: $500 for ''components.''
N/A for systems and equipment.
GBS: N/A
ENC: Yes for certain EI controlled commodities. See § 740.17 of the EAR for eligibility.

List of Items Controlled

Related Controls: ECCN 5A004.a controls ''components'' providing the means or functions necessary for ''information security.'' All such ''components'' are presumptively ''specially designed'' and controlled by 5A004.a. Defense articles described in USML Category XI(b), and software directly related to a defense article, are ''subject to the ITAR''; see § 120.10(a)(4).
Related Definitions: N/A
Items:

a. Designed or modified to perform 'cryptanalytic functions.'

Note: *5A004.a includes systems or equipment, designed or modified to perform 'cryptanalytic functions' by means of reverse engineering.*

Technical Note: *'Cryptanalytic functions' are functions designed to defeat cryptographic mechanisms in order to derive confidential variables or sensitive data, including clear text, passwords or cryptographic keys.*

b. Items, not specified by ECCNs 4A005 or 5A004.a, designed to perform all of the following:

b.1. 'Extract raw data' from a computing or communications device; *and*

b.2. Circumvent ''authentication'' or authorisation controls of the device, in order to perform the function described in 5A004.b.1.

Technical Note: *'Extract raw data' from a computing or communications device means to retrieve binary data from a storage medium, e.g., RAM, flash or hard disk, of the device without interpretation by the device's operating system or filesystem.*

Note 1: *5A004.b does not apply to systems or equipment specially designed for the ''development'' or ''production'' of a computing or communications device.*

Note 2: *5A004.b does not include:*

a. Debuggers, hypervisors;

b. Items limited to logical data extraction;

c. Data extraction items using chip-off or JTAG; or

d. Items specially designed and limited to jail-breaking or rooting.

* * * * *

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2021–22774 Filed 10–20–21; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Chapter I

Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico

AGENCY: Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This Notification announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the non-essential travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border. This Notification further announces that the Secretary intends to lift these limitations for individuals who are fully vaccinated for COVID–19 (as defined by the Centers for Disease Control and Prevention) to align with anticipated changes to international travel by air.

DATES: This Notification goes into effect at 12 a.m. Eastern Daylight Time (EDT) on October 22, 2021 and will remain in effect until 11:59 p.m. Eastern Standard Time (EST) on January 21, 2022, unless amended or rescinded prior to that time.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to ''essential travel,'' as further defined in that document.[1] The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a ''specific threat to human life or national interests.'' DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on October 21, 2021.[2]

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of October 13, 2021, there have been over 237 million confirmed cases globally, with over 4.8 million confirmed deaths.[3] There have been over 44.4 million confirmed and probable cases within the United States,[4] over 1.6 million confirmed cases in Canada,[5] and over 3.7 million confirmed cases in Mexico.[6] DHS also notes that the Delta variant has driven an increase in cases, hospitalizations, and deaths in the United States, Canada, and Mexico in recent months.[7]

Notwithstanding these realities, vaccines are effective against Delta and other known variants, protecting people from getting infected and severely ill, as well as significantly reducing the likelihood of hospitalization and death, according to the CDC.[8] As such, the risks posed by and to fully vaccinated travelers differ materially from those posed by unvaccinated travelers. As a result, in late September, the White House COVID–19 Response Coordinator indicated the United States plans to revise standards and procedures for incoming international air travel, so as to enable the air travel of fully vaccinated travelers beginning in early November. On October 12, 2021, DHS announced that it intends to do the same with respect to travelers crossing the land border from Mexico and Canada, so as to align the treatment of the land and air ports of entry and allow those who are fully vaccinated for COVID–19 to travel to the United States for non-essential purposes.[9]

Therefore, this Notification extends the limits on non-essential travel and also announces the Secretary's intent to lift these restrictions for certain such individuals who are fully vaccinated.

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, I have determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico poses an ongoing ''specific threat to human life or national interests.''

In March 2020, U.S. and Mexican officials mutually determined that non-essential travel between the United States and Mexico posed additional risk of transmission and spread of the virus associated with COVID–19 and placed the populace of both nations at increased risk of contracting the virus associated with COVID–19. Given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, non-essential travel to the United States places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),[10] I have determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in ''essential travel,'' as defined below. Given the definition of ''essential travel'' below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials

[1] 85 FR 16547 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to ''essential travel,'' as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

[2] *See* 86 FR 52609 (Sept. 22, 2021); 86 FR 46964 (Aug. 23, 2021); 86 FR 38556 (July 22, 2021); 86 FR 32764 (June 23, 2021); 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to ''essential travel.'' *See* 86 FR 52611 (Sept. 22, 2021); 86 FR 46963 (Aug. 23, 2021); 86 FR 38554 (July 22, 2021); 86 FR 32766 (June 23, 2021); 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

[3] WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (Oct. 12, 2021), available at Weekly operational update on COVID–19—12 October 2021 (who.int) (accessed Oct. 13, 2021).

[4] CDC, COVID Data Tracker: United States COVID–19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction, CDC COVID Data Tracker. (accessed Oct.13, 2021).

[5] WHO, Situation by Region, Country, Territory & Area, available at *https://covid19.who.int/table* (accessed Oct. 13, 2021).

[6] *Id.*

[7] *See* CDC, Delta Variant: What We Know About the Science, *https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html* (accessed Sept. 9, 2021). *See* Government of Canada, Coronavirus Disease (COVID–19) For Health Professionals, *https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html#VOC* (accessed Sept. 9, 2021). *See* Government of Mexico, Ministry of Health, COVID–19 National General Information, *https://datos.covid-19.conacyt.mx/#DOView* (accessed Aug. 16, 2021); *Mexican Consortium of Genomic Surveillance (CoViGen-Mex), Reportes, http://mexcov2.ibt.unam.mx:8080/COVID–TRACKER/* (accessed Sept. 9, 2021).

[8] What You Need to Know about Variants √ CDC (accessed Oct. 13, 2021).

[9] DHS Press Release, Secretary Mayorkas to Allow Fully Vaccinated Travelers from Canada and Mexico to Enter U.S. at Land Borders and Ferry Crossings, *www.dhs.gov/news/2021/10/12/secretary-mayorkas-allow-fully-vaccinated-travelers-canada-and-mexico-enter-us-land* (last accessed Oct. 14, 2021).

[10] 19 U.S.C. 1318(b)(1)(C) provides that ''[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,'' is authorized to ''[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.'' On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities ''related to Customs revenue functions'' were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep't Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that ''[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.'' Congress has vested in the Secretary of Homeland Security the ''functions of all officers, employees, and organizational units of the Department,'' including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to ''essential travel,'' which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.,* to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.,* individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.,* government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID–19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.,* truck drivers supporting the movement of cargo between the United States and Mexico);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of ''essential travel'' for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.,* sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EST on January 21, 2022. These restrictions also can be modified by the Secretary at any point prior to January 21, 2022 to allow non-essential travel through land ports of entry and ferry terminals for individuals who are fully vaccinated and have appropriate proof of vaccination. Any such modifications to the restrictions will be accomplished via a posting o to the DHS website (*https://www.dhs.gov*) and followed by a publication in the **Federal Register**. Moreover, this Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.

The CBP Commissioner is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification including any appropriate procedures regarding the lifting of restrictions for fully vaccinated travelers. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute ''essential travel'' under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in ''essential travel.''

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2021–23005 Filed 10–20–21; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Chapter I

Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada

AGENCY: Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This Notification announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the non-essential travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border. This Notification further announces that the Secretary intends to lift these limitations for individuals who are fully vaccinated for COVID–19 (as defined by the Centers for Disease Control and Prevention) to align with anticipated changes to international travel by air.

DATES: This notification goes into effect at 12 a.m. Eastern Daylight Time (EDT) on October 22, 2021 and will remain in effect until 11:59 p.m. Eastern Standard Time (EST) on January 21, 2022, unless amended or rescinded prior to that time.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to ''essential travel,'' as further defined in that document.[1] The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada posed a ''specific threat to human life or national interests.'' DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on October 21, 2021.[2]

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of October 13, 2021, there have been over 237 million confirmed cases globally, with over 4.8 million

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[1] 85 FR 16548 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to ''essential travel,'' as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

[2] *See* 86 FR 52609 (Sept. 22, 2021); 86 FR 46964 (Aug. 23, 2021); 86 FR 38556 (July 22, 2021); 86 FR 32764 (June 23, 2021); 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to ''essential travel.'' *See* 86 FR 52611 (Sept. 22, 2021); 86 FR 46963 (Aug. 23, 2021); 86 FR 38554 (July 22, 2021); 86 FR 32766 (June 23, 2021); 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

confirmed deaths.[3] There have been over 44.4 million confirmed and probable cases within the United States,[4] over 1.6 million confirmed cases in Canada,[5] and over 3.7 million confirmed cases in Mexico.[6] DHS also notes that the Delta variant has driven an increase in cases, hospitalizations, and deaths in the United States, Canada, and Mexico in recent months.[7]

Notwithstanding these realities, vaccines are effective against Delta and other known variants, protecting people from getting infected and severely ill, as well as significantly reducing the likelihood of hospitalization and death, according to the CDC.[8] As such, the risks posed by and to fully vaccinated travelers differ materially from those posed by unvaccinated travelers. As a result, in late September, the White House COVID–19 Response Coordinator indicated the United States plans to revise standards and procedures for incoming international air travel, so as to enable the air travel of fully vaccinated travelers beginning in early November. On October 12, 2021, DHS announced that it intends to do the same with respect to travelers crossing the land border from Mexico and Canada, so as to align the treatment of the land and air ports of entry and allow those who are fully vaccinated for COVID–19 to travel to the United States for non-essential purposes.[9]

Therefore, this Notification extends the limits on non-essential travel and also announces the Secretary's intent to lift these restrictions for certain such individuals who are fully vaccinated.

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, I have determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada poses an ongoing ''specific threat to human life or national interests.''

In March 2020, U.S. and Canadian officials mutually determined that non-essential travel between the United States and Canada posed additional risk of transmission and spread of the virus associated with COVID–19 and placed the populace of both nations at increased risk of contracting the virus associated with COVID–19. Given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, non-essential travel to the United States places the personnel staffing land ports of entry between the United States and Canada, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),[10] I have determined that land ports of entry along the U.S.-Canada border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in ''essential travel,'' as defined below. Given the definition of ''essential travel'' below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Canada border shall be limited to ''essential travel,'' which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.,* to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.,* individuals working in the farming or agriculture industry who must travel between the United States and Canada in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.,* government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID–19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.,* truck drivers supporting the movement of cargo between the United States and Canada);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of ''essential travel'' for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.,* sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EST on January 21, 2022. These restrictions also can be modified by the Secretary at any point prior to January 21, 2022 to allow non-

[3] WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (Oct. 12, 2021), available at Weekly operational update on COVID–19—12 October 2021 (who.int) (accessed Oct. 13, 2021).

[4] CDC, COVID Data Tracker: United States COVID–19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction, CDC COVID Data Tracker. (accessed Oct.13, 2021).

[5] WHO, Situation by Region, Country, Territory & Area, available at *https://covid19.who.int/table* (accessed Oct. 13, 2021).

[6] *Id.*

[7] *See* CDC, Delta Variant: What We Know About the Science, *https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html* (accessed Sept. 9, 2021). *See* Government of Canada, Coronavirus Disease (COVID–19) For Health Professionals, *https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html#VOC* (accessed Sept. 9, 2021). *See* Government of Mexico, Ministry of Health, COVID–19 National General Information, *https://datos.covid-19.conacyt.mx/#DOView* (accessed Aug. 16, 2021); *Mexican Consortium of Genomic Surveillance (CoViGen-Mex), Reportes, http://mexcov2.ibt.unam.mx:8080/COVID–TRACKER/* (accessed Sept. 9, 2021).

[8] What You Need to Know about Variants | CDC (accessed Oct. 13, 2021).

[9] DHS Press Release, Secretary Mayorkas to Allow Fully Vaccinated Travelers from Canada and Mexico to Enter U.S. at Land Borders and Ferry Crossings, *www.dhs.gov/news/2021/10/12/secretary-mayorkas-allow-fully-vaccinated-travelers-canada-and-mexico-enter-us-land* (last accessed Oct. 14, 2021).

[10] 19 U.S.C. 1318(b)(1)(C) provides that ''[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,'' is authorized to ''[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.'' On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities ''related to Customs revenue functions'' were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep't Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that ''[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.'' Congress has vested in the Secretary of Homeland Security the ''functions of all officers, employees, and organizational units of the Department,'' including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

essential travel through land ports of entry and ferry terminals for individuals who are fully vaccinated and have appropriate proof of vaccination. Any such modifications to the restrictions will be accomplished via a posting to the DHS website (*https://www.dhs.gov)* and followed by a publication in the **Federal Register**. Moreover, this Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.

The CBP Commissioner is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification including any appropriate procedures regarding the lifting of restrictions for fully vaccinated travelers. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute ''essential travel'' under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in ''essential travel.''

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2021–23006 Filed 10–20–21; 8:45 am]

BILLING CODE 9112–FP–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2021–0730]

Special Local Regulations; Recurring Marine Events, Sector St. Petersburg

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a special local regulation for the OPA World Championships/Englewood Beach Waterfest event on November 19, 2021 through November 21, 2021, to provide for the safety of life on navigable waterways during this event. Our regulation for recurring marine events within Sector St. Petersburg identifies the regulated area for this event in Englewood, FL. During the enforcement periods, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any designated representative.

DATES: The regulations in 33 CFR 100.703, Table 1 to § 100.703, Line No. 9, will be enforced from 8:00 a.m. through 7:00 p.m., from November 19, 2021, through November 21, 2021.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Marine Science Technician First Class Michael Shackleford, Sector St. Petersburg Prevention Department, Coast Guard; telephone (813) 228–2191, email *Michael.d.shackleford@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulation in 33 CFR 100.703, Table 1 to § 100.703, Line No. 9, for the OPA World Championships/Englewood Beach Waterfest regulated area from 8:00 a.m. to 7:00 p.m., each day from November 19, 2021 through November 21, 2021. This action is being taken to provide for the safety of life on navigable waterways during this event. Our regulation for recurring marine events, Sector St. Petersburg, § 100.703, Table 1 to § 100.703, Line No. 9, specifies the location of the regulated area for the OPA World Championships/Englewood Beach Waterfest which encompasses portions of the Gulf of Mexico near Englewood, FL. During the enforcement periods, as reflected in § 100.703(c), if you are the operator of a vessel in the regulated area you must comply with directions from the Patrol Commander or any designated representative.

In addition to this notification of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this enforcement period via the Local Notice to Mariners and/or marine information broadcasts.

Dated: October 15, 2021.

Matthew A. Thompson,

Captain, U.S. Coast Guard, Captain of the Port St. Petersburg.

[FR Doc. 2021–22983 Filed 10–20–21; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2020–0575; FRL–9061–02–R3]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Reasonably Available Control Technology Determinations for Case-by-Case Sources Under the 2008 8-Hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving multiple state implementation plan (SIP) revisions submitted by the Commonwealth of Pennsylvania. These revisions were submitted by the Pennsylvania Department of Environmental Protection (PADEP) to establish and require reasonably available control technology (RACT) for individual major sources of volatile organic compounds (VOC) and/or nitrogen oxides (NO_X) pursuant to the Commonwealth of Pennsylvania's conditionally approved RACT regulations. In this rule action, EPA is only approving source-specific RACT determinations (''case-by-case'' or alternative NO_X emissions limits) for sources at nine major NO_X and VOC emitting facilities located in Allegheny County. These RACT evaluations were submitted to meet RACT requirements for the 2008 8-hour ozone national ambient air quality standard (NAAQS). EPA is approving these revisions to the Pennsylvania SIP in accordance with the requirements of the Clean Air Act (CAA) and EPA's implementing regulations.

DATES: This final rule is effective on November 22, 2021.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2020–0575. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, 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 form. Publicly available docket materials are available through *https://www.regulations.gov*, or please contact

the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Mr. Riley Burger, Permits Branch (3AD10), Air and Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2217. Mr. Burger can also be reached via electronic mail at *burger.riley@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On May 7, 2021, EPA published a notice of proposed rulemaking (NPRM). 86 FR 24564. In the NPRM, EPA proposed approval of case-by-case RACT determinations for sources at ten facilities in Allegheny County, as EPA found that that the RACT controls for these sources met the CAA RACT requirements for the 2008 ozone NAAQS. PADEP, on behalf of Allegheny County Health Department (ACHD), initially submitted revisions to its SIP to address case-by-case NOx and VOC RACT for these sources on May 7, 2020 and supplemented the submittal on February 9, 2021.

Under certain circumstances, states are required to submit SIP revisions to address RACT requirements for both major sources of NO_X and VOC and any source covered by control technique guidelines (CTG) for each ozone NAAQS. Which NO_X and VOC sources in Pennsylvania are considered ''major,'' and are therefore subject to RACT, is dependent on the location of each source within the Commonwealth. Sources located in nonattainment areas would be subject to the ''major source'' definitions established under the CAA based on the area's current classification(s). In Pennsylvania, sources located in any ozone nonattainment areas outside of moderate or above are subject to the major source threshold of 50 tons per year (tpy) because of the Ozone Transport Region (OTR) requirements in CAA section 184(b)(2).

On May 16, 2016, PADEP submitted a SIP revision addressing RACT for both the 1997 and 2008 8-hour ozone NAAQS in Pennsylvania. PADEP's May 16, 2016 SIP revision intended to address certain outstanding non-CTG VOC RACT, VOC CTG RACT and major source VOC and NO_X RACT requirements for both standards. The SIP revision requested approval of Pennsylvania's 25 Pa. Code 129.96–100, *Additional RACT Requirements for Major Sources of NO_X and VOCs* (the ''presumptive'' RACT II rule). Prior to the adoption of the RACT II rule, Pennsylvania relied on the NO_X and VOC control measures in 25 Pa. Code 129.92–95, *Stationary Sources of NO_X and VOCs,* (the RACT I rule) to meet RACT for non-CTG major VOC sources and major NO_X sources. The requirements of the RACT I rule remain approved into Pennsylvania's SIP and continue to be implemented as RACT.[1] On September 26, 2017, PADEP submitted a letter, dated September 22, 2017, which committed to address various deficiencies identified by EPA in PADEP's May 16, 2016 ''presumptive'' RACT II rule SIP revision.

On May 9, 2019, EPA conditionally approved the RACT II rule based on the commitments PADEP made in its September 22, 2017 letter.[2] 84 FR 20274. In EPA's final conditional approval, EPA noted that PADEP would be required to submit, for EPA's approval, SIP revisions to address any facility-wide or system-wide NO_X emissions averaging plans approved under 25 Pa. Code 129.98 and any case-by-case RACT determinations under 25 Pa. Code 129.99. PADEP committed to submitting these additional SIP revisions within 12 months of EPA's final conditional approval (*i.e.,* by May 9, 2020). Through multiple submissions between 2017 and 2020, PADEP has submitted to EPA for approval various SIP submissions to implement its RACT II case-by-case determinations and NO_X averaging plan limits. This rulemaking is based on EPA's review of one of these SIP submissions.

The SIP revisions in this action only establish 2008 8-hour ozone NAAQS RACT requirements. Applicable RACT requirements under the CAA for sources located in Allegheny County for the 1997 8-hour ozone NAAQS were previously satisfied. See 78 FR 34584 (June 10, 2013).

II. Summary of SIP Revision and EPA Analysis

A. Summary of SIP Revision

To satisfy a requirement from EPA's May 9, 2019 conditional approval, PADEP submitted to EPA SIP revisions addressing alternative NO_X emissions limits and/or case-by-case RACT requirements for major sources in Pennsylvania subject to 25 Pa. Code 129.98 or 129.99. Among the submitted SIP revisions were case-by-case RACT determinations for sources in Allegheny County, which PADEP submitted on behalf of ACHD. PADEP's submission included SIP revisions pertaining to case-by-case RACT determinations for the existing emissions units at each of the major sources of NO_X and/or VOC that required a case-by-case RACT determination.

In the case-by-case RACT determinations submitted by PADEP on behalf of ACHD, an evaluation was completed to determine if previously SIP-approved, case-by-case RACT emission limits or operational controls (herein referred to as RACT I and contained in RACT I permits) were more stringent than the new RACT II presumptive or case-by-case requirements. If more stringent, the RACT I requirements will continue to apply to the applicable source. If the new case-by-case RACT II requirements are more stringent than the RACT I requirements, then the RACT II requirements will supersede the prior RACT I requirements.[3]

Here, EPA is approving SIP revisions pertaining to case-by-case RACT requirements for sources at nine major NO_X and/or VOC emitting facilities in Allegheny County, as summarized in Table 1 in this document.[4]

[1] The RACT I Rule was approved by EPA into the Pennsylvania SIP on March 23, 1998. 63 FR 13789. Through this rule, certain source-specific RACT I requirements will be superseded by more stringent requirements. See Section II of the preamble to this Final Rule.

[2] On August 27, 2020, the Third Circuit Court of Appeals issued a decision vacating EPA's approval of three provisions of Pennsylvania's presumptive RACT II rule applicable to certain coal-fired power plants. *Sierra Club* v. *EPA,* 972 F.3d 290 (3d Cir. 2020). None of the sources in this rule are subject to the three presumptive RACT II provisions at issue in that *Sierra Club* decision.

[3] While the prior SIP-approved RACT I permit will remain part of the SIP, this RACT II rule will incorporate by reference the RACT II requirements through the RACT II permit and clarify the ongoing applicability of specific conditions in the RACT I permit.

[4] In its May 7, 2021 proposed rulemaking, EPA had proposed approval of SIP revisions pertaining to case-by-case RACT requirements for sources at ten major NO_X and/or VOC emitting facilities in Allegheny County. At this time, EPA is only approving such SIP revisions at nine of those facilities and is not taking final action on the SIP revision related to the PPG Industries Inc. Springdale Plant.

TABLE 1—NINE MAJOR NO_X AND/OR VOC EMITTING FACILITIES IN ALLEGHENY COUNTY SUBJECT TO SOURCE-SPECIFIC RACT II DETERMINATIONS UNDER THE 1997 AND 2008 8-HOUR OZONE NAAQS

Major source	1997 8-hour ozone RACT source? (RACT I)	Major source pollutant (NO_X and/or VOC)	RACT II permit (effective date)
Bellefield Boiler Plant (formerly Bellefield Boiler Plant—Pittsburgh).	Yes	NO_X	0047–I003a (11/30/20).
Eastman Chemical Resins, Inc Jefferson Site (formerly Hercules, Inc.—West Elizabeth).	Yes	VOC	0058–I026a (9/30/20).
Energy Center Pittsburgh LLC North Shore Plant (formerly NRG Energy Center).	Yes	NO_X	0022–I003a (11/30/20).
Neville Chemical Company	Yes	VOC	0060d (11/10/20).
Pittsburgh Allegheny Co. Thermal, LTD	Yes	NO_X	0044–I001a (11/30/20).
Universal Stainless & Alloy Products, Inc	Yes	NO_X	0027a (2/20/20).
U.S. Steel Mon Valley Works Clairton Plant (formerly U.S. Steel (USX Corporation)—Clairton Works).	Yes	VOC and NO_X	0052–I020b (12/11/20).
U.S. Steel Mon Valley Works Edgar Thomson Plant (formerly USX Corporation—Edgar Thomson Works).	Yes	VOC and NO_X	0051–I008a (12/7/20).
U.S. Steel Mon Valley Works—Irvin Plant (formerly USX, Inc.—Irvin Works).	Yes	VOC and NO_X	0050–OP16c (12/7/20).

The case-by-case RACT determinations submitted by PADEP, on behalf of ACHD, consist of an evaluation of all reasonably available controls at the time of evaluation for each affected emissions unit, resulting in an ACHD determination of what specific emission limit or control measures satisfy RACT for that particular unit. The adoption of new, additional, or revised emission limits or control measures to existing SIP-approved RACT I requirements were specified as requirements in new or revised Federally enforceable permits (hereafter RACT II permits) issued by ACHD to the source. These RACT II permits have been submitted as part of the Pennsylvania RACT SIP revisions for EPA's approval into the Pennsylvania SIP under 40 CFR 52.2020(d)(1). The RACT II permits submitted by PADEP are listed in the last column of Table 1 of this preamble, along with the permit effective date, and are part of the docket for this rule, which is available online at *https://www.regulations.gov,* Docket No. EPA–R03–OAR–2020–0575.[5] EPA is incorporating by reference in the Pennsylvania SIP, via the RACT II permits, source-specific RACT emission limits and control measures under the 2008 8-hour ozone NAAQS for certain major sources of NO_X and VOC emissions.

B. EPA's Final Action

PADEP's SIP revisions incorporate ACHD's determinations of source-specific RACT II controls for individual emission units at major sources of NO_X and/or VOC in Allegheny County, where those units are not covered by or cannot meet Pennsylvania's presumptive RACT regulation. After thorough review and evaluation of the information provided by ACHD in the SIP revision submittals for sources at nine major NO_X and/or VOC emitting facilities in Allegheny County, EPA found that (1) ACHD's case-by-case RACT determinations and conclusions establish limits and/or controls on individual sources that are reasonable and appropriately considered technically and economically feasible controls and (2) ACHD's determinations are consistent with the CAA, EPA regulations, and applicable EPA guidance.

ACHD, in its RACT II determinations, considered the prior source-specific RACT requirements and, where more stringent, retained those prior RACT requirements as part of its new RACT determinations. In the NPRM, EPA proposed to find that all the proposed revisions to previously SIP-approved RACT requirements would result in equivalent or additional reductions of NO_X and/or VOC emissions. The proposed revisions should not interfere with any applicable requirements concerning attainment of the NAAQS, reasonable further progress, or other applicable requirements under section 110(l) of the CAA.

Other specific requirements of the 2008 8-hour ozone NAAQS case-by-case RACT determinations and the rationale for EPA's proposed action are explained more thoroughly in the NPRM, and its associated technical support document (TSD), and will not be restated here.

III. Public Comments and EPA Responses

EPA received comments from three commenters on the May 7, 2021 NPRM. 86 FR 24564. A summary of the comments and EPA's responses are discussed in this section. A copy of the comments can be found in the docket for this rule action.

Comment 1: Two commenters indicated that the permit for U.S Steel Mon Valley Works—Clairton listed in the table of the document should be Permit No. 0052–I020b effective, December 11, 2021 rather than Permit No., 0052–I020a effective, December 7, 2021.

Response 1: EPA agrees with commenters and has corrected the permit number and effective date indicated in the tables of this preamble.

Comment 2: One commenter identified that there is an appeal of the RACT II permit for the PPG Springdale facility pending before ACHD's Hearing Officer and, therefore, requested EPA not take final action on the SIP revision.

Response 2: EPA is not taking final action on the PPG Springdale RACT determination at this time and will act on this SIP revision in a later rulemaking. EPA will respond to the comment at that time.

IV. Final Action

EPA is approving case-by-case RACT determinations for sources at nine major NO_X and VOC emitting facilities in Allegheny County, as required to meet obligations pursuant to the 2008 8-hour ozone NAAQS, as revisions to the Pennsylvania SIP.

V. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes

[5] The RACT II permits included in the docket for this rule are redacted versions of the facilities' Federally enforceable permits. They reflect the specific RACT requirements being approved into the Pennsylvania SIP via this final action.

incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of source-specific RACT determinations and NOx averaging plan limits under the 1997 and 2008 8-hour ozone NAAQS for certain major sources of VOC and NO_X in Allegheny County. EPA has made, and will continue to make, these materials generally available through *https://www.regulations.gov* and at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully Federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rule of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[6]

VI. Statutory and Executive Order Reviews

A. General Requirements

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, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804, however, exempts from section 801 the following types of rules: Rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). Because this is a rule of particular applicability, EPA is not required to submit a rule report regarding this action under section 801.

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 20, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action approving Pennsylvania's NO_X and VOC RACT requirements for nine facilities for the 2008 8-hour ozone NAAQS may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 8, 2021.

Diana Esher,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart NN—Pennsylvania

■ 2. In § 52.2020, the table in paragraph (d)(1) is amended by:

■ a. Revising the entries for ''Hercules, Inc.—West Elizabeth'' (Permit No. E.O.-216); ''Hercules, Inc.—West Elizabeth'' (Permit No. CO–257); ''Neville Chemical Company''; ''Universal Stainless & Alloy Products, Inc''; ''U.S. Steel (USX Corporation.)—Clairton Works)''; ''USX Corporation—Edgar Thomson Works''; ''USX, Inc.—Irvin Works''; ''Bellefield Boiler Plant—Pittsburgh''; and ''Pittsburgh Allegheny County Thermal, Ltd''; ''NRG Energy Center (formerly Pittsburgh Thermal Limited Partnership)'';

■ b. Adding entries, in the following order, at the end of the table for ''Bellefield Boiler Plant (formerly referenced as Bellefield Boiler Plant—Pittsburgh) ''; ''Eastman Chemical Resins, Inc. Jefferson Site (formerly referenced as Hercules, Inc.—West Elizabeth)''; ''Energy Center Pittsburgh LLC North Shore Plant (formerly referenced as NRG Energy Center)''; ''U.S. Steel Mon Valley Works Clairton Plant (formerly referenced as U.S. Steel (USX Corporation)—Clairton Works)''; ''U.S. Steel Mon Valley Works Edgar Thomson Plant (formerly referenced as USX Corporation—Edgar Thomson Works)''; and ''U.S. Steel Mon Valley Works—Irvin Plant (formerly referenced as USX, Inc.—Irvin Works)''; ''Neville Chemical Company''; ''Pittsburgh Allegheny Co. Thermal, LTD''; and

[6] 62 FR 27968 (May 22, 1997).

''Universal Stainless & Alloy Products, Inc.''.

The revisions and additions read as follows:

§ 52.2020 Identification of plan.

* * * * *

(d) * * *

(1) * * *

Name of source	Permit No.	County	State effective date	EPA approval date	Additional explanations/ §§ 52.2063 and 52.2064 citations [1]
*	*	*	*	*	*
Hercules, Inc.—West Elizabeth.	EO–216	Allegheny	3/8/96	10/16/01, 66 FR 52506	See also 52.2064(e)(2).
Hercules, Inc.—West Elizabeth.	CO–257	Allegheny	1/14/97 11/1/99.	10/16/01, 66 FR 52506	See also 52.2064(e)(2).
Neville Chemical Company	CO–230	Allegheny	12/13/96	10/16/01, 66 FR 52506	See also 52.2064(e)(4).
*	*	*	*	*	*
Universal Stainless & Alloy Products, Inc.	CO–241	Allegheny	12/19/96	10/16/01, 66 FR 52511	See also 52.2064(e)(6).
*	*	*	*	*	*
U.S. Steel (USX Corporation.)—Clairton Works.	CO–234	Allegheny	12/30/96	10/16/01, 66 FR 52511	See also 52.2064(e)(7).
USX Corporation—Edgar Thomson Works.	CO–235	Allegheny	12/30/96	10/16/01, 66 FR 52511	See also 52.2064(e)(8).
USX, Inc.—Irvin Works	CO–258	Allegheny	12/30/96	10/16/01, 66 FR 52511	See also 52.2064(e)(9).
*	*	*	*	*	*
Bellefield Boiler Plant—Pittsburgh.	EO–248	Allegheny	12/19/96	10/12/01, 66 FR 52044	See also 52.2064(e)(1).
*	*	*	*	*	*
Pittsburgh Allegheny County Thermal, Ltd.	CO–265	Allegheny	11/9/98	10/12/01, 66 FR 52044	See also 52.2064(e)(5).
*	*	*	*	*	*
NRG Energy Center (formerly Pittsburgh Thermal Limited Partnership).	CO220	Allegheny	3/4/96	05/11/06, 71 FR 27394	See also 52.2064(e)(3).
*	*	*	*	*	*
Bellefield Boiler Plant (formerly referenced as Bellefield Boiler Plant—Pittsburgh).	0047–I003a	Allegheny	11/30/20	10/21/21, [insert **Federal Register** citation].	52.2064(e)(1).
Eastman Chemical Resins, Inc. Jefferson Site (formerly referenced as Hercules, Inc.—West Elizabeth).	0058–I026a	Allegheny	9/30/20	10/21/21, [insert **Federal Register** citation].	52.2064(e)(2).
Energy Center Pittsburgh LLC North Shore Plant (formerly referenced as NRG Energy Center).	0022–I003a	Allegheny	11/30/20	10/21/21, [insert **Federal Register** citation].	52.2064(e)(3).
U.S. Steel Mon Valley Works Clairton Plant (formerly referenced as U.S. Steel (USX Corporation)—Clairton Works).	0052–I020b	Allegheny	12/11/20	10/21/21, [insert **Federal Register** citation].	52.2064(e)(7).
U.S. Steel Mon Valley Works Edgar Thomson Plant (formerly referenced as USX Corporation—Edgar Thomson Works).	0051–I008a	Allegheny	12/7/20	10/21/21, [insert **Federal Register** citation].	52.2064(e)(8).
U.S. Steel Mon Valley Works—Irvin Plant (formerly referenced as USX, Inc.—Irvin Works).	0050–OP16c	Allegheny	12/7/20	10/21/21, [insert **Federal Register** citation].	52.2064(e)(9).
Neville Chemical Company	0060d	Allegheny	11/10/20	10/21/21, [insert **Federal Register** citation].	52.2064(e)(4).
Pittsburgh Allegheny Co. Thermal, LTD.	0044–I001a	Allegheny	11/30/20	10/21/21, [insert **Federal Register** citation].	52.2064(e)(5).

Name of source	Permit No.	County	State effective date	EPA approval date	Additional explanations/ §§ 52.2063 and 52.2064 citations [1]
Universal Stainless & Alloy Products, Inc..	0027a	Allegheny	2/20/20	10/21/21, [insert **Federal Register** citation].	52.2064(e)(6).

[1] The cross-references that are not § 52.2064 are to material that pre-date the notebook format. For more information, see § 52.2063.

* * * * *

■ 3. Amend § 52.2064 by adding paragraph (e) to read as follows:

§ 52.2064 EPA-approved Source-Specific Reasonably Available Control Technology (RACT) for Volatile Organic Compounds (VOC) and Oxides of Nitrogen (NO_X).

* * * * *

(e) Approval of source-specific RACT requirements for 2008 8-hour ozone national ambient air quality standards for the facilities listed in this paragraph are incorporated as specified. (Rulemaking Docket No. EPA–OAR–2020–0575).

(1) Bellefield Boiler Plant—Incorporating by reference Installation Permit No. 0047–I003a, issued on April 14, 2020 and amended on November 30, 2020 as redacted by ACHD, which supersedes RACT Enforcement Order No. 248, effective December 19, 1996, except for Conditions 1.2, 1.3, 1.4, 1.5 and 1.7A through E, which remain as RACT requirements. See also § 52.2063(c)(177)(i)(B)(3) for prior RACT approval.

(2) Eastman Chemical Resins, Inc. Jefferson Site—Installation Permit No. 0058–I026 issued April 21, 2020, as redacted by ACHD, which supersedes Consent Order No. 257, issued on January 14, 1997, except for Conditions 1.1, 1.2, 1.3, 1.4, and 1.7, which remain as RACT requirements. The requirements of Enforcement Order No. 216, issued March 8, 1996, also continue to apply to identified sources that continue to operate. See also §§ 52.2063(c)(166)(i)(B)(2) and 52.2063(c)(166)(i)(B)(3), respectively, for prior RACT approval.

(3) Energy Center Pittsburgh LLC, North Shore Plant— Incorporating by reference Installation Permit No. 0022–I003a, issued on March 18, 2020 and amended on November 30, 2020, as redacted by ACHD. All permit conditions in the prior RACT Permit, CO No. 220, effective March 4, 1996, remain as RACT requirements. See also § 52.2063(d)(1)(o) for prior RACT approval.

(4) Neville Chemical Company—Incorporating by reference Installation Permit No. 00060d issued September 28, 2015 and amended on November 10, 2020, as redacted by ACHD, which supersedes Consent Order No. 230, issued on December 13, 1996, except for Conditions 1.1, 1.3, 1.5, 1.6, 1.7. 1.9, and 1.10, which remain as RACT requirements. See also § 52.2063(c)(166)(i)(B)(4) for prior RACT approval.

(5) Pittsburgh Allegheny County Thermal, Ltd—Incorporating by reference Permit No. 0044–I001a, issued on March 25, 2020 and amended on November 30, 2020, as redacted by ACHD. All permit conditions in the prior RACT Permit, CO No. 265, effective November 9, 1998, remain as RACT requirements. See also § 52.2063(c)(177)(i)(B)(8) for prior RACT approval.

(6) Universal Stainless & Alloy Products, Inc.—Incorporating by reference Title V Operating Permit No. 0027a, issued on November 21, 2017 and amended on February 20, 2020, as redacted by ACHD, which supersedes Consent Order No. 241 issued on December 19, 1996, except for Conditions 1.1, 1.2, and 1.3, which remain as RACT requirements. See also § 52.2063(c)(172)(i)(B)(2) for prior RACT approval.

(7) U.S. Steel Mon Valley Works Clairton Plant—Incorporating by reference Installation Permit No. 0052–I020b, revised and issued December 11, 2020, as redacted by ACHD, which supersedes RACT Consent Order No. 234, issued December 30, 1996, except for Conditions 1.1, 1.3, 1.4, 1.5, and 1.6, which remain as RACT requirements. See also § 52.2063(c)(172)(i)(B)(5) for prior RACT approval.

(8) U.S. Steel Mon Valley Works Edgar Thompson Plant—Incorporating by reference Installation Permit 0051–I008a, revised and effective on (December 7, 2020), which supersedes the RACT Consent Order No. 235, issued December 30, 1996, except for Conditions 1.1, 1.3, 1.4, 1.5, 1.6, and 1.7, which remain as RACT requirements. See also § 52.2063(c)(172)(i)(B)(6) for prior RACT approval.

(9) U.S. Steel Mon Valley Works—Irvin Plant—Incorporating by reference Title V Operating Permit No. 0050–OP16c, issued on December 7, 2020, as redacted by ACHD, which supersedes RACT Consent Order No. 258, issued December 30, 1996, except for Conditions 1.1 and 1.2 and for Source ID P008 (No. 3 Five Stand Cold Reduction Mill) Condition 1.3, which remain as RACT requirements. See also § 52.2063(c)(172)(i)(B)(7) for prior RACT approval.

[FR Doc. 2021–22570 Filed 10–20–21; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register

Vol. 86, No. 201

Thursday, October 21, 2021

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

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2021–0042]

Privacy Act of 1974: Implementation of Exemptions; U.S. Department of Homeland Security Office of Inspector General Investigative Records System of Records

AGENCY: Office of Inspector General, U.S. Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Homeland Security (DHS) is giving concurrent notice of an updated and reissued system of records pursuant to the Privacy Act of 1974 for the ''DHS/Office of Inspector General (OIG)-002 Investigative Records System of Records'' and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: Comments must be received on or before November 22, 2021.

ADDRESSES: You may submit comments, identified by docket number DHS–2021–0042, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Lynn Parker Dupree, Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general and privacy questions, please contact: Lynn Parker Dupree, (202) 343–1717, Chief Privacy Officer, U.S. Department of Homeland Security, Washington, DC 20528–0655.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, the U.S. Department of Homeland Security (DHS), Office of Inspector General (OIG), is modifying and reissuing this system of records notice. DHS OIG is responsible for a wide range of oversight functions, including to initiate, conduct, supervise, and coordinate audits, investigations, inspections, and other reviews relating to the programs and operations of DHS. DHS OIG promotes economy, efficiency, and effectiveness within DHS and prevents, detects, and investigates employee corruption, fraud, waste, and abuse in its programs and operations. DHS OIG is responsible for investigating allegations of criminal, civil, and administrative misconduct involving DHS employees, contractors, grantees, and DHS programs and activities. These investigations can result in criminal prosecutions, fines, civil monetary penalties, and administrative sanctions. While DHS OIG is operationally a part of DHS, it operates independently of DHS and all offices within it.

The DHS/OIG–002 Investigative Records System of Records assists DHS OIG with receiving and processing allegations of misconduct, including violations of criminal and civil laws, as well as administrative policies and regulations pertaining to DHS employees, contractors, grantees, and other individuals and entities within DHS. The system includes complaints and investigation-related files. DHS OIG manages information provided during the course of its investigations to: Create records showing dispositions of allegations; audit actions taken by DHS management regarding employee misconduct; audit legal actions taken following referrals to the U.S. Department of Justice (DOJ) for criminal prosecution or civil action; calculate and report statistical information; manage OIG investigators' training; and manage Government-issued investigative property and other resources used for investigative activities.

DHS is issuing this notice of proposed rulemaking to exempt this system of records from certain provisions of the Privacy Act.

A fuller description of this modified SORN can be found herein the **Federal Register**.

II. Privacy Act

The Privacy Act codifies fair information practice principles in a statutory framework governing the means by which Federal Government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. Additionally, and similarly, the Judicial Redress Act (JRA) provides a statutory right to covered persons to make requests for access and amendment to covered records, as defined by the JRA, along with judicial review for denials of such requests. In addition, the JRA prohibits disclosures of covered records, except as otherwise permitted by the Privacy Act.

The Privacy Act allows government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/OIG–002 Investigative Records System of Records. Some information DHS/OIG–002 Investigative Records System of Records relates to official DHS national security, law enforcement, immigration, intelligence activities, and protective services to the President of the U.S. or other individuals pursuant to Section 3056 and 3056A of Title 18. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically,

the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS' ability to obtain information from third parties and other sources; to protect the privacy of third parties; to safeguard classified information; and to safeguard records in connection with providing protective services to the President of the U.S. or other individuals pursuant to Section 3056 and 3056A of Title 18. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

In appropriate circumstances, when compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A system of records notice for DHS/OIG–002 Investigative Records System of Records is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend chapter I of title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for Part 5 continues to read as follows:

Authority: 6 U.S.C. 101 *et seq.;* Pub. L. 107–296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. In Appendix C to Part 5, paragraph 5 is revised to read as follows:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

5. The DHS/OIG–002 Investigative Records System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/OIG–002 Investigative Records System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; national security and intelligence activities; and protection of the President of the U.S. or other individuals pursuant to Section 3056 and 3056A of Title 18. The DHS/OIG–002 Investigative Records System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies.

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3), (c)(4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f); and (g)(1). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5), has exempted this system from the following provisions of the Privacy Act, 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process. When an investigation has been completed, information on disclosures made may continue to be exempted if the fact that an investigation occurred remains sensitive after completion.

(b) From subsection (d) (Access and Amendment to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(f) From subsections (e)(4)(G), (H), and (I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(j) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

* * * * *

Lynn Parker Dupree,

Chief Privacy Officer, U.S. Department of Homeland Security.

[FR Doc. 2021–22837 Filed 10–20–21; 8:45 am]

BILLING CODE 9110–9B–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0878; Project Identifier MCAI–2020–01460–G]

RIN 2120–AA64

Airworthiness Directives; Schempp-Hirth Flugzeugbau GmbH Gliders

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 Schempp-Hirth Flugzeugbau GmbH Model Duo Discus and Duo Discus T gliders. This proposed AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as jerky extension of the air brakes at very high air speeds, including cases where the air brake blades interlock. This proposed AD would require replacing certain air brake end stop bushings, inspecting certain other air brake end stops, and repairing 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 December 6, 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 Schempp-Hirth Flugzeugbau GmbH, Krebenstrasse 25, 73230 Kirchheim/Teck, Germany; phone: +49 7021 7298–0; fax: +49 7021 7298–199; email: *info@schempp-hirth.com*; website: *https://www.schempp-hirth.com.* You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0878; 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, the MCAI, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Jim Rutherford, Aviation Safety Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@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–2021–0878; Project Identifier MCAI–2020–01460–G'' 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 NPRM.

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 Jim Rutherford, Aviation Safety Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 901 Locust, Room 301, Kansas City, MO 64106. 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 European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0233, dated October 27, 2020 (referred to after this as ''the MCAI''), to address an unsafe condition on certain serial-numbered (S/N) Schempp-Hirth Flugzeugbau GmbH Model Duo Discus, Duo Discus C, and Duo Discus T gliders. The MCAI states:

> Occurrences were reported of experiencing jerky extension of the airbrakes at very high air speeds, in some cases of which the airbrake blades interlocked. An increasing number of age-related damage was observed on a specific version (22 mm plastic bushes) of the airbrake end-stops.
>
> This condition, if not corrected, could lead to blockage of the airbrakes, possibly resulting in reduced control of the (powered) sailplane.
>
> To address this potential unsafe condition, Schempp-Hirth issued the applicable [technical note] TN (original issue) to provide instructions to replace the affected parts with a new version bushing, made of better material.
>
> Since [EASA planned AD] PAD 20–119 was issued, it was discovered that early s/n sailplanes were equipped with a single metal end stop per airbrake. The applicable TN was revised accordingly. The PAD was revised to include those metal end stops in the definition of 'affected part' to ensure these are inspected.
>
> For the reasons described above, this [EASA] AD requires replacement of certain affected parts with serviceable parts. For other affected parts, this [EASA] AD requires a one-time inspection for sufficient overlap and, depending on findings, accomplishment of applicable corrective action(s). This [EASA] AD also prohibits (re)installation of affected parts.

You may examine the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0878.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Schempp-Hirth Flugzeugbau GmbH Working Instructions for Technical Note 890–16 rev1 and Technical Note 396–20 rev1 action 1, dated September 18, 2020. The service information contains procedures for replacing each air brake end stop plastic bushing (22 mm) with an air brake end stop plastic bushing (32 mm). The FAA also reviewed Schempp-Hirth Flugzeugbau GmbH Working Instructions for Technical Note 396–20 rev1 action 2, dated September 18, 2020. The service information contains procedures for inspecting each single air brake metal end stop for overlap. 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

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information already described, except as described under ''Differences Between this Proposed AD and the MCAI.'' This proposed AD would also require repairing any single air brake metal end stop with insufficient overlap.

Differences Between This Proposed AD and the MCAI

The MCAI applies to Schempp-Hirth Flugzeugbau GmbH Model Duo Discus C gliders, and this proposed AD would not because this model does not have an FAA type certificate.

The MCAI allows credit for modifications done prior to the effective date of the EASA AD in accordance with the original issue of Schempp-Hirth TN 396–20/TN 890–16, but this proposed AD would not provide such credit.

The MCAI prohibits installation of air brake end stop plastic bushings (22 mm) after a glider has been modified with an air brake end stop plastic bushing (32 mm). This proposed AD would prohibit installation of air brake end stop plastic bushings (22 mm) as of the effective date of this AD.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 27 gliders of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace plastic end stop bushings	4 work-hours × $85 per hour = $340.	$150	$490	Up to $13,230 (depending on number of gliders with plastic end stop bushings).
Inspect metal end stops	1 work-hour × $85 per hour = $85	0	85	Up to $2,295 (depending on number of gliders with metal end stops).

The FAA estimates the following costs to do any necessary repairs that would be required based on the results of the proposed inspection. The FAA has no way of determining the number of gliders that might need these repairs:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Repair metal end stops	4 work-hours × $85 per hour = $340	$150	$490

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:

Schempp-Hirth Flugzeugbau GmbH: Docket No. FAA–2021–0878; Project Identifier MCAI–2020–01460–G.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by December 6, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Schempp-Hirth Flugzeugbau GmbH gliders identified in paragraphs (c)(1) and (2) of this AD, certificated in any category.

(1) Model Duo Discus gliders, serial number (S/N) 1 through 541 inclusive, except S/N 534.

(2) Model Duo Discus T gliders, S/N 1 through 174 inclusive.

(d) Subject

Joint Aircraft System Component (JASC) Code 2760, Drag Control System.

(e) Unsafe Condition

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as jerky extension of the air brakes at very high air speeds, including cases where the air brake blades interlock. The FAA is issuing this AD to prevent and correct damage of the airbrake end-stops. The unsafe condition, if not addressed, could result in blockage of the air brakes and reduced control of the glider.

(f) Compliance

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

(g) Required Actions

(1) For gliders with air brake end stop plastic bushings (22 mm) installed: Within 3 months after the effective date of this AD, replace each air brake end stop plastic bushing (22 mm) with an air brake end stop plastic bushing (32 mm) in accordance with Schempp-Hirth Flugzeugbau GmbH Working Instructions for Technical Note 890–16 rev1 and Technical Note 396–20 rev1 action 1, dated September 18, 2020.

(2) For gliders with single air brake metal end stops installed: Within 3 months after the effective date of this AD, inspect each single air brake metal end stop for overlap in accordance with Schempp-Hirth Flugzeugbau GmbH Working Instructions for Technical Note 396–20 rev1 action 2, dated September 18, 2020. If there is insufficient overlap, before further flight, repair using a method approved by the FAA or the European Union Aviation Safety Agency (EASA).

(h) Parts Installation Prohibition

As of the effective date of this AD, do not install an air brake end stop plastic bushing (22 mm) on any glider.

(i) 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 (j)(1) of this AD or email: *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.

(j) Related Information

(1) For more information about this AD, contact Jim Rutherford, Aviation Safety Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@faa.gov.*

(2) Refer to EASA AD 2020–0233, dated October 27, 2020, for more information. You may examine the EASA AD in the AD docket at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2021–0878.

(3) For service information identified in this AD, contact Schempp-Hirth Flugzeugbau GmbH, Krebenstrasse 25, 73230 Kirchheim/Teck, Germany; phone: +49 7021 7298–0; fax: +49 7021 7298–199; email: *info@schempp-hirth.com*; website: *https://www.schempp-hirth.com.* You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Issued on October 8, 2021.

Gaetano A. Sciortino,

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

[FR Doc. 2021–22680 Filed 10–20–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2021–0818; Airspace Docket No. 19–AAL–35]

RIN 2120–AA66

Proposed Establishment of United States Area Navigation (RNAV) Route T–366; Point Hope, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish United States Area Navigation (RNAV) route T–366 in the vicinity of Point Hope, AK in support of a large and comprehensive T-route modernization project for the state of Alaska.

DATES: Comments must be received on or before December 6, 2021.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2021–0818; Airspace Docket No. 19–AAL–35 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order JO 7400.11F, 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. FAA Order JO 7400.11F is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order JO 7400.11F at NARA, email: *fr.inspection@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Christopher McMullin, 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 expand the availability of RNAV in Alaska and improve the efficient flow of air traffic within the National Airspace System (NAS) by lessening the dependency on ground based navigation.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2021–0818; Airspace Docket No. 19–AAL–35) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2021–0818; Airspace Docket No. 19–AAL–35.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Western Service Center, Operations Support Group, Federal Aviation Administration, 2200 South 216th St., Des Moines, WA 98198.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021. FAA Order JO 7400.11F is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11F lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

In 2003, Congress enacted the Vision 100—Century of Aviation Reauthorization Act (Pub L., 108–176), which established a joint planning and development office in the FAA to manage the work related to the Next Generation Air Transportation System (NextGen). Today, NextGen is an ongoing FAA-led modernization of the nation's air transportation system to make flying safer, more efficient, and more predictable.

In support of NextGen, this proposal is part of a larger and comprehensive T-route modernization project in the state of Alaska. The project mission statement states: ''To modernize Alaska's Air Traffic Service route structure using satellite based navigation Development of new T-routes and optimization of existing T-routes will enhance safety, increase efficiency and access, and will provide en route continuity that is not subject to the restrictions associated with ground based airway navigation.'' As part of this project, the FAA evaluated the existing Colored Airway structure for: (a) Direct replacement (*i.e.,* overlay) with a T-route that offers a similar or lower Minimum En route Altitude (MEA) or Global Navigation Satellite System Minimum En route Altitude (GNSS MEA); (b) the replacement of the colored airway with a T-route in an optimized but similar geographic area, while retaining similar or lower MEA; or (c) removal with no route structure (T-route) restored in that area because the value was determined to be insignificant.

The aviation industry/users have indicated a desire for the FAA to transition the Alaskan en route navigation structure away from dependency on Non-Directional Beacons (NDB), and move to develop and improve the RNAV route structure. The FAA proposes to establish RNAV route T–366 to provide an alternate routing for Colored airways B–2, B–5, and G–16. These routes utilize Wainwright Village, AK, (UKK) and Nuiqsut Village, AK, (UQS) NDBs, which are planned for decommissioning.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to establish RNAV route T–366 in the vicinity of Point Hope, AK in support of a large and comprehensive T-route modernization project for the state of Alaska. The proposed route is described below.

T–366: The FAA proposes to establish T–366 navigating from Point Hope, AK, to Cape Lisburne, AK, (LUR), mirroring Colored airway B–5, from LUR to Point Lay, AK, (PIZ), mirroring Colored airway B–2, and from PIZ to UQS, mirroring Colored airway G–16.

United States Area Navigation Routes are published in paragraph 6011 of FAA Order JO 7400.11F dated August 10, 2021, and effective September 15, 2021, which is incorporated by reference in 14 CFR 71.1. The RNAV route listed in this document would be published subsequently in FAA Order JO 7400.11F.

FAA Order JO 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 proposed regulation 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 will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 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 JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021, is amended as follows:

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T–366 VANTY, AK TO JATIL, AK [NEW]

VANTY, AK	WP	(lat. 68°20′40.68″ N, long. 166°47′53.61″ W)
CABGI, AK	WP	(lat. 68°52′16.53″ N, long. 166°04′33.62″ W)
SUPGY, AK	WP	(lat. 69°01′57.87″ N, long. 164°13′31.71″ W)
JODGU, AK	WP	(lat. 69°44′11.33″ N, long. 162°59′46.66″ W)
FILEV, AK	WP	(lat. 70°38′16.81″ N, long. 159°59′41.10″ W)
BARROW, AK (BRW)	VOR/DME	(lat. 71°16′24.33″ N, long. 156°47′17.22″ W)
JATIL, AK	WP	(lat. 70°12′43.84″ N, long. 151°00′02.99″ W)

* * * * *

Issued in Washington, DC, on October 12, 2021.

Michael R. Beckles,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2021–22546 Filed 10–20–21; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 240, 249 and 274

[Release No. 33–10998; 34–93311; IC–34399; File No. S7–12–15]

RIN 3235–AK99

Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Securities and Exchange Commission (''Commission'') is reopening the comment period for its proposal to implement the provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''). The proposed rule would direct the national securities exchanges and national securities associations to establish listing standards that would require each issuer to develop and implement a policy providing for the recovery, under certain circumstances, of incentive-based compensation based on financial information required to be reported under the securities laws that is received by current or former executive officers, and require disclosure of the policy (the ''Proposed Rules''). The Proposed Rules were set forth in a release published in the **Federal Register** on July 14, 2015 (Release No. 34–75342) (the ''Proposing Release''), and the related comment period ended on September 14, 2015. The reopening of this comment period is intended to allow interested persons further opportunity to analyze and comment upon the Proposed Rules in light of developments since the publication of the Proposing Release and our further consideration of the Section 954 mandate.

DATES: The comment period for the proposed rule published July 14, 2015, at 80 FR 41143, is reopened. Comments should be received on or before November 22, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*).

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–12–15. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*http://www.sec.gov/rules/proposed.shtml*). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. 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.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Steven G. Hearne, Senior Special Counsel, in the Office of Rulemaking, at (202) 551–3430, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

Section 954 of the Dodd-Frank Act added Section 10D to the Securities Exchange Act of 1934 [1] (''Exchange Act''), which provides that the Commission require national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not develop and implement a policy providing for the recovery of erroneously awarded compensation and for disclosure of that policy. As described more fully in the Proposing Release,[2] under the Proposed Rules, an issuer would be subject to delisting if it does not adopt a compensation recovery policy that complies with the applicable listing standard, disclose the policy in accordance with Commission rules, and comply with the policy's recovery provisions. Specifically, the Proposed Rules would:

1. Require national securities exchanges and associations to establish listing standards that require listed issuers to adopt and comply with a compensation recovery policy in which:

i. Recovery is required:

a. From current and former executive officers who received incentive-based compensation during the three fiscal years preceding the date on which the issuer is required to prepare an accounting restatement to correct a material error.

b. On a ''no fault'' basis, without regard to whether any misconduct occurred or an executive officer's responsibility for the misstated financial statements.

ii. The amount of incentive-based compensation to be recovered is the amount received by an executive officer that exceeds the amount the executive officer would have received had the incentive-based compensation been determined based on the restated financial statements.

iii. Issuers must recover in compliance with their recovery policies except to the extent that it would be impracticable to do so, such as where the direct expense of enforcing recovery would exceed the amount to be recovered or, for foreign private issuers, in specified circumstances where recovery would violate home country law.

iv. Issuers are prohibited from indemnifying current and former executive officers against the loss of recoverable incentive-based compensation.

2. Define significant terms, including:

i. ''Incentive-based compensation'' as any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure, and further defining ''financial reporting measure'' as a measure that is determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, any measure derived wholly or in part from such financial information, and stock price and total shareholder return. For incentive-based compensation based on stock price or total shareholder return, issuers would be permitted to use a reasonable estimate of the effect of the restatement on the applicable measure to determine the amount to be recovered.

ii. ''Executive officer'' modeled on the definition of ''officer'' under 15 U.S.C. 78p (''Exchange Act Section 16''), to include the issuer's president, principal financial officer, principal accounting officer, any vice-president in charge of a principal business unit, division or function, and any other person who performs policy-making functions for the issuer and otherwise conforms to the full scope of the Exchange Act Section 16 definition.[3]

3. Require the filing of the compensation recovery policy as an exhibit to the issuer's Exchange Act annual report, and if during its last completed fiscal year the issuer either completed a restatement that required recovery, or there was an outstanding balance of excess incentive-based compensation relating to a prior restatement, require disclosure, block tagged in XBRL, to accompany the executive compensation disclosure in annual reports and any proxy or information statements of:

i. The date on which the issuer was required to prepare each accounting restatement, the aggregate dollar amount of excess incentive-based compensation attributable to the restatement, and the aggregate dollar amount of excess incentive-based compensation that remained outstanding at the end of its last completed fiscal year.

ii. The name of each individual subject to recovery from whom the issuer decided not to pursue recovery, the amounts due from each such individual, and a brief description of the reason the issuer decided not to pursue recovery.

iii. If at the end of the issuer's last completed fiscal year, amounts of excess incentive-based compensation are outstanding from any individual for more than 180 days, the name of, and amount due from, each such individual.

4. Apply to all listed issuers except for certain registered investment companies to the extent they do not provide incentive-based compensation to their employees and limited accommodations for foreign private issuers.

II. Reopening of Comment Period

Since the enactment of Section 954 of the Dodd-Frank Act in 2010, and the publication of the Proposed Rules in 2015, there have been important developments relating to clawback policies. We have observed an increase in the number of issuers disclosing information about their ability to recoup performance-based awards in the event of fraud, restatement of financial statements, or other reasons, and adopting and implementing executive compensation clawback policies addressing these circumstances.[4]

In light of these developments, and our further consideration of how best to implement the Section 954 mandate, we are reopening the comment period for the Proposed Rules until November 22, 2021 to provide the public with an additional opportunity to analyze and comment on the Proposed Rules. Commenters may submit, and the Commission will consider, comments on any aspect of the Proposed Rules. All comments received to date on the Proposed Rules will be considered and need not be resubmitted. Comments are particularly helpful to us if accompanied by quantified estimates or other detailed analysis and supporting

[1] 15 U.S.C. 78a *et seq.*

[2] *See Listing Standards for Recovery of Erroneously Awarded Compensation,* Release No. 34–75342 (Jul. 1, 2015) [80 FR 41143 (Jul. 14, 2015)].

[3] *See* 17 CFR 240. 16a–1(f).

[4] An Intelligize search indicates a significant increase in the number of publicly traded companies that adopted a clawback compensation policy, from 982 in 2015 to 1,321 in 2018 and to 2,021 in 2020.

data regarding the issues addressed in those comments. In addition to the requests for comment included in the Proposing Release, the Commission specifically seeks comments on the following:

Request for Comment

1. Exchange Act Section 10D provides for the implementation of a policy for the recovery of certain incentive-based compensation ''in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws.'' The Commission proposed to define an ''accounting restatement'' for this purpose as ''the result of the process of revising previously issued financial statements to reflect the correction of one or more errors that are material to those financial statements.'' The proposed definition would not require a recovery where an issuer's previously issued financial statements are required to be restated in order to correct errors that were not material to those previously issued financial statements, but would result in a material misstatement if (a) the errors were left uncorrected in the current report or (b) the error correction was recognized in the current period.

Since the Commission issued the Proposing Release in 2015, concerns have been expressed that issuers may not be making appropriate materiality determinations for errors identified. Some commentators have suggested that this could be because some of these issuers are seeking to avoid compensation recovery under their clawback policies.[5] One commenter expressed concerns regarding immaterial ''revision restatements'' that would allow an issuer to avoid the application of the proposed clawback provisions and recommended that the clawback trigger not be limited to material restatements of previously issued financial statements.[6] In this regard, we note that Commission staff has provided guidance that an issuer's materiality evaluation of an identified unadjusted error should consider the effects of the identified unadjusted error on the applicable financial statements and related footnotes, and evaluate quantitative and qualitative factors.[7]

We are considering whether the term ''an accounting restatement due to material noncompliance'' should be interpreted to include all required restatements made to correct an error in previously issued financial statements.[8] This interpretation would include restatements required to correct errors that were not material to those previously issued financial statements, but would result in a material misstatement if (a) the errors were left uncorrected in the current report or (b) the error correction was recognized in the current period. Under such an interpretation, those restatements as well as restatements to correct errors that are material to the previously issued financial statements, would be considered ''an accounting restatement due to material noncompliance'' and therefore would result in a clawback recovery analysis. We believe that revising the Proposed Rules to encompass these types of restatements would be an appropriate means of implementing the statute.

Should the scope of the Proposed Rules include (1) restatements that correct errors that are material to previously issued financial statements and (2) restatements that correct errors that are not material to previously issued financial statements, but would result in a material misstatement if (a) the errors were left uncorrected in the current report or (b) the error correction was recognized in the current period? Are there practical or other considerations that would make application of the clawback policy in these circumstances challenging or unduly burdensome? If so, are there additional changes we should make to address those challenges or burdens? For example, in instances where a clawback analysis would be trigged by restatements that correct errors that are not material to previously issued financial statements, should the rules provide additional discretion for compensation committees of the issuer's board of directors to determine whether to pursue recovery of incentive-based compensation and how much to recover, and would such discretion be consistent with Section 954? Is there an alternative interpretation of ''an accounting restatement due to material noncompliance'' that would be more appropriate and better capture required restatements? Are there accounting restatements that are due to material noncompliance that would not be captured by the proposed definition or the interpretation set forth above that should be subject to clawback?

2. For purposes of triggering the three-year lookback period, the Proposed Rules would establish the date on which an issuer is required to prepare an accounting restatement as the earlier of (a) the date the issuer's board of directors, a committee of the board of directors, or the officer or officers of the issuer authorized to take such action if board action is not required, concludes, or reasonably should have concluded, that the issuer's previously issued financial statements contain a material error, or (b) the date a court, regulator or other legally authorized body directs the issuer to restate its previously issued financial statements to correct a material error. The Proposing Release indicated the Commission's belief that a definition that incorporates the proposed triggering events rather than leaving the determination solely to the discretion of the issuer would better realize the objectives of Section 10D while providing clarity about when a recovery policy, and specifically the determination of the three-year look-back period, would be triggered for purposes of the proposed listing standards. Some commenters expressed concern that the ''reasonably should have concluded'' standard adds

[5] *See, e.g.,* Shh! Companies Are Fixing Accounting Errors Quietly—WSJ—Wall Street Journal (Dec. 5, 2019). *See also* Choudhary, Preeti and Merkley, Kenneth J. and Schipper, Katherine, *Immaterial Error Corrections and Financial Reporting Reliability* (June 15, 2021) available at *https://ssrn.com/abstract=2830676* or *http://dx.doi.org/10.2139/ssrn.2830676;* and Thompson, Rachel, *Reporting Misstatements as Revisions: An Evaluation of Managers' Use of Materiality Discretion* (Sept. 17, 2021) available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450828.*

[6] *See* letter in response to the Proposing Release from AFL–CIO (Sept. 14, 2015) (''AFL–CIO''). Some commenters supported a trigger when *any* revision to previously issued financial statements occurred. *See, e.g.,* letters in response to the Proposing Release from As You Sow Foundation (Sept. 15, 2015); Council of Institutional Investors (Aug. 27, 2015); California Public Employees Retirement System (Sept. 14, 2015). Other commenters supported the proposed standard to limit the trigger to material restatements of previously issued financial statements. *See, e.g.,* letters in response to the Proposing Release from Ernst & Young LLP (Sept. 15, 2015) and Society of Corporate Secretaries and Governance Professionals (Sept. 18, 2015) (''SCSGP'').

[7] The staff has provided guidance to assist registrants in carrying out these evaluations. *See* Staff Accounting Bulletin No. 99, *Materiality* (Aug. 12, 1999) and Staff Accounting Bulletin No. 108, *Considering the Effects of Prior Year Misstatements when Quantifying Misstatements in Current Year Financial Statements* (Sept. 13, 2006). The statements in the staff accounting bulletins are not rules or interpretations of the Commission, nor are they published as bearing the Commission's official approval. They represent interpretations and practices followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the Federal securities laws.

[8] *See* Financial Accounting Standards Board (''FASB'') Accounting Standards Codification (''ASC'') Topic 250, which defines ''error in previously issued financial statements'' as an error in recognition, measurement, presentation, or disclosure in financial statements resulting from mathematical mistakes, mistakes in the application of generally accepted accounting principles, or oversight or misuse of facts that existed at the time the financial statements were prepared.

unnecessary uncertainty to the determination.[9] Should we remove the ''reasonably should have concluded'' standard in light of concerns that the standard adds uncertainty to the determination? For example, should we revise the trigger to use the earlier of (a) the date the issuer's board of directors, a committee of the board of directors, or the officer or officers of the issuer authorized to take such action if board action is not required, concludes that the issuer's previously issued financial statements require a restatement to correct an error in those financial statements that is material to the previously issued financial statements or that would result in a material misstatement if (1) the error was left uncorrected in the current report or (2) the error correction was recognized in the current period; or (b) the date a court, regulator or other legally authorized body directs the issuer to restate its previously issued financial statements for either type of error? For errors that are material to the previously issued financial statements, we generally expect the date in (a) to coincide with the date disclosed in the Item 4.02(a) Form 8–K filed.[10] For errors that are not material to the previously issued financial statements but where the issuer concludes that a restatement is required, we believe evidence of the conclusion that a restatement is required is generally included in the issuer's documentation of its materiality analysis of the error.[11] Should we remove the ''reasonably should have concluded'' standard in light of concerns raised by commenters, regardless of whether we revise the proposed trigger to accommodate the additional accounting restatements that we are considering? Is there another standard consistent with the purposes of the rule that may reduce the expected complexities of applying the ''reasonably should have concluded'' standard?

3. The Commission proposed defining a number of terms for purposes of the Proposed Rules. Alternatively, should the Commission rely on common understanding or specifically delineate the rules without relying on a set of definitions specific to this rule? For example, an ''accounting restatement'' was proposed to be defined solely for the purposes of the Proposed Rule as ''the result of the process of revising previously issued financial statements to reflect the correction of one or more errors that are material to those financial statements.'' U.S. GAAP and IFRS include guidance on how an issuer should correct accounting errors in previously issued financial statements.[12] In addition, Federal securities laws and Commission rules require presenting information that is not misleading. To assist registrants with compliance with the Federal securities laws, the staff has provided certain guidance on how registrants assess the materiality of an accounting error.[13] Because the revised clawback trigger we are considering would specifically refer to all required restatements to previously issued financial statements, including those restatements that were not material to those previously issued financial statements, but would result in a material misstatement if (a) the errors were left uncorrected in the current report or (b) the error correction was recognized in the current period, we are considering whether it would be more appropriate to rely on existing guidance, literature and definitions concerning accounting errors rather than define ''accounting restatement'' and ''material noncompliance.'' Should we rely on these existing resources and remove the proposed definitions of ''accounting restatement'' and ''material noncompliance''? Alternatively, are there other definitions of ''accounting restatement'' and ''material noncompliance'' we should use or would adding new definitions cause more confusion in their application? Additionally, if the rule does not establish a specific definition regarding when incentive-based compensation is ''received,'' what guidance, if any, should we provide regarding the meaning of that term?

4. If we interpret the statutory term ''an accounting restatement due to material noncompliance'' to include restatements required to correct errors that were not material to previously issued financial statements, but would result in a material misstatement if (a) the errors were left uncorrected in the current report or (b) the error correction was recognized in the current period, then those restatements would require a recovery analysis. Registrants do not always label historical financial statements as ''restated'' for these types of restatements. Also, an Item 4.02 Form 8–K filing is not typically filed for this type of error, because the error is not material to the previously issued financial statements. As such, to provide greater transparency around such restatements, we are considering whether to add check boxes to the cover page of the Form 10–K that indicate separately (a) whether the previously issued financial statements included in the filing include an error correction, and (b) whether any such corrections are restatements that triggered a clawback analysis during the fiscal year. Would one or both checkboxes and the related information be useful to investors? Is there another method, such as via a Form 8–K filing, that we should consider in order to provide this information to investors in a transparent and prominent manner? Are there any other disclosures that would be useful to investors in explaining or clarifying information surrounding any restatements or the issuer's decision of whether or not to claw back compensation?

5. As noted above, there has been an observed increase in voluntary adoption of compensation clawback policies in recent years, together with accompanying disclosures about those policies. These developments would impact the potential costs of the Proposed Rules at the aggregate level. However, such impact is likely to differ across issuers in a variety of ways. For example, some issuers may already have policies that would satisfy, or easily could be modified to satisfy, the requirements of the Proposed Rules. Other issuers may have clawback policies in place that are substantially different from the requirements of the Proposed Rules, or may not have clawback policies in place altogether. We request any estimates or data that would allow us to refine our characterization of costs and benefits of the clawback policies under the current state of issuer clawback policies and how such effects would differ under the Proposed Rules. In particular, we request specific estimates of the costs that are incurred by issuers in implementing these policies, and the costs and benefits to investors. How might these costs and/or benefits change in implementing a policy pursuant to a

[9] *See* letters in response to the Proposing Release from American Bar Association (Feb. 11, 2016) (''ABA''); Business Roundtable (Sept. 14, 2015); Center on Executive Compensation (Sept. 14, 2015); Davis Polk & Wardwell LLC (Sept. 11, 2015); Exxon Mobil Corporation (Sept. 14, 2015); and SCSGP. The letter from Exxon Mobil Corporation asserted it is not ''a realistic concern'' that issuers would delay issuing a restatement to avoid a clawback.

[10] An Item 4.02(a) Form 8–K is required to report when the registrant concludes that its previously issued financial statements should no longer be relied upon because of an error in such financial statements as addressed in FASB ASC Topic 250, Accounting Changes and Error Corrections.

[11] An Item 4.02 Form 8–K is not typically filed for an error that is not material to the previously issued financial statements.

[12] *See* FASB ASC Topic 250, *Accounting Changes and Error Corrections,* and International Accounting Standard 8, *Accounting Policies, Changes in Accounting Estimates and Errors.*

[13] *See* supra note 7.

Commission rulemaking and the new potential interpretation of ''an accounting restatement due to material noncompliance''? We also request data regarding the characteristics of voluntarily adopted clawback policies (for example, clawback triggers, scope of covered persons, scope of compensation covered, among other characteristics), and data regarding compensation structures that are used by issuers (for example, compensation instruments utilized, measures used to award/earn such compensation, among others). Has the voluntary adoption of clawback provisions resulted in a decrease of incentive-based compensation or an increase in compensation tied to non-financial performance by issuers?

6. We understand that as part of the materiality analysis relating to errors, issuers already consider whether any misstatement of previously issued financial statements had the effect of increasing management's compensation. To what extent can the evaluation already conducted in connection with evaluating the materiality of an error be leveraged in connection with determining the need for and the amount of any clawback? Would revising the scope of the Proposed Rules to encompass additional accounting restatements, as described above, affect how an issuer conducts this evaluation and, if so, how? Would revising the scope largely capture situations where issuers may have shifted from restating previously issued financial statements to avoid triggering compensation clawback policies, or would there be situations where the revised scope becomes over-inclusive? How would revising the scope impact the costs to issuers or benefits to investors of the clawback provision and the execution of the clawback analysis as compared to the Proposed Rules? We request data or analysis that will assist us in evaluating the effects of including these additional accounting restatements within the scope of the rule, in particular any data that may assist in quantifying the number of additional clawback analyses that would be triggered and the costs and benefits of revising the scope of the rule. How would the potential changes discussed in this release affect the appropriateness of the scope of the Proposed Rules overall? For example, in response to the Proposing Release, some commenters stated that the Proposed Rules applied too broadly both to individuals and to issuers.[14] Is the rule as proposed appropriately tailored? How, if at all, would the changes to the scope of the rules discussed in this release affect the other aspects of the Proposed Rules?

7. The Commission proposed to define the recoverable amount as ''the amount of incentive-based compensation received by the executive officer or former executive officer that exceeds the amount of incentive-based compensation that otherwise would have been received had it been determined based on the accounting restatement.'' [15] Applying this definition, after an accounting restatement, the issuer would first recalculate the applicable financial reporting measure and the amount of incentive-based compensation based thereon. The issuer would then determine whether, based on that financial reporting measure as calculated relying on the original financial statements and taking into account any discretion that the compensation committee had applied to reduce the amount originally received, the executive officer received a greater amount of incentive-based compensation than would have been received applying the recalculated financial reporting measure.

There are a number of possible methods to reasonably estimate the effect of an accounting restatement on stock price with varying levels of complexity and a range of related costs. For incentive-based compensation based on stock price or total shareholder return, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in the accounting restatement, the Proposed Rules would require an issuer to maintain documentation of the determination of that reasonable estimate and provide such documentation to the relevant exchange or association.[16] The Proposed Rules did not explicitly require disclosure of how issuers calculated the recoverable amount. We request comment on whether additional disclosures beyond what was proposed should be required. For example, would investors benefit from disclosure of how issuers calculated the recoverable amount, including their analysis of the amount of the executive's compensation that is recoverable under the rule, and/or the amount that is not subject to recovery? For incentive-based compensation based on stock price or total shareholder return, would investors benefit from disclosure regarding the determination and methodology that an issuer used to estimate the effect of stock price or total shareholder return? What are the costs associated with such disclosure?

8. Have there been any changes or developments since the Proposing Release with respect to payment of incentive-based compensation by listed registered management investment companies that should affect how listed registered management investment companies are treated under the Proposed Rules? If an investment company, or a business development company, is externally, rather than internally, managed, should this impact how the company is treated under the Proposed Rules? For example, should listed business development companies (or externally managed listed business development companies) be treated the same as listed registered management investment companies and be eligible for the conditional exemption as long as they do not actually pay incentive-based compensation? Should we reconsider any of the Proposed Rules' conditions or disclosure requirements with respect to registered or unregistered investment companies? What impact would any of those changes have on the economic effects of the rule?

9. The Commission proposed to require that the new compensation recovery disclosures be block-text tagged using XBRL. The Commission is considering requiring that specific data points within the new compensation recovery disclosure be separately detail tagged using Inline XBRL instead of, or in addition to, the proposed block-text tagging.[17] Would Inline XBRL detail tagging of some or all of the compensation recovery disclosures be valuable to investors? If so, which disclosures should we require issuers to detail tag and why? Is there an alternative technology to XBRL that we should consider? Should we enable more flexibility by adopting other tagging technologies?

10. Are there any other developments since the Proposing Release that should affect our consideration of the Proposed

[14] *See e.g.,* letters in response to the Proposing Release from ABA; National Association of Manufacturers (Sept. 14, 2015); and SCSGP. *But see, e.g.,* letters in response to the Proposing Release from Better Markets, Inc. ((Sept. 14, 2015); and AFL–CIO (supporting the scope of the Proposed Rules).

[15] *See* Proposed Rule 10D–1(b)(1)(iii).

[16] *See* Proposed Rule 10D–1(b)(1)(iii)(B).

[17] Subsequent to the proposal, the Commission adopted rules replacing XBRL tagging requirements for issuer financial statements and open-end fund risk/return summary disclosures with Inline XBRL tagging requirements. Inline XBRL embeds the machine-readable tags in the human-readable document itself, rather than in a separate exhibit. *See Inline XBRL Filing of Tagged Data,* Release No. 33–10514 (June 28, 2018) [83 FR 40846 (Aug. 16, 2018)]. As a result of those changes, we are considering using Inline XBRL, rather than XBRL, for the proposed tagging requirements.

Rules or their potential economic effects? Are there any changes we should consider in the methodologies and estimates used to analyze the economic effects of the Proposed Rules in the Proposing Release?

We request and encourage any interested person to submit comments regarding the Proposed Rules, specific issues discussed in this release or the Proposing Release, and other matters that may have an effect on the Proposed Rules. We request comment from the point of view of issuers, shareholders, directors, investors, and other market participants. We note that comments are of particular assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments, particularly quantitative information as to the costs and benefits. If alternatives to the Proposed Rules are suggested, supporting data and analysis and quantitative information as to the costs and benefits of those alternatives are of particular assistance. Commenters are urged to be as specific as possible; when commenting, it would be most helpful if you include the reasoning behind your position or recommendation. All comments received to date on the Proposed Rules will be considered and need not be resubmitted. If any commenters who have already submitted a comment letter wish to provide supplemental or updated comments, we encourage them to do so.

Dated: October 14, 2021.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021–22754 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AQ70

Medical Benefits Package; Chiropractic Services

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to revise its medical regulations to add chiropractic services to the definitions of medical services and preventive care. VA would further revise the definition of medical services to include rehabilitative services consistent with its statutory definition and to reflect changes made in other VA medical regulations and in prior legislation not previously codified. The proposed amendments would make VA medical regulations consistent with current practices, prior changes in law and VA's medical regulations, and changes in law made by the Consolidated Appropriations Act, 2018. These amendments would not substantively change the current administration of medical benefits to veterans.

DATES: Comments must be received on or before December 20, 2021.

ADDRESSES: Comments may be submitted through *http://www.Regulations.gov.* Comments received will be available at *regulations.gov* for public viewing, inspection, or copies.

FOR FURTHER INFORMATION CONTACT: Anthony Lisi, D.C., Director, Veterans Health Administration Chiropractic Service, Rehabilitation and Prosthetic Services (10P4R), 810 Vermont Ave. NW, Washington, DC 20420, (203) 932–5711, ext. 5341. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Section 1710 of title 38 of the United States Code (U.S.C.) requires VA to furnish hospital care and medical services which the Secretary determines to be needed for eligible veterans. Prior to March 23, 2018, under 38 U.S.C. 1701(6), medical services included medical examination and treatment, rehabilitative services, surgical services, dental services and appliances, optometric and podiatric services, preventive health services, noninstitutional extended care services, travel and certain incidental expenses, and prosthetic and related items and services. Preventive health services were specifically listed as medical services in section 1701(6)(D) while rehabilitative services were listed as medical services in the introductory text of section 1701(6). Both rehabilitative services and preventive health services were further defined in 38 U.S.C. 1701(8) and 1701(9), respectively. Rehabilitative services included professional, counseling, and guidance services and treatment programs necessary to restore the physical, mental, and psychological functioning of an ill or disabled person, while preventive health services included such services as medical and dental examinations, patient health education, mental health preventive services, substance abuse prevention measures, certain immunizations, and routine vision testing and eye care services.

On March 23, 2018, the President of the United States signed the Consolidated Appropriations Act, 2018, Public Law (Pub. L.) 115–141 (hereafter ''Appropriations Act''). In section 245 of Division J of the Appropriations Act, Congress amended 38 U.S.C. 1701(6) by adding chiropractic services to the definition of medical services. Similarly, Congress amended the definition of rehabilitative services under section 1701(8) to include chiropractic services. Congress also amended section 1701(9) by adding chiropractic examinations and services to the definition of preventive services under section 1701(9). VA proposes to amend title 38 Code of Federal Regulations (CFR) 17.30 and 17.38 to conform to these statutory changes and for additional reasons, as set forth in more detail in the subsequent discussions.

Section 17.30 Definitions

VA has incorporated the definitions of medical services and preventive services into its medical regulations. Currently, § 17.30(a) defines the term medical services to include medical examination, treatment and rehabilitative services; surgical services; dental services and appliances as authorized in §§ 17.160 through 17.166; optometric and podiatric services; (in the case of a person otherwise receiving care or services under this chapter) preventive health care services set forth in 38 U.S.C. 1701(9); noninstitutional extended care services; wheelchairs, artificial limbs, trusses and similar appliances; special clothing made necessary by the wearing of prosthetic appliances, and such other supplies and services as are medically determined to be reasonable and necessary.

We propose to make several changes to this definition of medical services in 38 CFR 17.30(a) to make the regulation easier to read, to provide clarification, to conform to the statutory authority (38 U.S.C. 1701), including amendments made to this authority by the Appropriations Act, and to reference other applicable VA medical regulations in 38 CFR part 17.

For clarity and because of other changes we propose to amend § 17.30 as further explained below. We propose to redesignate current paragraphs (a)(2) and (a)(3) as (a)(3) and (a)(4), respectively; propose to move the language, medical examination, treatment, and rehabilitative services, from paragraph (a) to paragraph (a)(1) and revise it; and propose to move the language in current paragraph (a)(1) to paragraph (a)(2) and revise it.

Paragraph (a) would continue to include the heading of medical services and would state that the term medical services includes the following; after

which, subparagraphs (1) through (4) would list the definition of medical services.

Revised paragraph (a)(1) would explain that medical services include medical examination, treatment, and rehabilitative services (as defined in 38 U.S.C. 1701(8)).

As we do not further define in VA's medical regulations rehabilitative services, as used in 38 U.S.C. 1701(8), we propose to amend the definition of medical services in 38 CFR 17.30(a)(1) to make clear that the term ''rehabilitative services'' as used in these regulations is defined in 38 U.S.C. 1701(8). This would be similar to how we refer to preventive services in this definition of medical services under current § 17.30(a)(1). Individuals could thus refer to the term rehabilitative services in 38 U.S.C. 1701(8) to understand how we define it for purposes of medical services in part 17.

Consistent with changes to 38 U.S.C. 1701(6) made by the Appropriations Act, we propose to include chiropractic services in revised paragraph (a)(2).

Current paragraph (a)(1) includes a parenthetical before the part of the definition that references preventive health care services set forth in 38 U.S.C. 1701(9). This parenthetical phrase, (in the case of a person otherwise receiving care or services under this chapter), was included in current 38 CFR 17.30(a)(1) with respect to preventive health care services to be consistent with prior statutory authority. However, section 103 of Public Law 104–262 struck the parenthetical phrase from the statutory location where it applied to preventive health care services and inserted it before wheelchairs. This phrase, as included in current § 17.30(a)(1), is now inconsistent with the current language of 38 U.S.C. 1701(6)(D) and (9) with respect to preventive care. Instead, this parenthetical phrase is included in section 1701(6)(F), which states that medical services include the following: In the case of a person otherwise receiving care or services under this chapter—(i) wheelchairs, artificial limbs, trusses, and similar appliances; (ii) special clothing made necessary by the wearing of prosthetic appliances; and (iii) such other supplies or services as the Secretary determines to be reasonable and necessary. Because we are proposing to move and revise the language in current paragraph (a) to paragraph (a)(1), we would move the current language in paragraph (a)(1) to paragraph (a)(2) and revise it to remove the parenthetical with respect to preventive health care services. However, as explained in the next paragraph, the parenthetical phrase would not be included in the revisions to 38 CFR 17.30(a)(2) related to 38 U.S.C. 1701(6)(F).

Due to changes we made to VA's medical regulations in part 17, we would also amend § 17.30(a)(2) to include items and services as authorized in §§ 17.3200 through 17.3250. In a final rule published on December 28, 2020, we established new regulations on eligibility and criteria for the provision to veterans of certain items and services as authorized medical services pursuant to 38 U.S.C. 1701(6)(F) and 38 U.S.C. 1710(a). See 85 FR 84259. As currently written, the definition of medical services in § 17.30(a)(1) includes wheelchairs, artificial limbs, trusses and similar appliances, and such other supplies or services as are medically determined to be reasonable and necessary. This language is consistent with the language of 38 U.S.C. 1701(6)(F), which is further interpreted and implemented in the regulations at 38 CFR 17.3200 through 17.3250. Thus, as we are moving and revising this language in revised paragraph (a)(2), we would amend the definition of medical services to remove the language included in current paragraph (a)(1) that refers to wheelchairs, artificial limbs, trusses and similar appliances, and such other supplies or services as are medically determined to be reasonable and necessary and, in its place, add the items and services authorized by regulations at §§ 17.3200 through 17.3250. We would not include in revised § 17.30(a)(2) the parenthetical phrase discussed in the previous paragraph that is currently included in section 1701(6)(F) as such language is implemented in the regulations at §§ 17.3200 through 17.3250, thus making it redundant and unnecessary to include that phrase in revised § 17.30(a)(2) with respect to items and services authorized under §§ 17.3200 through 17.3250.

In the Authority section of 38 CFR part 17, we propose to add a citation to 38 U.S.C. 1701 as authority for § 17.30. This change would be consistent with the Office of the Federal Register's current format for the placement of authority citations in the CFR.

Section 17.38 Medical Benefits Package

Relatedly, 38 CFR 17.38(a) sets forth the hospital, outpatient, and extended care services that constitute the medical benefits package (basic care and preventive care) available to eligible veterans. Included in the medical benefits package under § 17.38(a)(2) is preventive care, which the regulation makes clear is defined in 38 U.S.C. 1701(9). The regulation further provides examples of what is included: Periodic medical exams, health education, including nutrition education; maintenance of drug-use profiles, drug monitoring, and drug use education; mental health and substance abuse preventive services; immunizations against infectious disease; prevention of musculoskeletal deformity or other gradually developing disabilities of a metabolic or degenerative nature; genetic counseling concerning inheritance of genetically determined diseases; routine vision testing and eye-care services; periodic reexamination of members of high-risk groups for selected diseases and for functional decline of sensory organs, and the services to treat these diseases and functional declines.

To conform with the changes to 38 U.S.C. 1701(9) made by the Appropriations Act, we would amend 38 CFR 17.38(a)(2) by adding a new paragraph (x) to specifically include chiropractic services as preventive care. The term chiropractic services would encompass both chiropractic services and examinations. To maximize healthcare outcomes for veterans, the type of chiropractic services that would be available to eligible veterans as preventive care would be those services that are consistent with current evidence-based practices and chiropractic training and licensure.

In addition to the preventive care provided pursuant to 38 CFR 17.38(a)(2), VA provides basic care under § 17.38(a)(1). Basic care includes such care as inpatient and outpatient medical, surgical and mental healthcare; inpatient hospital healthcare; prescription drugs; and rehabilitative services. While not explicitly stated in § 17.38(a)(1), VA provides chiropractic services to veterans enrolled in VA's healthcare system as part of basic care. These services include examination, diagnosis, treatment, and management of neuromuscular and musculoskeletal conditions using non-pharmacological and non-operative methods. Because we have interpreted basic care to include chiropractic services, have provided these services as part of the medical benefits package, and will continue to do so, we are not amending the definition of basic care in § 17.38(a)(1) to explicitly include such services as it would be unnecessary to do so.

We note that we do not define rehabilitative services in our medical regulations, though the medical benefits package explicitly includes them in basic care, 38 CFR 17.38(a)(1)(vi), so we find it unnecessary to make any further changes to § 17.38 based on the changes

to the definition of rehabilitative services in 38 U.S.C. 1701(8).

In the Authority section of 38 CFR part 17, we propose to add a citation to 38 U.S.C. 1701 as authority for § 17.38. This change would be consistent with the Office of the Federal Register's current format for the placement of authority citations in the CFR.

For those reasons explained above, we would amend the medical services definition in § 17.30 to include chiropractic services, reference 38 U.S.C. 1701(8) for purposes of defining rehabilitative services, remove the parenthetical before preventive health care services, and reference VA's regulations at 38 CFR 17.3200 through 17.3250. We would also amend § 17.38 to add chiropractic services to preventive care.

Paperwork Reduction Act

This action does not contain any provisions constituting collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. There would be no material changes to the medical benefits available to veterans. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Government contracts, Government programs—veterans, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and Dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on October 8, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 17 as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 is amended by adding an entry for § 17.30 and revising the entry for § 17.38 to read in part as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

Section 17.30 is also issued under 38 U.S.C. 1701.

* * *

Section 17.38 is also issued under 38 U.S.C. 1701 and 1703.

* * * * *

■ 2. Amend § 17.30 by:

■ a. Redesignating paragraphs (a)(2) and (3) as paragraphs (a)(3) and (4), respectively.

■ b. Revising paragraphs (a) introductory text, and (a)(1), and adding (a)(2) to read as follows:

§ 17.30 Definitions.

* * * * *

(a) *Medical services.* The term *medical services* includes the following:

(1) Medical examination, treatment, and rehabilitative services (as defined in 38 U.S.C. 1701(8)).

(2) Surgical services, dental services and appliances as authorized in §§ 17.160 through 17.166, optometric and podiatric services, chiropractic services, preventive health care services set forth in 38 U.S.C. 1701(9), noninstitutional extended care, and items and services as authorized in §§ 17.3200 through 17.3250.

* * * * *

■ 3. Amend § 17.38 by adding new paragraph (a)(2)(x) to read as follows:

§ 17.38 Medical benefits package.

(a) * * *

(2) * * *

(x) Chiropractic services.

* * * * *

[FR Doc. 2021–22535 Filed 10–20–21; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 174 and 180

[EPA–HQ–OPP–2021–0088; FRL–8792–04–OCSPP]

Receipt of Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities (October 2021)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notices of filing of petitions and request for comment.

SUMMARY: This document announces the Agency's receipt of initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before November 22, 2021.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition (PP) of interest as shown in the body of this document, online at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

Due to the public health concerns related to COVID–19, the 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 the EPA/DC and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Marietta Echeverria, Registration Division (7505P), main telephone number: (703) 305–7090, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each pesticide petition summary.

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. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through 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 EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within 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 preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the Agency taking?

EPA is announcing receipt of pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the requests before responding to the petitioners. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petitions described in this document contain data or information prescribed in FFDCA section 408(d)(2), 21 U.S.C. 346a(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petitions. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), summaries of the petitions that are the subject of this document, prepared by the petitioners, are included in dockets EPA has created for these rulemakings. The dockets for these petitions are available at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), EPA is publishing notice of the petitions so that the public has an opportunity to comment on these requests for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petitions may be obtained through the petition summaries referenced in this unit.

A. Amended Tolerance Exemptions for Inerts (Except PIPS)

1. *PP IN–11083.* (EPA–HQ–OPP–2021–0659). Landis International, Inc., on behalf of Morse Enterprises Limited, Inc. d/b/a KeyPlex (P.O. Box 2515, Winter Park, FL 32790), requests to amend 40 CFR 180.920 to add α-terpineol (CAS No. 98–55–5) as a solvent inert ingredient in pesticide formulations at rates of 5% of the formulation when applied pre-harvest to crops. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

2. *PP IN–11530.* (EPA–HQ–OPP–2021–0656). Spring Regulatory Sciences (6620 Cypresswood Dr., Suite 250, Spring, TX 77379), on behalf of BASF Corporation (100 Park Avenue, Florham Park, New Jersey 07932), requests to amend the current tolerance exemption description for alkyl alcohol alkoxylate phosphate and sulfate derivatives (AAAPSDs) to add alcohols, C10–16, ethoxylated, sulfates, mono(hydroxyethyl)ammonium salts (CAS No. 157627–92–4) to the approved tolerance exemptions under 40 CFR 180.910 and 180.930 for use in pesticide formulations. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

3. *PP IN–11552.* (EPA–HQ–OPP–2021–0335). Celanese Corporation, Inc.,

9502 Bayport Blvd., Pasadena, TX 77507, requests to amend tolerance exemption for low-risk polymer, Acetic acid ethenyl ester, polymer with ethene, N-(hydroxymethyl)-2-propenamide, and 2-propenamide (AM–E–NMA–VA), (CAS No. 49603–78–3) use as (a binder for non-woven wipes for use in disinfectant wipe products in pesticide formulations) to the approved tolerance exemptions under 40 CFR 180.960 for use in pesticide formulations. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

4. *PP IN–11566.* (EPA–HQ–OPP–2021–0682) Spring Regulatory Sciences on behalf of Evonik Corporation, (P.O. Box 34628, Richmond, VA 23234), requests to amend the existing tolerance exemption to add additional food uses in antimicrobial formulations for Sodium dioctylsulfosuccinate (CAS No. 577–11–7) adding it to the approved list of food use inert ingredients under 40 CFR 180.940(a) for use in pesticide formulations. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

B. Amended Tolerances for Non-Inerts

1. *PP 0E8876.* (EPA–HQ–OPP–2021–0130). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR part 180 by removing established tolerances for residues of ethalfluralin, N-ethyl-N-(2-methyl-2-propenyl)-2,6-dinitro-4-(trifluoromethyl)benzenamine in or on the raw agricultural commodities Bean, dry, seed at 0.05 parts per million (ppm), pea, dry, seed at 0.05 ppm and potato at 0.05 ppm. *Contact:* RD.

2. *PP 1E8898.* (EPA–HQ–OPP–2021–0388). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR 180.451 by removing established tolerances for the residues of tribenuron methyl, methyl-2-[[[[N-(4-methoxy-6-methyl-1,3,5-triazin-2-yl) methylamino] carbonyl] amino] sulfonyl] benzoate,] in or on the raw agricultural commodities: Canola, seed at 0.02 ppm; cotton, gin byproducts at 0.02 ppm; cotton, undelinted seed at 0.02 ppm; flax, seed at 0.02 ppm; and oat, hay at 0.05 ppm. *Contact:* RD.

3. *PP 1E8904.* (EPA–HQ–OPP–2021–0387). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR part 180 by removing established tolerances for residues of the insecticide cyclaniliprole, 3-bromo-*N*-[2-bromo-4-chloro-6-[[(1-cyclopropylethyl)amino] carbonyl]phenyl]-1-(3-chloro-2-pyridinyl)-1*H*-pyrazole-5-carboxamide, including its metabolites and degradates, in or on the raw agricultural commodity: Vegetable, fruiting, group 8–10 at 0.20 ppm. *Contact:* RD.

4. *PP 1E9805.* (EPA–HQ–OPP–2021–0386). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR part 180 by removing established tolerances for residues of the fungicide Pyriofenone, (5-chloro-2-methoxy-4-methyl-3-pyridinyl) (2,3,4-trimethoxy-6-methylphenyl) methanone, including its metabolites and degradates, in or on the raw agricultural commodity: Vegetable, fruiting, group 8–10 at 0.3 ppm. *Contact:* RD.

5. *PP 1E8913.* (EPA–HQ–OPP–2021–0385). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR part 180 by removing established tolerances for residues of isofetamid, N-[1,1-dimethyl-2-[2-methyl-4-(l-methylethoxy)phenyl]-2-oxoethyl]-3-methyl-2-thiophenecarboxamide, including its metabolites and degradates, in or on the raw agricultural commodities: Pea and bean, dried shelled, except soybean, subgroup 6C at 0.040 ppm; Pea and bean, succulent shelled, subgroup 6B at 0.030 ppm; and vegetable, legume, edible podded, subgroup 6A at 1.50 ppm. *Contact:* RD.

6. *PP 1E8931.* (EPA–HQ–OPP–2021–0448). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR part 180 by removing established tolerances for residues of the sum of trifloxystrobin, benzeneacetic acid, (E,E)-α-(methoxyimino)-2-[[[[1-[3-(trifluoromethyl) phenyl]ethylidene]amino]oxy]methyl]-methyl ester, and the free form of its acid metabolite CGA–321113, ((*E,E*)-methoxyimino-[2-[1-(3-trifluoromethyl-phenyl)-ethylideneaminooxymethyl]-phenyl]acetic acid, calculated as the stoichiometric equivalent of trifloxystrobin] in or on the raw agricultural commodities: Brassica, head and stem, subgroup 5A at 2.0 ppm; brassica, leafy greens, subgroup 5B at 30 ppm; fruit, citrus, group 10 at 0.6 ppm; fruit, pome at 0.5 ppm; fruit, stone, group 12 at 2 ppm; leaf petioles subgroup 4B at 9.0 ppm; leafy greens, subgroup 4A at 30 ppm; nut, tree, group 14 at 0.04 ppm; pea and bean, dried shelled, except soybean, subgroup 6C at 0.06 ppm; pistachio at 0.04 ppm; vegetable, fruiting at 0.5 ppm. *Contact:* RD.

C. New Tolerance Exemptions for Inerts (Except PIPS)

1. *PP IN–11546.* (EPA–HQ–OPP–2021–0635). Verdesian Life Sciences U.S., LLC, 1001 Winstead Drive, Suite 480, Cary, NC 27513, requests to establish an exemption from the requirement of a tolerance for residues of adipic acid (CAS Reg. No. 124–04–9) when used as an inert ingredient in pesticide formulations applied to growing crops under 40 CFR 180.920. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

2. *PP IN–11550.* (EPA–HQ–OPP–2021–0613). Spring Regulatory Sciences, on behalf of Oxiteno USA, LLC, 3200 Southwest Freeway, Suite 1200, Houston, TX 77027, requests to establish an exemption from the requirement of a tolerance for residues of 1-propanaminium, 3-amino-N-(2-carboxyethyl)-*N,N*-dimethyl-, N-coco acyl derivatives, inner salts (CAS Reg. No. 499781–63–4) when used as an inert ingredient in pesticide formulations applied to crops pre- and post-harvest under 40 CFR 180.910. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

3. *PP IN–11585.* (EPA–HQ–OPP–2021–0681). AgroSpheres, Inc., (1180 Seminole Trail, Charlottesville, VA, USA, 22901), requests to establish an exemption from the requirement of a tolerance for *Escherichia coli* K–12 derived micelles, a biologically derived inert ingredient under 40 CFR 180.910 for pre- or post-harvest use as an inert ingredient for all agriculture uses. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

4. *PP IN–11586.* (EPA–HQ–OPP–2021–0680) BYK USA Inc., 524 South Cherry St., Wallingford, CT 06492, requests to establish an exemption from the requirement of a tolerance for Poly(oxy-1,2-ethanediyl)- -hydro-hydroxy-, polymer with

poly(isocyanatoalkyl)benzene alkylol-blocked at (10,000 ppm)) under 40 CFR 180.960 for use in pesticide formulations. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD

5. *PP IN–11612.* (EPA–HQ–OPP–2021–0639). Spring Regulatory Sciences (6620 Cypresswood Dr., Suite 250, Spring, TX 77379), on behalf of Colorants Solutions USA LLC (4000 Monroe Road, Charlotte, NC 28205), requests to establish an exemption from the requirement of a tolerance for 2,5-Furandione, polymer with ethenylbenzene, octyl imide, imide with polyethylene-polypropylene glycol 2-aminopropyl Me ether (CAS Number: 1812871–29–6), with a number average molecular weight of 11,000 daltons, when used as a pesticide inert ingredient (dispersing agent) in pesticide formulations under 40 CFR 180.960. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

6. *PP IN–11616.* (EPA–HQ–OPP–2021–0636). Fine Agrochemicals Ltd., Hill End House, Whittington, Worcester WR5 2RQ, UK, requests to establish an exemption from the requirement of a tolerance for residues of adipic acid (CAS Reg. No. 124–04–9) when used as an inert ingredient in pesticide formulations applied to growing crops under 40 CFR 180.920. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

D. New Tolerances for Non-Inerts

1. *PP 0F8857.* (EPA–HQ–OPP–2021–0290). Taminco US LLC, a subsidiary of Eastman Chemical Company, 200 S Wilcox Drive, Kingsport, TN 37660–5147, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide chlormequat chloride in or on the raw agricultural commodities barley grain at 8 ppm, eggs at 0.1 ppm, meat byproducts of cattle at 0.7 ppm; meat of cattle at 0.2 ppm; meat byproducts of goats at 0.7 ppm; meat of goats at 0.2 ppm, meat byproducts of hogs at 0.5 ppm; meat of hogs at 0.2 ppm, meat byproducts of sheep at 0.7 ppm; meat of sheep at 0.2 ppm, milk at 0.5 ppm; poultry meat byproducts at 0.1 ppm; poultry meat at 0.05 ppm; oat grain at 40 ppm, triticale grain at 5 ppm; and wheat grain at 5 ppm. The validated LC–MS/MS method is used to measure and evaluate the chemical residues of chlormequat chloride in plants and animal products. *Contact:* RD.

2. *PP 0E8876.* (EPA–HQ–OPP–2021–0130). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR part 180 by establishing tolerances for residues of ethalfluralin, N-ethyl-N-(2-methyl-2-propenyl)-2,6-dinitro-4-(trifluoromethyl)benzenamine in or on the raw agricultural commodities Hemp, seed at 0.05 ppm, stevia, dried leaves at 0.05 ppm; vegetable, tuberous and corm, subgroup 1C at 0.01 ppm; individual crops of Proposed Crop Subgroup 6–18E: Dried shelled bean, except soybean, subgroup including Adzuki bean, dry seed at 0.05 ppm; African yam-bean, dry seed at 0.05 ppm; American potato bean, dry seed at 0.05 ppm; Andean lupin, dry seed at 0.05 ppm; asparagus bean, dry seed at 0.05 ppm; black bean, dry seed at 0.05 ppm; blackeyed pea, dry seed at 0.05 ppm; blue lupin, dry seed at 0.05 ppm; broad bean, dry seed at 0.05 ppm; catjang bean, dry seed at 0.05 ppm; Chinese longbean, dry seed at 0.05 ppm; cowpea, dry seed at 0.05 ppm; cranberry bean, dry seed at 0.05 ppm; crowder pea, dry seed at 0.05 ppm; dry bean, dry seed at 0.05 ppm; field bean, dry seed at 0.05 ppm; French bean, dry seed at 0.05 ppm; garden bean, dry seed at 0.05 ppm; goa bean, dry seed at 0.05 ppm; grain lupin, dry seed at 0.05 ppm; great northern bean, dry seed at 0.05 ppm; green bean, dry seed at 0.05 ppm; guar bean, dry seed at 0.05 ppm; horse gram, dry seed at 0.05 ppm; jackbean, dry seed at 0.05 ppm; kidney bean, dry seed at 0.05 ppm; lablab bean, dry seed at 0.05 ppm; lima bean, dry seed at 0.05 ppm; morama bean, dry seed at 0.05 ppm; moth bean, dry seed at 0.05 ppm; mung bean, dry seed at 0.05 ppm; navy bean, dry seed at 0.05 ppm; pink bean, dry seed at 0.05 ppm; pinto bean, dry seed at 0.05 ppm; red bean, dry seed at 0.05 ppm, rice bean, dry seed at 0.05 ppm; scarlet runner bean, dry seed at 0.05 ppm; southern pea, dry seed at 0.05 ppm; sweet lupin, dry seed at 0.05 ppm; sword bean, dry seed at 0.05 ppm; tepary bean, dry seed at 0.05 ppm; urd bean, dry seed at 0.05 ppm; vegetable soybean, dry seed at 0.05 ppm; velvet bean, seed, dry seed at 0.05 ppm; white lupin, dry seed at 0.05 ppm; white sweet lupin, dry seed at 0.05 ppm; winged pea, dry seed at 0.05 ppm; yardlong bean, dry seed at 0.05 ppm; yellow bean, dry seed at 0.05 ppm; yellow lupin, dry seed at 0.05 ppm; and individual crops of Proposed Crop Subgroup 6–18F: Dried shelled pea subgroup including: Chickpea, dry seed at 0.05 ppm; dry pea, dry seed at 0.05 ppm; field pea, dry seed at 0.05 ppm; garden pea, dry seed at 0.05 ppm; grass-pea, dry seed at 0.05 ppm; green pea, dry seed at 0.05 ppm; lentil, dry seed at 0.05 ppm; pigeon pea, dry seed at 0.05 ppm. Adequate analytical methods for determining ethalfluralin in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

3. *PP1E8898.* (EPA–HQ–OPP–2021–0388). Interregional Research Project Number 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of New Jersey, 500 College Road East, Suite 201 W, Princeton, NJ 08450, requests to establish tolerances in 40 CFR 180.451 for residues of the herbicide, tribenuron methyl, methyl-2-[[[[N-(4-methoxy-6-methyl-1,3,5-triazin-2-yl) methylamino] carbonyl] amino] sulfonyl] benzoate, in or on the following agricultural commodities: Rapeseed subgroup 20A at 0.02 ppm; cottonseed subgroup 20C at 0.02 ppm; individual commodities of proposed Crop Subgroup 6–18E: Dried shelled bean, except soybean, subgroup at 0.01 ppm including Adzuki bean, dry seed; African yam-bean, dry seed; American potato bean, dry seed; Andean lupin bean, dry seed; Asparagus bean, dry seed; black bean, dry seed; blackeyed pea, dry seed; blue lupin bean, dry seed; broad bean, dry seed; catjang bean, dry seed; Chinese longbean, dry seed; cowpea, dry seed; cranberry bean, dry seed; crowder pea, dry seed; dry bean, dry seed; field bean, dry seed; French bean, dry seed; garden bean, dry seed; goa bean, dry seed; grain lupin bean, dry seed; great northern bean, dry seed; green bean, dry seed; guar bean, dry seed; horse gram, dry seed; jackbean, dry seed; kidney bean, dry seed; lablab bean, dry seed; Lima bean, dry seed; morama bean, dry seed; moth bean, dry seed; mung bean, dry seed; navy bean, dry seed; pink bean, dry seed; pinto bean, dry seed; red bean, dry seed; rice bean, dry seed; scarlet runner bean, dry seed; southern pea, dry seed; sweet lupin bean, dry seed; sword bean, dry seed; tepary bean, dry seed; urd bean, dry seed; vegetable soybean, dry seed; velvet bean, seed, dry seed; white lupin bean, dry seed; white sweet lupin bean, dry seed; winged pea, dry seed; yardlong bean, dry seed; yellow bean, dry seed; and yellow lupin bean, dry seed; individual commodities of proposed Crop Subgroup 6–18F: Dried shelled pea subgroup at 0.01 ppm including chickpea, dry seed; dry pea, dry seed; field pea, dry seed; garden

pea, dry seed; grass-pea, dry seed; green pea, dry seed; lentil, dry seed; and Pigeon pea, dry seed; pea, field, hay at 0.01 ppm; pea, field, vines at 0.01 ppm; individual commodities of proposed Crop Subgroup 15–20A: Wheat subgroup including amaranth, grain, forage at 0.3 ppm; amaranth, grain, grain at 0.05 ppm; amaranth, grain, hay at 0.5 ppm; amaranth, grain, straw at 0.1 ppm; amaranth, purple, forage at 0.3 ppm; amaranth, purple, grain at 0.05 ppm; amaranth, purple, hay at 0.5 ppm; amaranth, purple, straw at 0.1 ppm; cañihua, forage at 0.3 ppm; cañihua, grain at 0.05 ppm; cañihua, hay at 0.5 ppm; cañihua, straw at 0.1 ppm; chia, forage at 0.3 ppm; chia, grain at 0.05 ppm; chia, hay at 0.5 ppm; chia, straw at 0.1 ppm; cram cram, forage at 0.3 ppm; cram cram, grain at 0.05 ppm; cram cram, hay at 0.5 ppm; cram cram, straw at 0.1 ppm; huauzontle, grain, forage at 0.3 ppm; huauzontle, grain, grain at 0.05 ppm; huauzontle, grain, hay at 0.5 ppm; huauzontle, grain, straw at 0.1 ppm; inca wheat, forage at 0.3 ppm; inca wheat, grain at 0.05 ppm; inca wheat, hay at 0.5 ppm; inca wheat, straw at 0.1 ppm; princess feather, forage at 0.3 ppm; princess feather, grain at 0.05 ppm; princess feather, hay at 0.5 ppm; princess feather, straw at 0.1 ppm; psyllium, forage at 0.3 ppm; psyllium, grain at 0.05 ppm; psyllium, hay at 0.5 ppm; psyllium, straw at 0.1 ppm; psyllium, blond, forage at 0.3 ppm; psyllium, blond, grain at 0.05 ppm; psyllium, blond, hay at 0.5 ppm; psyllium, blond, straw at 0.1 ppm; quinoa, forage at 0.3 ppm; quinoa, grain at 0.05 ppm; quinoa, hay at 0.5 ppm; quinoa, straw at 0.1 ppm; rye, forage at 0.3 ppm; rye, grain at 0.05 ppm; rye, hay at 0.5 ppm; rye, straw at 0.1 ppm; triticale, forage at 0.3 ppm; triticale, grain at 0.05 ppm; triticale, hay at 0.5 ppm; triticale, straw at 0.1 ppm; wheat, club, forage at 0.3 ppm; wheat, club, grain at 0.05 ppm; wheat, club, hay at 0.5 ppm; wheat, club, straw at 0.1 ppm; wheat, common, forage at 0.3 ppm; wheat, common, grain at 0.05 ppm; wheat, common, hay at 0.5 ppm; wheat, common straw at 0.1 ppm; wheat, durum, forage at 0.3 ppm; wheat, durum, grain at 0.05 ppm; wheat, durum, hay at 0.5 ppm; wheat, durum, straw at 0.1 ppm; wheat, einkorn, forage at 0.3 ppm; wheat, einkorn, grain at 0.05 ppm; wheat, einkorn, hay at 0.5 ppm, wheat, einkorn, straw at 0.1 ppm; wheat, emmer, forage at 0.3 ppm; wheat, emmer, grain at 0.05 ppm; wheat, emmer, hay at 0.5 ppm; wheat, emmer, straw at 0.1 ppm; wheat, macha, forage at 0.3 ppm; wheat, macha, grain at 0.05 ppm; wheat, macha, hay at 0.5 ppm; wheat, macha, straw at 0.1 ppm; wheat, oriental, forage at 0.3 ppm; wheat, oriental, grain at 0.05 ppm; wheat, oriental, hay at 0.5 ppm; wheat, oriental, straw at 0.1 ppm; wheat, Persian, forage at 0.3 ppm; wheat, Persian, grain at 0.05 ppm; wheat, Persian, hay at 0.5 ppm; wheat, Persian, straw at 0.1 ppm; wheat, Polish, forage at 0.3 ppm; wheat, Polish, grain at 0.05 ppm; wheat, Polish, hay at 0.5 ppm; wheat, Polish, straw at 0.1 ppm; wheat, poulard, forage at 0.3 ppm; wheat, poulard, grain at 0.05 ppm; wheat, poulard, hay at 0.5 ppm; wheat, poulard, straw at 0.1 ppm; wheat, shot, forage at 0.3 ppm; wheat, shot, grain at 0.05 ppm; wheat, shot, hay at 0.5 ppm; wheat, shot, straw at 0.1 ppm; wheat, spelt, forage at 0.3 ppm; wheat, spelt, grain at 0.05 ppm; wheat, spelt, hay at 0.5 ppm; wheat, spelt, straw at 0.1 ppm; wheat timopheevi, forage at 0.3 ppm; wheat timopheevi, grain at 0.05 ppm; wheat timopheevi, hay at 0.5 ppm; wheat timopheevi, straw at 0.1 ppm; wheat, vavilovi, forage at 0.3 ppm; wheat, vavilovi, grain at 0.05 ppm; wheat, vavilovi, hay at 0.5 ppm; wheat, vavilovi, straw at 0.1 ppm; wheat, wild einkorn, forage at 0.3 ppm; wheat, wild einkorn, grain at 0.05 ppm; wheat, wild einkorn, hay at 0.5 ppm; wheat, wild einkorn, straw at 0.1 ppm; wheat, wild emmer, forage at 0.3 ppm; wheat, wild emmer, grain at 0.05 ppm; wheat, wild emmer, hay at 0.5 ppm; wheat, wild emmer, straw at 0.1 ppm; wheatgrass, intermediate, forage at 0.3 ppm; wheatgrass, intermediate, grain at 0.05 ppm; wheatgrass, intermediate, hay at 0.5 ppm; and wheatgrass intermediate, straw at 0.1 ppm; individual commodities of proposed Crop Subgroup 15–20B: Barley subgroup including Buckwheat, grain at 0.05 ppm; buckwheat, hay at 0.4 ppm; buckwheat, straw at 0.1 ppm; buckwheat, tartary, grain at 0.05 ppm; buckwheat, tartary, hay at 0.4 ppm; buckwheat, tartary, straw at 0.1 ppm; canarygrass, annual, grain at 0.05 ppm; canarygrass, annual, hay at 0.4 ppm; canarygrass, annual, straw at 0.1 ppm; oat, hay at 0.4 ppm; oat, abyssinian, grain at 0.05 ppm; oat, abyssinian, hay at 0.4 ppm; oat, abyssinian, straw at 0.1 ppm; oat, common, grain at 0.05 ppm; oat, common, hay at 0.4 ppm; oat, common, straw at 0.1 ppm; oat, naked, grain at 0.05 ppm; oat, naked, hay at 0.4 ppm; oat, naked, straw at 0.1 ppm; oat, sand, grain at 0.05 ppm; oat, sand, hay at 0.4 ppm; and oat, sand, straw at 0.1 ppm; individual commodities of proposed Crop Subgroup 15–20C: Field Corn subgroup including popcorn, forage at 0.15 ppm; popcorn, grain at 0.01 ppm; popcorn, stover at 1.1 ppm; teosinte, forage at 0.15 ppm; teosinte, grain at 0.01 ppm; and teosinte, stover at 1.1 ppm; individual commodities of proposed Crop Subgroup 15–20E: Grain Sorghum and Millet subgroup at 0.05 ppm; fonio, black, forage; fonio, black, grain; fonio, black, stover; fonio, white, forage; fonio, white, grain; fonio, white, stover; job's tears, forage; job's tears, grain; job's tears, stover; millet, barnyard, forage; millet, barnyard, grain; millet, barnyard, stover; millet, finger, forage; millet, finger, grain; millet, finger, stover; millet, foxtail, forage; millet, foxtail, grain; millet, foxtail, stover; millet, little, forage; millet, little, grain; millet, little, stover; millet, pearl, forage; millet, pearl, grain; millet, pearl, stover; millet, proso, forage; millet, proso, grain; millet, proso, stover; teff, forage; teff, grain; and teff, stover; and individual commodities of proposed Crop Subgroup 15–20F: Rice subgroup at 0.05 ppm including rice, African, grain; wild rice, grain; and wild rice, eastern, grain. A High-Performance Liquid Chromatograph-Mass Spectrometer (LC/MS/MS) was used to measure and evaluate the residues of tribenuron methyl. *Contact:* RD.

4. *PP 1E8904.* (EPA–HQ–OPP–2021–0387). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR part 180 by establishing tolerances for residues of the insecticide cyclaniliprole, 3-bromo-*N*-[2-bromo-4-chloro-6-[[(1-cyclopropylethyl)amino] carbonyl]phenyl]-1-(3-chloro-2-pyridinyl)-1*H*-pyrazole-5-carboxamide, including its metabolites and degradates, in or on the raw agricultural commodities: Artichoke, globe at 1.5 ppm; pepper/eggplant 8–10B at 1.5 ppm; sunflower subgroup 20B at 0.4 ppm; and tomato subgroup 8–10A at 0.6. A practical analytical method for Cyclaniliprole and NK–1375 using Liquid Chromatography-MS/MS is available for analysis of all plant matrices. This method has been confirmed through independent laboratory validation and is available for enforcement purposes. *Contact:* RD.

5. *PP 1E9805.* (EPA–HQ–OPP–2021–0386). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR part 180 by amending a tolerance for residues of the fungicide Pyriofenone, (5-chloro-2-methoxy-4-methyl-3-pyridinyl) (2,3,4-trimethoxy-6-methylphenyl)methanone, including its metabolites and degradates, in or on the raw agricultural commodities pepper/

eggplant 8–10B at 2 ppm and tomato subgroup 8–10A at 0.3 ppm. A practical analytical method for Pyriofenone using Liquid Chromatography-MS/MS is available for analysis of crop commodities. This method has been confirmed through independent laboratory validation and is available for enforcement purposes. *Contact:* RD.

6. *PP 1E8913.* (EPA–HQ–OPP–2021–0385). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR part 180 by establishing tolerances for residues of the fungicide isofetamid, N-[1,1-dimethyl-2-[2-methyl-4-(l-methylethoxy)phenyl]-2-oxoethyl]-3-methyl-2-thiophenecarboxamide including its metabolites and degradates, in or on the raw agricultural commodities ginseng, at 3 ppm; individual commodities of Proposed Crop Subgroup 6–19A: Edible podded bean legume vegetable subgroup including: Asparagus bean, edible podded at 0.6 ppm; catjang bean, edible podded at 0.6 ppm; Chinese longbean, edible podded at 0.6 ppm; cowpea, edible podded at 0.6 ppm; French bean, edible podded at 0.6 ppm; garden bean, edible podded at 0.6 ppm; goa bean, edible podded at 0.6 ppm; green bean, edible podded at 0.6 ppm; guar bean, edible podded at 0.6 ppm; jackbean, edible podded at 0.6 ppm; kidney bean, edible podded at 0.6 ppm; lablab bean, edible podded at 0.6 ppm; moth bean, edible podded at 0.6 ppm; mung bean, edible podded at 0.6 ppm; navy bean, edible podded at 0.6 ppm; rice bean, edible podded at 0.6 ppm; scarlet runner bean, edible podded at 0.6 ppm; snap bean, edible podded at 0.6 ppm; sword bean, edible podded at 0.6 ppm; urd bean, edible podded at 0.6 ppm; vegetable soybean, edible podded at 0.6 ppm; velvet bean, edible podded at 0.6 ppm; wax bean, edible podded at 0.6 ppm; winged pea, edible podded at 0.6 ppm; yardlong bean, edible podded at 0.6 ppm; individual commodities of Proposed Crop Subgroup 6–19B: Edible podded pea legume vegetable subgroup including: Chickpea, edible podded at 1.5 ppm; dwarf pea, edible podded at 1.5 ppm; edible podded pea at 1.5 ppm; grass-pea, edible podded at 1.5 ppm; green pea, edible podded at 1.5 ppm; lentil, edible podded at 1.5 ppm; pigeon pea, edible podded at 1.5 ppm; snap pea, edible podded at 1.5 ppm; snow pea, edible podded at 1.5 ppm; sugar snap pea, edible podded at 1.5 ppm; individual commodities of Proposed Crop Subgroup 6–19C: Succulent shelled bean subgroup including: Andean lupin, succulent shelled at 0.04 ppm; blackeyed pea, succulent shelled at 0.04 ppm; blue lupin, succulent shelled at 0.04 ppm; broad bean, succulent shelled at 0.04 ppm; catjang bean, succulent shelled at 0.04 ppm; cowpea, succulent shelled at 0.04 ppm; crowder pea, succulent shelled 0.04 ppm; goa bean, succulent shelled at 0.04 ppm; grain lupin, succulent shelled at 0.04 ppm; jackbean, succulent shelled at 0.04 ppm; lablab bean, succulent shelled at 0.04 ppm; lima bean, succulent shelled at 0.04 ppm; moth bean, succulent shelled at 0.04 ppm; scarlet runner bean, succulent shelled at 0.04 ppm; southern pea, succulent shelled at 0.04 ppm; sweet lupin, succulent shelled at 0.04 ppm; vegetable soybean, succulent shelled at 0.04 ppm; velvet bean, succulent shelled at 0.04 ppm; wax bean, succulent shelled at 0.04 ppm; white lupin, succulent shelled at 0.04 ppm; white sweet lupin, succulent shelled at 0.04 ppm; yellow lupin, succulent shelled at 0.04 ppm; individual commodities of Proposed Crop Subgroup 6–19D: Succulent shelled pea subgroup including: Chickpea, succulent shelled at 0.04 ppm; English pea, succulent shelled at 0.04 ppm; garden pea, succulent shelled at 0.04 ppm; green pea, succulent shelled at 0.04 ppm; lentil, succulent shelled at 0.04 ppm; pigeon pea, succulent shelled at 0.04 ppm; individual commodities of Proposed Crop Subgroup 6–19E: Dried shelled bean (except soybean), subgroup including: Adzuki bean, dry seed at 0.04 ppm; African yam-bean, dry seed at 0.04 ppm; American potato bean, dry seed at 0.04 ppm; Andean lupin bean, dry seed at 0.04 ppm; asparagus bean, dry seed at 0.04 ppm; black bean, dry seed at 0.04 ppm; blackeyed pea, dry seed at 0.04 ppm; blue lupin bean, dry seed at 0.04 ppm; broad bean, dry seed at 0.04 ppm; catjang bean, dry seed at 0.04ppm; Chinese longbean, dry seed at 0.04 ppm; cowpea, dry seed at 0.04 ppm; cranberry bean, dry seed at 0.04 ppm; crowder pea, dry seed at 0.04 ppm; dry bean, dry seed at 0.04 ppm; field bean, dry seed at 0.04 ppm; french bean, dry seed at 0.04 ppm; garden bean, dry seed at 0.04 ppm; goa bean, dry seed at 0.04 ppm; grain lupin bean, dry seed at 0.04 ppm; great northern bean, dry seed at 0.04 ppm; green bean, dry seed at 0.04ppm; guar bean, dry seed at 0.04 ppm; horse gram, dry seed at 0.04 ppm; jackbean, dry seed at 0.04 ppm; kidney bean, dry seed at 0.04 ppm; lablab bean, dry seed at 0.04 ppm; lima bean, dry seed at 0.04 ppm; morama bean, dry seed at 0.04 ppm; moth bean, dry seed at 0.04 ppm; mung bean, dry seed at 0.04 ppm; navy bean, dry seed at 0.04 ppm; pink bean, dry seed at 0.04 ppm; pinto bean, dry seed at 0.04 ppm; red bean, dry seed at 0.04 ppm; rice bean, dry seed at 0.04 ppm; scarlet runner bean, dry seed at 0.04 ppm; southern pea, dry seed at 0.04 ppm; sweet lupin bean, dry seed at 0.04 ppm; sword bean, dry seed at 0.04 ppm; tepary bean, dry seed at 0.04 ppm; urd bean, dry seed at 0.04 ppm; vegetable soybean, dry seed at 0.04 ppm; velvet bean, dry seed at 0.04 ppm; white lupin bean, dry seed at 0.04 ppm; white sweet lupin bean, dry seed at 0.04 ppm; winged pea, dry seed at 0.04 ppm; yardlong bean, dry seed at 0.04 ppm; yellow bean, dry seed at 0.04 ppm; yellow lupin bean, dry seed at 0.04 ppm; and individual commodities of Proposed Crop Subgroup 6–19F: Dried shelled pea subgroup including: Chickpea, dry seed at 0.04 ppm; dry pea, dry seed at 0.04 ppm; field pea, dry seed at 0.04 ppm; garden pea, dry seed at 0.04 ppm; grass-pea, dry seed at 0.04 ppm; green pea, dry seed at 0.04 ppm; lentil, dry seed at 0.04 ppm; pigeon pea, dry seed at 0.04 ppm. The LC–MS/MS method proposed for residue analysis of plants and plant products determines the residues of parent IKF–5411 and its metabolite, GPTC. *Contact:* RD.

7. *PP 1E8931.* (EPA–HQ–OPP–2021–0448). Interregional Research Project No. 4 (IR–4), IR–4 Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to amend 40 CFR part 180 by establishing tolerances for residues of the sum of trifloxystrobin, benzeneacetic acid, (E,E)-α-(methoxyimino)-2-[[[[1-[3-(trifluoromethyl) phenyl]ethylidene]amino]oxy]methyl]-methyl ester, and the free form of its acid metabolite CGA–321113, ((E,E)-methoxyimino-[2-[1-(3-trifluoromethyl-phenyl)-ethylideneaminooxymethyl]-phenyl]acetic acid, calculated as the stoichiometric equivalent of trifloxystrobin] in or on the raw agricultural commodities brassica, leafy greens, subgroup 4–16B at 30 ppm; celtuce at 9 ppm; fennel, Florence, fresh leaves and stalk at 9 ppm; fruit, citrus, group 10–10 at 0.6 ppm; fruit, pome, group 11–10 at 0.7; fruit, stone, group 12–12 at 3 ppm; kohlrabi at 2 ppm; leafy greens subgroup 4–16A at 30 ppm; leaf petiole vegetable subgroup 22B at 9 ppm; nut, tree, group 14–12 at 0.04 ppm; onion, bulb, subgroup 3–07A at 0.04 ppm; onion, green, subgroup 3–07B at 1.5 ppm; spice group 26 at 30 ppm; vegetable, brassica, head and stem, group 5–16 at 2 ppm; vegetable, fruiting, group 8–10 at 0.5 ppm; individual crops of Proposed Subgroup 6 18A: Edible

podded bean legume vegetable subgroup including: Asparagus bean, edible podded at 1.5 ppm; catjang bean, edible podded at 1.5 ppm; Chinese longbean, edible podded at 1.5 ppm; cowpea, edible podded at 1.5 ppm; French bean, edible podded at 1.5 ppm; garden bean, edible podded at 1.5 ppm; goa bean, edible podded at 1.5 ppm; green bean, edible podded at 1.5 ppm; guar bean, edible podded at 1.5 ppm; jackbean, edible podded at 1.5 ppm; kidney bean, edible podded at 1.5 ppm; lablab bean, edible podded at 1.5 ppm; moth bean, edible podded at 1.5 ppm; mung bean, edible podded at 1.5 ppm; navy bean, edible podded at 1.5 ppm; rice bean, edible podded at 1.5 ppm; scarlet runner bean, edible podded at 1.5 ppm; snap bean, edible podded at 1.5 ppm; sword bean, edible podded at 1.5 ppm; urd bean, edible podded at 1.5 ppm; vegetable soybean, edible podded at 1.5 ppm; velvet bean, edible podded at 1.5 ppm; wax bean, edible podded at 1.5 ppm; winged pea, edible podded at 1.5 ppm; yardlong bean, edible podded at 1.5 ppm; individual crops of Proposed Subgroup 6–18E: Dried shelled bean, except soybean, subgroup including: Adzuki bean, dry seed at 0.06 ppm; African yam-bean, dry seed at 0.06 ppm; American potato bean, dry seed at 0.06 ppm; Andean lupin bean, dry seed at 0.06 ppm; asparagus bean, dry seed at 0.06 ppm; black bean, dry seed at 0.06 ppm; blackeyed pea, dry seed at 0.06 ppm; blue lupin bean, dry seed at 0.06 ppm; broad bean, dry seed at 0.06 ppm; catjang bean, dry seed at 0.06 ppm; Chinese longbean, dry seed at 0.06 ppm; cowpea, dry seed at 0.06 ppm; cranberry bean, dry seed at 0.06 ppm; crowder pea, dry seed at 0.06 ppm; dry bean, dry seed at 0.06 ppm; field bean, dry seed at 0.06 ppm; French bean, dry seed at 0.06 ppm; garden bean, dry seed at 0.06 ppm; goa bean, dry seed at 0.06 ppm; grain lupin bean, dry seed at 0.06 ppm; great northern bean, dry seed at 0.06 ppm; green bean, dry seed at 0.06 ppm; guar bean, dry seed at 0.06 ppm; horse gram, dry seed at 0.06 ppm; jackbean, dry seed at 0.06 ppm; kidney bean, dry seed at 0.06 ppm; lablab bean, dry seed at 0.06 ppm; lima bean, dry seed at 0.06 ppm; morama bean, dry seed at 0.06 ppm; moth bean, dry seed at 0.06 ppm; mung bean, dry seed at 0.06 ppm; navy bean, dry seed at 0.06 ppm; pink bean, dry seed at 0.06 ppm; pinto bean, dry seed at 0.06 ppm; red bean, dry seed at 0.06 ppm; rice bean, dry seed at 0.06 ppm; scarlet runner bean, dry seed at 0.06 ppm; southern pea, dry seed at 0.06 ppm; sweet lupin bean, dry seed at 0.06 ppm; sword bean, dry seed at 0.06 ppm; tepary bean, dry seed at 0.06 ppm; urd bean, dry seed at 0.06 ppm; vegetable soybean, dry seed at 0.06 ppm; velvet bean, dry seed at 0.06 ppm; white lupin bean, dry seed at 0.06 ppm; white sweet lupin bean, dry seed at 0.06 ppm; winged pea, dry seed at 0.06 ppm; yardlong bean, dry seed at 0.06 ppm; yellow bean, dry seed at 0.06 ppm; yellow lupin bean, dry seed at 0.06 ppm; and individual commodities of Proposed Crop Subgroup 6–18F: Dried shelled pea subgroup including: Chickpea, dry seed at 0.2 ppm; dry pea, dry seed at 0.2 ppm; field pea, dry seed at 0.2 ppm; garden pea, dry seed at 0.2 ppm; grass-pea, dry seed at 0.2 ppm; green pea, dry seed at 0.2 ppm; lentil, dry seed at 0.2 ppm; pigeon pea, dry seed at 0.2 ppm. A practical analytical methodology for detecting and measuring levels of trifloxystrobin in or on raw agricultural commodities has been submitted. *Contact:* RD.

8. *PP 1F8930.* (EPA–HQ–OPP–2021–0624). Bayer CropScience LP, 800 N Lindbergh Blvd., St. Louis, MO 63167, requests to establish a tolerance in 40 CFR part 180 for residues of the insecticide, Tetraniliprole [1-(3-chloro-2-pyridinyl)-N-[4-cyano-2-methyl-6-[(methylamino)carbonyl]phenyl]-3-[[5-(trifluoromethyl)-2H-tetrazol-2-yl]methyl]-1H-pyrazole-5-carboxamide], in or on soybean: seed at 0.2 ppm; hulls at 0.60 ppm; aspirated grain fractions at 45 ppm; hay at 0.20 ppm; and forage at 0.07 ppm. The high-performance liquid chromatography-electrospray ionization/tandem mass spectrometry (LC/MS/MS) is used to measure and evaluate the chemical Tetraniliprole. *Contact:* RD.

9. *PP 1F8930.* (EPA–HQ–OPP–2021–0624). Bayer CropScience LP, 800 N Lindbergh Blvd., St. Louis, MO 63167, requests to establish a tolerance in 40 CFR part 180 for residues of the insecticide, Tetraniliprole [1-(3-chloro-2-pyridinyl)-N-[4-cyano-2-methyl-6-[(methylamino)carbonyl]phenyl]-3-[[5-(trifluoromethyl)-2H-tetrazol-2-yl]methyl]-1H-pyrazole-5-carboxamide], in or on the raw agricultural commodities of Crop Group 15; cereal grains, except rice at 0.01 ppm and Crop Group 16; forage, fodder, and straw of cereal grains group, except field corn, popcorn, and sweet corn at 0.1 ppm. The high-performance liquid chromatography-electrospray ionization/tandem mass spectrometry (LC/MS/MS) is used to measure and evaluate the chemical Tetraniliprole. *Contact:* RD.

Authority: 21 U.S.C. 346a.

Dated: October 13, 2021.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2021–22970 Filed 10–20–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 422, 423, 438, and 498

[CMS–4185–RCN]

RIN 0938–AK02

Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program of All-Inclusive Care for the Elderly (PACE), Medicaid Fee-For-Service, and Medicaid Managed Care Programs for Years 2020 and 2021; Extension of Timeline To Finalize a Rulemaking

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Extension of timeline.

SUMMARY: The Social Security Act (the Act) requires us to publish a Medicare final rule no later than 3 years after the publication date of the proposed rule. This document announces an extension of the timeline for publication of a Medicare final rule in accordance with the Act, which allows us to extend the timeline for publication of the ''Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program of All-inclusive Care for the Elderly (PACE), Medicaid Fee-For-Service, and Medicaid Managed Care Programs for Years 2020 and 2021'' final rule under exceptional circumstances.

DATES: As of October 21, 2021, the timeline for publication of a rule to finalize the November 1, 2018 proposed rule (83 FR 54982) is extended until November 1, 2022.

FOR FURTHER INFORMATION CONTACT: Joseph Strazzire, (410) 786–2775.

SUPPLEMENTARY INFORMATION: On November 1, 2018 (83 FR 54982), we published a proposed rule, ''Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program of All-inclusive Care for the Elderly (PACE), Medicaid Fee-

For-Service, and Medicaid Managed Care Programs for Years 2020 and 2021,'' that would revise the Medicare Advantage (MA) Risk Adjustment Data Validation (RADV) regulations to improve program efficiency and payment accuracy. The proposed rule discussed the Secretary's authority to: (1) Extrapolate in the recovery of RADV overpayments, starting with payment year 2011 contract-level audits; and (2) not apply a fee-for-service (FFS) adjuster to the RADV overpayment determinations.

Section 1871(a)(3)(A) of the Act requires the Secretary to establish and publish a regular timeline for the publication of final regulations based on the previous publication of a proposed regulation. In accordance with section 1871(a)(3)(B) of the Act, the timeline may vary among different regulations based on differences in the complexity of the regulation, the number and scope of comments received, and other relevant factors, but may not be longer than 3 years except under exceptional circumstances. In addition, in accordance with section 1871(a)(3)(B) of the Act, the Secretary may extend the initial targeted publication date of the final regulation if the Secretary, no later than the regulation's previously established proposed publication date, publishes a notice with the new target date for publication, and such notice includes a brief explanation of the justification for the variation.

The final rule for the November 1, 2018 proposed rule should be published by November 1, 2021. However, we are unable to meet the 3-year timeline for publication of the previously referenced RADV-audit related provisions because of exceptional circumstances. Specifically, on October 26, 2018, just prior to the publication of the proposed rule, we published the FFS Adjuster Study. On December 27, 2018, we announced an extension of the comment period for the proposed RADV provisions of the rule until April 30, 2019 and a plan to release data underlying the FFS Adjuster study. On March 6, 2019 we announced the release of data underlying the FFS Adjuster study. On April 30, 2019, we announced an additional extension of the comment period for the RADV provision until August 28, 2019. We also announced that we would be releasing additional data underlying the FFS Adjuster Study, including additional data containing Protected Health Information, to all parties who entered an applicable data use agreement and paid the required fee. Finally, on June 28, 2019, we released additional material related to the FFS Adjuster Study, and made a further request for public comment. Based on extensive public comments received on the proposed rule and subsequent FFS Adjuster study and related data along with delays resulting from the agency's focus on the COVID–19 public health emergency, we determined that additional time is needed to address the complex policy and operational issues that were raised.

This document extends the timeline for publication of the final rule for 1 year, until November 1, 2022.

Karuna Seshasai,

Executive Secretary to the Department, Department of Health and Human Services.

[FR Doc. 2021–22908 Filed 10–20–21; 8:45 am]

BILLING CODE 4120–01–P

Notices

Federal Register
Vol. 86, No. 201
Thursday, October 21, 2021

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Agency Information Collection Activities: Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request

AGENCY: U.S. Agency for International Development.

ACTION: Notice of information collection.

SUMMARY: The U.S. Agency for International Development (USAID), 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 continuing information collections, as required by the Paperwork Reduction Act of 1995. Comments are requested concerning whether the proposed or continuing collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimates; ways to enhance the quality, utility, and clarity of the information collected; and ways to minimize the burden of the collection of the information on the respondents, including the use of automated collection techniques or other forms of information technology.

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.

ADDRESSES: Interested persons are invited to submit written comments regarding the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), 725 7th Street NW, Washington, DC 20543. Attention: Desk Officer for USAID.

FOR FURTHER INFORMATION CONTACT: Alexandra Riboul, U.S. Agency for International Development, Office of Human Capital and Talent Management, Office of Workforce Planning, Policy, and Systems Management (PPSM)—Washington, DC 20523; tel. 202–712–1234, option #2.

SUPPLEMENTARY INFORMATION:

I. Abstract

The purpose of this collection is to determine if a candidate is eligible to receive Physician and Dentist Pay under the provisions of Title 38. This information will be maintained by USAID and made available to the Internal Revenue Service for tax and withholding purposes and to the U.S. Office of Personnel Management. Disclosure is voluntary. However, without the requested information, USAID will not be able to process a candidate's request to receive Physician and Dentist Pay. Authority to collect this information is contained in 5 U.S.C. 1104 and 5 U.S.C. 5371. The Office of U.S. Office of Personnel Management delegated authority to USAID to use provisions of Title 38, U.S.C. until June 30, 2022.

II. Method of Collection

Paper.

III. Data

(a) Full Name
(b) Organization
(c) Position
(d) Position Description Number (Federal candidates only)
(e) Additional Comments (as necessary)
(f) Current Occupation
(g) Pay Information
  a. *Federal Candidate:* Pay Plan, Step, Tier, Title, Clinical Specialty/Board Certification, General Schedule Employee Current Pay
  b. *Non-Federal Candidate:* Clinical Specialty/Board Certifications, Total Annual Compensation
(h) Official Tour of Duty (Full Time or Part Time)

IV. Format

(a) *Form Title:* Request for Title 38 Physician and Dentist Pay.
(b) *Form Number:* AID Form 465–1.
(c) *Type of Review:* Initial.
(d) *Affected Public:* Individuals.
(e) *Estimated Number of Respondents:* 200.
(f) *Estimated Total Annual Burden Hours:* 100–200.

V. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of USAID, including whether the information collected has practical utility; (b) the accuracy of USAID's estimate of the burden (including both hours and cost) of the proposed collection of information; (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 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. The comments will also become a matter of public record.

Dated: October 14, 2021.

Alicia Modzelewski,

Management and Program Analyst, Policy and Accountability Division, Office of Workforce Planning, Policy, and Systems Management (PPSM), Office of Human Capital and Talent Management (HCTM).

[FR Doc. 2021–22646 Filed 10–20–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No AMS–FGIS–21–0053]

United States Grain Standards Act Designation Opportunities and Request for Comments on Official Agencies Providing Services

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: United States Grain Standards Act (USGSA) designations of official agencies listed in **SUPPLEMENTARY INFORMATION** below will end on prescribed dates. We are seeking persons or governmental agencies interested in providing official services in areas presently served by these

agencies to submit an application for designation. In addition, we request comments on the quality of services provided by the following designated agencies: Northeast Indiana Grain Inspection, Inc. (Northeast Indiana); State Grain Inspection, Inc. (State Grain); J.W. Barton Grain Inspection Service, Inc. (Barton); Farwell Commodity and Grain Services, Inc. (Farwell Southwest); Northern Plains Grain Inspection Service, Inc. (Northern Plains); Plainview Grain Inspection and Weighing Service, Inc. (Plainview); Sioux City Inspection and Weighing Service Company (Sioux City); and the Montana Department of Agriculture (Montana). The Agricultural Marketing Service (AMS) encourages submissions from traditionally underrepresented individuals, organizations, and businesses to reflect the diversity of this industry. AMS encourages submissions from qualified applicants, regardless of race, color, age, sex, sexual orientation, gender identity, national origin, religion, disability status, protected veteran status, or any other characteristic protected by law.

DATES: Applications and comments for areas of designation terminating on 12/31/2021 currently operated by Northeast Indiana and State Grain must be received by November 22, 2021.

Applications and comments for areas of designation terminating on 3/31/2022 currently operated by Barton, Farwell South, Northern Plains, Plainview, and Sioux City must be received between 11/1/2021 and 11/30/2021.

Applications and comments for areas of designation terminating on 6/30/2022 currently operated by Montana must be received between 1/3/2022 and 2/1/2022.

ADDRESSES: Submit applications and comments concerning this Notice using any of the following methods:

- *To apply for USGSA Designation:* Go to FGISonline and then click on the Delegations/Designations and Export Registrations (DDR) link. You will need to obtain an FGISonline customer number (CIM) and create a USDA eAuthentication account prior to applying.
- *To submit Comments Regarding Current Designated Official Agencies:* Go to *Regulations.gov* (*http://www.regulations.gov*). Instructions for submitting and reading comments are detailed on the site. Interested persons are invited to submit written comments concerning this notice. All comments must be submitted through the Federal e-rulemaking portal at *http://www.regulations.gov* and should reference the document number, date, and page number of this issue of the **Federal Register**. All comments submitted in response to this notice will be included in the record and will be made available to the public. Please be advised that the identity of individuals or entities submitting comments will be made public on the internet at the address provided above.

Read Applications and Comments: If you would like to view applications, please contact us at *FGISQACD@usda.gov.* All comments will be available for public inspection online at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Austyn Hughes at *FGISQACD@usda.gov* or 816–266–5066.

SUPPLEMENTARY INFORMATION: Designations of official agencies listed below will end on the prescribed dates:

Official agency	Headquarters location and telephone	Designation end
Northeast Indiana Grain Inspection, Inc	Decatur, IN, 260–341–7497	12/31/2021
State Grain Inspection, Inc	Savage, MN, 952–808–8566	12/31/2021
J.W. Barton Grain Inspection Service, Inc	Owensboro, KY, 270–683–0616	3/31/2022
Farwell Commodity and Grain Services, Inc	Casa Grande, AZ, 520–560–1674	3/31/2022
Northern Plains Grain Inspection Service, Inc	Grand Forks, ND, 701–772–2414	3/31/2022
Plainview Grain Inspection and Weighing Service, Inc	Plainview, TX, 806–293–1364	3/31/2022
Sioux City Inspection and Weighing Service Company	Sioux City, IA, 712–255–0959	3/31/2022
Montana Department of Agriculture	Great Falls, MT, 406–452–9561	6/30/2022

Section 7(f) of the USGSA authorizes the Secretary to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services (7 U.S.C. 79(f)). A designated agency may provide official inspection services and/or Class X or Class Y weighing services at locations other than port locations. Under section 7(g) of the USGSA, designations of official agencies are effective for no longer than five years, unless terminated by the Secretary, and may be renewed according to the criteria and procedures prescribed in section 7(f) of the USGSA. See also, 7 CFR 800.196 for further information and guidance. Please note that sampling, weighing, and inspections conducted under the Agricultural Marketing Act of 1946 are conducted through cooperative agreements with AMS under the auspices of current official agency designation. See 7 U.S.C. 1621 *et seq.,* as amended for further information.

Designation Application Locations

The following list identifies designated official agencies currently operating and specific areas of operation that are open for designation applications. Please review the additional information provided via separate **Federal Register** notice for complete understanding of locations needing service designation. These are listed in order of anticipated designation termination date.

Northeast Indiana: Areas of designation include parts of Indiana. Please see the December 12, 2016, issue of the **Federal Register** (81 FR 89428) for descriptions of areas open for designation.

State Grain: Areas of designation include parts of Minnesota. Please see the July 3, 2017, issue of the **Federal Register** (82 FR 30818–30819) for descriptions of areas open for designation.

Barton: Areas of designation include parts of Indiana, Kentucky, and Tennessee. Please see the March 22, 2017, issue of the **Federal Register** (82 FR 14676–14677) for descriptions of areas open for designation.

Farwell Southwest: Areas of designation include parts of Arizona and California. Please see the January 10, 2017, issue of the **Federal Register** (82 FR 2939) for descriptions of areas open for designation.

Northern Plains: Areas of designation include parts of Minnesota and North Dakota. Please see the March 22, 2017, issue of the **Federal Register** (82 FR 14676) for descriptions of areas open for designation.

Plainview: Areas of designation include parts of Texas. Please see the March 22, 2017, issue of the **Federal Register** (82 FR 14679) for descriptions of areas open for designation.

Sioux City: Areas of designation include parts of Iowa, Minnesota, Nebraska, and South Dakota. Please see the March 22, 2017, issue of the **Federal Register** (82 FR 14677) for descriptions of areas open for designation.

Montana: Area of designation includes April 17, 2017, issue of Montana. Please see the April 17, 2017, issue of the **Federal Register** (82 FR 18100) for descriptions of areas open for designation.

Opportunity for Designation

Interested persons or governmental agencies may apply for designation to provide official services in geographic areas of official agencies specified above under provisions of section 7(f) of the USGSA and 7 CFR 800.196. Designation in specified geographic areas for Northeast Indiana and State Grain begins January 1, 2022. Designation in specified geographic areas for Barton, Farwell Southwest, Northern Plains, Plainview, and Sioux City begins April 1, 2022. Designation in specified geographic areas for Montana begins July 1, 2022. To apply for designation or to request more information on geographic areas serviced by these official agencies, contact *FGISQACD@usda.gov.*

Request for Comments

We are publishing this Notice to provide interested persons the opportunity to comment on the quality of services provided by the Northeast Indiana, State Grain, Barton, Farwell Southwest, Northern Plains, Plainview, Sioux City, and Montana official agencies. In the designation process, we are particularly interested in receiving comments citing reasons and pertinent data supporting or objecting to the designation of the applicant(s). Such comments should be submitted through the Federal e-rulemaking portal at *http://www.regulations.gov.*

We consider applications, comments, and other available information when determining which applicants will be designated.

Authority: 7 U.S.C. 71–87k.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2021–22995 Filed 10–20–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

October 18, 2021.

The Department of Agriculture has submitted the following information collection requirement(s) to 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; and 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 and other forms of information technology.

Comments regarding this information collection received by November 22, 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.

Forest Service

Title: National Woodland Owner Survey.

OMB Control Number: 0596–0078.

Summary of Collection: The Forest and Rangeland Renewable Resources Planning Act of 1974 (Pub. L. 93–278 Sec. 3) and the Forest and Rangeland Renewable Resources Research Act of 1978 (Pub. L. 307 Sec. 3) are the legal authorities for conducting the National Woodland Owner Survey. There are an estimated 823 million acres of forestland across the United States. Of this forestland, over half is owned by millions of corporations, families, individuals, and other private groups. Understanding the attitudes and behaviors of these private ownerships is critical for understanding the current and future state of the nation's forests. The Forest Service conducts the National Woodland Owner Survey (NWOS) to increase our understanding of:

- Who owns and manages the forestland of the United States;
- Why they own/manage it;
- How they have used it; and
- How they intend to use it.

This information is used by policy analysts, foresters, educators, and researchers to facilitate planning and implementation of forest policies and programs.

The Forest Service's direction and authority to conduct the NWOS is from the Resources Planning Act of 1974 and the Forest and Rangeland Renewable Resources Research Act of 1978. These acts assign responsibility for inventory and assessment of forest and related renewable resources to the Secretary of Agriculture, and these responsibilities are subsequently delegated to the Forest Service. Additionally, the importance of an ownership survey in this inventory and assessment process has been highlighted in the 2014 Farm Bill, the Agricultural Research, Extension, and Education Reform Act of 1998, and the recommendations of the 1998 Second Blue Ribbon Panel on the Forest Inventory and Analysis program. Previous iterations of the NWOS were conducted in 1978, 1993, 2002–2006, 2011–2013, and 2017–2018. Data collection for the current iteration is planned for 2019–2023. Initial approval for the current data collection cycle of the NWOS expires on October 31, 2021. If renewed, the current NWOS data collection cycle will be completed in 2023.

Need and Use of the Information: The NWOS will utilize a mixed-mode survey technique involving cognitive interviews, focus groups, self-administered questionnaires, and telephone interviews. Cognitive interviews will be used to test specific questions. Focus groups will be used to provide more in-depth understanding of the responses and to explore new areas of inquiry. This information collection will generate scientifically-based, statistically-reliable, up-to-date information about the owners of forestland in the United States. Results of these efforts will provide more reliable information on this important and dynamic segment of the United States population, thus facilitating more complete assessments of the country's

forestland resources and improved planning and implementation of forestry programs on state, regional, and national levels.

Description of Respondents: Individuals or households; Business or other for-profit; State, Local or Tribal Government.

Number of Respondents: 3,558.

Frequency of Responses: Reporting: Annual.

Total Burden Hours: 2,118.

Forest Service

Title: Volunteer Application and Agreement for Natural and Cultural Resource Agencies.

OMB Control Number: 0596–0080.

Summary of Collection: The Volunteer Act of 1972, (Pub. L. 92–300), as amended, authorizes Federal land management agencies to use volunteers and volunteer organizations to plan, develop, maintain and manage, where appropriate, trails and campground facilities, improve wildlife habitat, and perform other useful and important conservation services throughout the Nation. Participating agencies in Department of Agriculture: Forest Service and National Resources Conservation Service; Department of the Interior: National Park Service, Fish and Wildlife Service, Bureau of Land Management, Bureau of Reclamation, Bureau of Indian Affairs, Office of Surface Mining Reclamation and Enforcement, and U.S. Geological Survey; Department of Defense: U.S. Army Corps of Engineers and Department of Commerce: National Oceanic and Atmospheric; Administration—Office of National Marine Sanctuaries. Agencies will collect information using Common Forms OF 301—Volunteer Service Application; OF 301a Volunteer Service Agreement and OF 301b Volunteer Service Agreement and Sign-up Form for Groups.

Need and Use of the Information: Agencies will collect the names, addresses, and certain information about individuals who are interested in public service as volunteers. The information is used by the agencies as a position application, to review and determine if a potential volunteer is a good fit for a particular volunteer position. The OF–301a is used to enroll volunteers, collect contact information, parent or guardian approval, describe duties, project locations, schedules and any reimbursements, describe safety requirements and delineate any other terms of service. The OF–301b form is used to record the name and contact information of the volunteer group, and the names and signatures of volunteers participating in a project. If the information is not collected, participating natural resource agencies will be unable to recruit and/or screen volunteer applicants or administer/run volunteer programs that are crucial to assisting these agencies in fulfilling their missions.

Description of Respondents: Individuals or households.

Number of Respondents: 125,000.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 500,000.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2021–22971 Filed 10–20–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Modoc County Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Modoc County Resource Advisory Committee (RAC) will hold a virtual meeting by phone and/or video conference. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act as well as make recommendations on recreation fee proposals for sites on or benefitting the Modoc National Forest within Modoc County, consistent with the Federal Lands Recreation Enhancement Act. RAC information and virtual meeting information can be found at the following website: *https://www.fs.usda.gov/main/modoc/workingtogether/advisorycommittees.*

DATES: The virtual meeting will be held on November 10, 2021 at 3:00 p.m.–6:00 p.m., Pacific Standard Time.

All RAC meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

ADDRESSES: The meeting will be held virtually via Microsoft Teams video/phone conference. Members of the public may click here to join the meeting via video conference or call in (audio only) at 323–886–7051, Phone conference ID: 993 916 790#.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

FOR FURTHER INFORMATION CONTACT: Chris Christofferson, Designated Federal Officer (DFO), by phone at 530–233–8700 or email at *chris.christofferson@usda.gov.*

Individuals who use telecommunication devices for the deaf/hard-of-hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

1. Hear from possible Title II project proponents and discuss project proposals;
2. Plan for project solicitation and replacment member recruitment;
3. Review old project meeting minutes; and
4. Schedule the next meeting.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing by November 3, 2021, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee before or after the meeting. Written comments and requests for time for oral comments must be sent to Chris Christofferson, Modoc County RAC, 225 W 8th St., Alturas, California 96101 or by email to *chris.christofferson@usda.gov.*

Meeting Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accomodation. For access to proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Equal opportunity practices, in line with USDA policies, will be followed in all membership appointments to the RAC. To help ensure that recommendations of the RAC have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals

with demonstrated ability to represent minorities, women, and persons with disabilities.

The USDA prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, political beliefs, income derived from a public assistance program, 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).

Dated: October 14, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–22764 Filed 10–20–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–471–807]

Certain Uncoated Paper From Portugal: Final Results of Antidumping Duty Administrative Review; 2019–2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that The Navigator Company, S.A. (Navigator) made sales of certain uncoated paper (uncoated paper) from Portugal in the United States at less than normal value during the period of review (POR) March 1, 2019, through February 29, 2020.

DATES: Applicable October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Eric Hawkins, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1988.

SUPPLEMENTARY INFORMATION:

Background

On June 4, 2021, Commerce published the *Preliminary Results* covering one producer/exporter, Navigator.[1] On October 4, 2021, Commerce extended the time period for issuing the final results of this review by an additional 13 days, to 133 days after the publication date of the *Preliminary Results.*[2] The deadline for the final results of this review is now October 15, 2021. For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[3]

Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The products covered by this order are certain uncoated paper from Portugal. For a full description of the scope, *see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum is attached to this notice as an appendix. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties, we have recalculated the weighted-average dumping margin for Navigator. Specifically, we made a change to one post-sale price adjustment for Navigator's home market sales. For a more detailed discussion of this change, *see* the Final Analysis Memorandum.[4]

Final Results of the Review

Commerce determines that the following weighted-average dumping margin exists for the period March 1, 2019, through February 29, 2020:

Exporter/producer	Weighted-average dumping margin (percent)
The Navigator Company, S.A.	2.21

Disclosure

Commerce intends to disclose to interested parties the calculations performed in connection with the final results within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of final determination in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rate

Pursuant to section 751(a)(2)(A) of the Act, and 19 CFR 351.212(b)(1), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.

Because Navigator's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent), Commerce has calculated importer-specific antidumping duty assessment rates. We calculated importer-specific antidumping duty assessment rates by aggregating the total amount of dumping calculated for the examined sales of each importer and dividing each of these amounts by the total sales value associated with those sales. Where an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For entries of subject merchandise during the POR produced by Navigator for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[5]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

[1] *See Certain Uncoated Paper from Portugal: Preliminary Results of the Administrative Review of the Antidumping Duty Order; 2019–2020,* 86 FR 30003 (June 4, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Certain Uncoated Paper from Portugal: Extension of Deadline for Final Results of Antidumping Duty Administrative Review, 2019–2020,'' dated October 4, 2021.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order: Certain Uncoated Paper from Portugal; 2019–2020,'' dated concurrently with and hereby adopted by this notice (Issues and Decision Memorandum).

[4] *See* Memorandum, ''Final Results Analysis Memorandum for The Navigator Company, S.A.,'' dated concurrently with this memorandum.

[5] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Navigator will be the rate established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 7.80 percent, the all-others rate established in the LTFV investigation.[6] These cash deposit requirements, when imposed, shall remain in effect until further notice.

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 duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/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

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5) and 19 CFR 351.213(h)(1).

Dated: October 15, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, Performing the Non-Exclusive Functions and Duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Changes Since the *Preliminary Results*
V. Discussion of the Issues
  Comment 1: Whether to Cap ''Bonus'' Rebates in the Home Market
  Comment 2: Whether Commerce Should Grant Navigator a Constructed Export Price Offset
VI. Recommendation

[FR Doc. 2021–22998 Filed 10–20–21; 8:45 am]

BILLING CODE 3510–DS–P

[6] *See Certain Uncoated Paper from Portugal: Final Determination of Sales at Less than Fair Value and Final Negative Determination of Critical Circumstances,* 81 FR 3105 (January 20, 2016).

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 84–32A12]

Export Trade Certificate of Review

ACTION: Notice of issuance of an amended Export Trade Certificate of Review to Northwest Fruit Exporters (''NFE''), Application No. 84–32A12.

SUMMARY: The Secretary of Commerce, through the Office of Trade and Economic Analysis (''OTEA''), issued an amended Export Trade Certificate of Review (''Certificate'') to NFE on September 30, 2021.

FOR FURTHER INFORMATION CONTACT: Joseph Flynn, Director, Office of Trade and Economic Analysis, International Trade Administration, by telephone at (202) 482–5131 (this is not a toll-free number) or email at *etca@trade.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001 21) (''the Act'') authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. An Export Trade Certificate of Review protects the holder and the members identified in the Certificate from State and Federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. The regulations implementing Title III are found at 15 CFR part 325. OTEA is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Secretary of Commerce to publish a summary of the certification in the **Federal Register**. Under Section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Certified Content

NFE's Certificate was amended as follows:

1. Removed the following companies as Members of the Certificate:

- Griggs Farms Packing, LLC, Orondo, WA
- Naumes, Inc., Medford, OR
- Pride Packing Company LLC, Wapato, WA
- Yakima Fresh, Yakima, WA

2. Changed the names of the following Members of the Certificate:

- Auvil Fruit Co., Inc. (Orondo, WA) changed to Auvil Fruit Co., Inc. dba Gee Whiz II, LLC (Orondo, WA)
- Conrad & Adams Fruit L.L.C. (Grandview, WA) changed to River Valley Fruit, LLC (Grandview, WA)

3. Changed the Export Product coverage for one Member:

- E.W. Brandt & Sons, Inc. changed Export Product coverage from fresh apples and fresh sweet cherries to fresh apples (dropped fresh sweet cherries).

NFE's amended Certificate Membership is as follows:

1. Allan Bros., Naches, WA
2. AltaFresh L.L.C. dba Chelan Fresh Marketing, Chelan, WA
3. Apple House Warehouse & Storage, Inc., Brewster, WA
4. Apple King, L.L.C., Yakima, WA
5. Auvil Fruit Co., Inc. dba Gee Whiz II, LLC, Orondo, WA
6. Baker Produce, Inc., Kennewick, WA
7. Blue Bird, Inc., Peshastin, WA
8. Blue Star Growers, Inc., Cashmere, WA
9. Borton & Sons, Inc., Yakima, WA
10. Brewster Heights Packing & Orchards, LP, Brewster, WA
11. Chelan Fruit Cooperative, Chelan, WA
12. Chiawana, Inc. dba Columbia Reach Pack, Yakima, WA

13. CMI Orchards LLC, Wenatchee, WA
14. Columbia Fruit Packers, Inc., Wenatchee, WA
15. Columbia Valley Fruit, L.L.C., Yakima, WA
16. Congdon Packing Co. L.L.C., Yakima, WA
17. Cowiche Growers, Inc., Cowiche, WA
18. CPC International Apple Company, Tieton, WA
19. Crane & Crane, Inc., Brewster, WA
20. Custom Apple Packers, Inc., Quincy, and Wenatchee, WA
21. Diamond Fruit Growers, Inc., Odell, OR
22. Domex Superfresh Growers LLC, Yakima, WA
23. Douglas Fruit Company, Inc., Pasco, WA
24. Dovex Export Company, Wenatchee, WA
25. Duckwall Fruit, Odell, OR
26. E. Brown & Sons, Inc., Milton-Freewater, OR
27. Evans Fruit Co., Inc., Yakima, WA
28. E.W. Brandt & Sons, Inc., Parker, WA (for fresh apples only)
29. FirstFruits Farms, LLC, Prescott, WA
30. Frosty Packing Co., LLC, Yakima, WA
31. G&G Orchards, Inc., Yakima, WA
32. Gilbert Orchards, Inc., Yakima, WA
33. Hansen Fruit & Cold Storage Co., Inc., Yakima, WA
34. Henggeler Packing Co., Inc., Fruitland, ID
35. Highland Fruit Growers, Inc., Yakima, WA
36. HoneyBear Growers LLC, Brewster, WA
37. Honey Bear Tree Fruit Co LLC, Wenatchee, WA
38. Hood River Cherry Company, Hood River, OR
39. JackAss Mt. Ranch, Pasco, WA
40. Jenks Bros Cold Storage & Packing, Royal City, WA
41. Kershaw Fruit & Cold Storage, Co., Yakima, WA
42. L & M Companies, Union Gap, WA
43. Legacy Fruit Packers LLC, Wapato, WA
44. Manson Growers Cooperative, Manson, WA
45. Matson Fruit Company, Selah, WA
46. McDougall & Sons, Inc., Wenatchee, WA
47. Monson Fruit Co., Selah, WA
48. Morgan's of Washington dba Double Diamond Fruit, Quincy, WA
49. Northern Fruit Company, Inc., Wenatchee, WA
50. Olympic Fruit Co., Moxee, WA
51. Oneonta Trading Corp., Wenatchee, WA
52. Orchard View Farms, Inc., The Dalles, OR
53. Pacific Coast Cherry Packers, LLC, Yakima, WA
54. Piepel Premium Fruit Packing LLC, East Wenatchee, WA
55. Pine Canyon Growers LLC, Orondo, WA
56. Polehn Farms, Inc., The Dalles, OR
57. Price Cold Storage & Packing Co., Inc., Yakima, WA
58. Quincy Fresh Fruit Co., Quincy, WA
59. Rainier Fruit Company, Selah, WA
60. River Valley Fruit, LLC, Grandview, WA
61. Roche Fruit, Ltd., Yakima, WA
62. Sage Fruit Company, L.L.C., Yakima, WA
63. Smith & Nelson, Inc., Tonasket, WA
64. Stadelman Fruit, L.L.C., Milton-Freewater, OR, and Zillah, WA
65. Stemilt Growers, LLC, Wenatchee, WA
66. Symms Fruit Ranch, Inc., Caldwell, ID
67. The Dalles Fruit Company, LLC, Dallesport, WA
68. Underwood Fruit & Warehouse Co., Bingen, WA
69. Valicoff Fruit Company Inc., Wapato, WA
70. Washington Cherry Growers, Peshastin, WA
71. Washington Fruit & Produce Co., Yakima, WA
72. Western Sweet Cherry Group, LLC, Yakima, WA
73. Whitby Farms, Inc. dba: Farm Boy Fruit Snacks LLC, Mesa, WA
74. WP Packing LLC, Wapato, WA
75. Yakima Fruit & Cold Storage Co., Yakima, WA
76. Zirkle Fruit Company, Selah, WA

The amended Certificate is effective from July 2, 2021, the date on which the application for the Certificate was deemed submitted.

Dated: October 14, 2021.

Joseph Flynn,

Director, Office of Trade and Economic Analysis, International Trade Administration, U.S. Department of Commerce.

[FR Doc. 2021–22761 Filed 10–20–21; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–876]

Welded Line Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) finds that the producers/exporters subject to this administrative review did not make sales of subject merchandise at less than normal value during the period of review (POR) December 1, 2018, through November 30, 2019.

DATES: Applicable October 21, 2021.

FOR FURTHER INFORMATION CONTACT: David Goldberger or Adam Simons, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4136 or (202) 482–6172, respectively.

SUPPLEMENTARY INFORMATION:

Background

This review covers 30 producers/exporters of the subject merchandise. Commerce selected two companies, NEXTEEL Co., Ltd. (NEXTEEL) and SeAH Steel Corporation (SeAH), for individual examination.[1] The producers/exporters not selected for individual examination are listed in Appendix II.

On April 20, 2021, Commerce published the *Preliminary Results* and invited parties to comment on the *Preliminary Results*.[2] On May 20, 2021, we received case briefs from the Domestic Interested Parties,[3] NEXTEEL, and SeAH. On June 1, 2021, we received rebuttal briefs from the Domestic Interested Parties, NEXTEEL, SeAH, and Husteel Co., Ltd. On July 29, 2021, we postponed the final results to no later than October 15, 2021.[4] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[5]

[1] *See* Memorandum, ''2018–2019 Antidumping Duty Administrative Review of Welded Line Pipe from the Republic of Korea: Respondent Selection,'' dated March 2, 2020.

[2] *See Welded Line Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019,* 86 FR 20484, 20486 (April 20, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[3] The Domestic Interested Parties are California Steel Industries; Welspun Tubular LLC USA; Stupp Corporation; American Cast Iron Pipe Company; Maverick Tube Corporation; and IPSCO Tubulars Inc.

[4] *See* Memorandum, ''Welded Line Pipe from the Republic of Korea: Extension of Time Limit for Final Results of 2018–2019 Antidumping Duty Administrative Review,'' dated July 29, 2021.

[5] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2018–2019 Administrative Review of the Antidumping Duty Order on Welded Line Pipe from Korea,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Scope of the Order

The merchandise subject to the *Order* is welded line pipe.[6] The product is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) item numbers: 7305.11.1030, 7305.11.1060, 7305.11.5000, 7305.12.1030, 7305.12.1060, 7305.12.5000, 7305.19.1030, 7305.19.5000, 7306.19.1010, 7306.19.1050, 7306.19.5110, and 7306.19.5150. Although the HTSUS numbers are provided for convenience and for customs purposes, the written product description remains dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are listed in Appendix I to this notice and addressed in the Issues and Decision Memorandum. Interested parties can find a complete discussion of these issues and the corresponding recommendations in this public memorandum, which is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* we made certain changes to the calculation of the preliminary weighted-average dumping margin for NEXTEEL.[7] These changes, however, did not result in a change to the weighted-average dumping margin calculated for NEXTEEL from the *Preliminary Results.*

Final Results of the Review

As a result of this review, we determine the following weighted-average dumping margins for the period December 1, 2018, through November 30, 2019:

Producer or exporter	Weighted-average dumping margin (percent)
NEXTEEL Co., Ltd	0.00
SeAH Steel Corporation	0.00
Companies Not Selected for Individual Review[8]	0.00

Review-Specific Rate for Companies Not Selected for Individual Review

The dumping margins for the exporters/producers not selected for individual review are listed in Appendix II.

Disclosure of Calculations

We intend to disclose the calculations performed for NEXTEEL in connection with these final results to interested parties within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

Pursuant to 19 CFR 351.212(b)(1), NEXTEEL reported the entered value of its U.S. sales such that we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. SeAH did not report actual entered value for all of its U.S. sales; in such instances, we calculated importer-specific per-unit duty assessment rates by aggregating the total amount of antidumping duties calculated for the examined sales and dividing this amount by the total quantity of those sales. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For the companies which were not selected for individual review, because we are assigning these companies an assessment rate based on the deposit rate calculated for NEXTEEL and SeAH,[9] we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[10]

Commerce's ''automatic assessment'' practice will apply to entries of subject merchandise during the POR produced by NEXTEEL or SeAH for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[11]

Consistent with its recent notice,[12] Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for each specific company listed above will be equal to the weighted-average dumping margin

[6] For a complete description of the scope of the order, *see* the Issues and Decision Memorandum; *see also Welded Line Pipe from the Republic of Korea and the Republic of Turkey: Antidumping Duty Orders,* 80 FR 75056, 75057 (December 1, 2015) (*Order*).

[7] *See* Issues and Decision Memorandum at 3. We made no changes to the calculation of SeAH's preliminary weighted-average dumping margin.

[8] Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually examined, excluding any margins that are zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.'' For these final results, we have calculated weighted-average dumping margins for NEXTEEL and SeAH that are zero or *de minimis,* and we have not calculated any margins which are not zero, *de minimis,* or determined entirely on the basis of facts available. Accordingly, we have assigned to the companies not individually examined a margin of zero percent. The exporters/producers subject to this review, but not selected for individual review, are listed in Appendix II.

[9] *See supra* at n.11.

[10] *See* section 751(a)(2)(C) of the Act.

[11] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[12] *See Notice of Discontinuation of Policy to Issue Liquidation Instructions After 15 Days in Applicable Antidumping and Countervailing Duty Administrative Proceedings,* 86 FR 884 (January 15, 2021).

that is established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated or reviewed companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the cash deposit rate established for the most recently completed segment for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 4.38 percent, the all-others rate established in the LTFV investigation.[13] These deposit requirements, when imposed, shall remain in effect until further notice.

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 duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice serves as the only 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), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of return/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.

[13] *See Order.*

Dated: October 15, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, Performing the Non-Exclusive Functions and Duties of the Assistant Secretary for Enforcement and Compliance.

Appendix I—List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Margin Calculations
IV. Discussion of the Issues
  Comment 1: Existence of a Particular Market Situation
  Comment 2: Differential Pricing Methodology
  Comment 3: Non-Prime Costs for NEXTEEL
  Comment 4: Suspended Production Loss for NEXTEEL
  Comment 5: Billing Adjustments for NEXTEEL
  Comment 6: Capping of Freight Revenue for SeAH
  Comment 7: G&A Expense Adjustment for State Pipe & Supply, Inc.
  Comment 8: SeAH's Constructed Export Price Offset Claim
V. Recommendation

Appendix II—Review-Specific Average Rate Applicable to Companies Not Selected for Individual Review

1. AJU Besteel Co., Ltd.
2. Daewoo International Corporation
3. Dong Yang Steel Pipe
4. Dongbu Incheon Steel Co.
5. Dongbu Steel Co., Ltd.
6. Dongkuk Steel Mill
7. EEW Korea Co., Ltd.
8. HISTEEL Co., Ltd.
9. Husteel Co., Ltd.
10. Hyundai RB Co. Ltd.
11. Hyundai Steel Company/Hyundai HYSCO
12. Keonwoo Metals Co., Ltd.
13. Kolon Global Corp.
14. Korea Cast Iron Pipe Ind. Co., Ltd.
15. Kurvers Piping Italy S.R.L.
16. Miju Steel MFG Co., Ltd.
17. MSTEEL Co., Ltd.
18. Poongsan Valinox (Valtimet Division)
19. POSCO
20. POSCO Daewoo
21. R&R Trading Co. Ltd.
22. Sam Kang M&T Co., Ltd.
23. Sin Sung Metal Co., Ltd.
24. SK Networks
25. Soon-Hong Trading Company
26. Steel Flower Co., Ltd.
27. TGS Pipe
28. Tokyo Engineering Korea Ltd.

[FR Doc. 2021–22997 Filed 10–20–21; 8:45 am]

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DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number: 211013–0207]

Draft of Promoting Access to Voting: Recommendations for Addressing Barriers to Private and Independent Voting for People With Disabilities

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice; request for public comments.

SUMMARY: The National Institute of Standards and Technology (NIST) requests public comments on the Draft *Promoting Access to Voting: Recommendations for Addressing Barriers to Private and Independent Voting for People with Disabilities* Document (Draft). The Draft was developed by NIST using information collected through the Request for Information (RFI) that was published in the **Federal Register** on June 16, 2021; review of reports, papers and other literature; and engagement with stakeholder organizations and election officials. The Draft was developed in response to NIST responsibilities set forth in Executive Order (E.O.) 14019, Promoting Access to Voting. Under section 7 of the E.O., Ensuring Equal Access for Voters with Disabilities, NIST is directed to evaluate the steps needed to ensure that the online Federal Voter Registration Form is accessible to people with disabilities and to analyze barriers to private and independent voting for people with disabilities and make recommendations to remove these barriers. The Draft is posted on the Federal eRulemaking Portal at *https://www.regulations.gov* as well as the NIST website at: *https://www.nist.gov/itl/voting.* The use of the eRulemakng Portal does not imply that the Draft is a regulation, nor mandatory guidance for federal agencies.

DATES: Comments must be received by 5:00 p.m. Eastern time on November 22, 2021. Written comments in response to this request for public comment should be submitted according to the instructions in the **ADDRESSES** and **SUPPLEMENTARY INFORMATION** sections below. Submissions received after that date may not be considered.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Electronic submission:* Submit electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *www.regulations.gov* and enter NIST–XXX–XXX in the search field,
2. Click the ''Comment Now!'' icon, complete the required fields, and
3. Enter or attach your comments.

• *Email:* Comments in electronic form may also be sent to *pva-eo@list.nist.gov* in any of the following formats: HTML; ASCII; Word; RTF; or PDF.

Please submit comments only and include your name, organization's name (if any), and cite ''Promoting Access to Voting'' in all correspondence.

FOR FURTHER INFORMATION CONTACT: For questions about this request for public comment contact: Kevin Mangold, NIST, at (301) 975–5628, or email *Kevin.Mangold@nist.gov.* Please direct media inquiries to NIST's Office of Public Affairs at (301) 975–2762. Users of telecommunication devices for the deaf, or a text telephone, may call the Federal Relay Service, toll free at 1–800–877–8339.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, NIST will make the Draft available in alternate formats, such as Braille or large print, upon request by persons with disabilities.

SUPPLEMENTARY INFORMATION: As stated in Executive Order 14019, Promoting Access to Voting,[1] the right to vote is the foundation of American democracy. Under section 7 of Executive Order 14019, (Ensuring Equal Access for Voters with Disabilities), NIST is directed to evaluate the steps needed to ensure that the online Federal Voter Registration Form is accessible to people with disabilities and identify barriers to private and independent voting for people with disabilities and make recommendations to remove these barriers. NIST is seeking public comment on the Draft *Promoting Access to Voting: Recommendations for Addressing Barriers to Private and Independent Voting for People with Disabilities* document. The Draft was developed by NIST using information collected through the Request for Information (RFI) that was published in the **Federal Register** on June 16, 2021, review of reports, papers and other literature, and engagement with stakeholder organizations and election officials.

Request for Comment

NIST seeks public comments on the draft *Promoting Access to Voting: Recommendations for Addressing Barriers to Private and Independent Voting for People with Disabilities* document and the draft recommendations contained in it regarding both the Federal Voter Registration Form as well as the barriers it has identified that prevent people with disabilities from exercising their fundamental rights and the ability to vote privately and independently. NIST is seeking comment from persons with disabilities, disability advocacy groups, assistive technology vendors and professionals, non-partisan voting promotion groups, voting technology vendors, election officials and other key stakeholders.

The Draft is available electronically from the NIST website at: *https://www.nist.gov/itl/voting* as well as *www.regulations.gov.* A comment template is available at: *https://www.nist.gov/itl/voting.* Use of the comment template is suggested but not required. Interested parties should submit comments in accordance with the **DATES** and **ADDRESSES** section of this notice.

Comments containing references, studies, research, and other empirical data that are not widely published should include copies of the referenced materials. All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. NIST reserves the right to publish relevant comments publicly, unedited and in their entirety. All relevant comments received will be made publicly available at *https://www.nist.gov/itl/voting* and *regulations.gov.*

Personally identifiable information (PII), such as street addresses, phone numbers, account numbers or Social Security numbers, or names of other individuals, should not be included. NIST asks commenters to avoid including PII as NIST has no plans to redact PII from comments. Do not submit confidential business information, or otherwise sensitive or protected information. Comments that contain profanity, vulgarity, threats, or other inappropriate language or content will not be considered. NIST requests that commenters, to the best of their ability, only submit attachments that are accessible to people who rely upon assistive technology. A good resource for document accessibility can be found at: *section508.gov/create/documents.*

Authority: Exec. Order No. 14019, Promoting Access to Voting, 86 FR 13623 (Mar. 07, 2021).

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2021–22757 Filed 10–20–21; 8:45 am]

BILLING CODE 3510–13–P

[1] Exec. Order No. 14019, Promoting Access to Voting, 86 FR 13623 (Mar. 07, 2021).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Meeting of the Advisory Committee on Commercial Remote Sensing

ACTION: Notice of meeting.

SUMMARY: The Advisory Committee on Commercial Remote Sensing (''ACCRES'') will meet for 2 half-day meetings on November 3–November 4, 2021.

DATES: The meeting is scheduled as follows: November 3–November 4, 2021 from 11:00 a.m.–3:00 p.m. Eastern Daylight Time (EDT) each day.

ADDRESSES: The meeting will be a hybrid event with the Committee convening ''in person'' at the Herbert C. Hoover Building, 1401 Constitution Avenue NW, Washington, DC, and any public participants can attend virtually via GoToWebinar.

FOR FURTHER INFORMATION CONTACT: Tahara Dawkins, NOAA/NESDIS/CRSRA, 1335 East West Highway, G–101, Silver Spring, Maryland 20910; 301–427–2560 or *CRSRA@noaa.gov.*

SUPPLEMENTARY INFORMATION: As required by Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (FACA) and its implementing regulations, *see* 41 CFR 102–3.150, notice is hereby given of the meeting of ACCRES. ACCRES was established by the Secretary of Commerce (Secretary) on May 21, 2002, to advise the Secretary through the Under Secretary of Commerce for Oceans and Atmosphere on matters relating to the U.S. commercial remote sensing space industry and on the National Oceanic and Atmospheric Administration's activities to carry out the responsibilities of the Department of Commerce set forth in the National and Commercial Space Programs Act of 2010 (51 U.S.C. 60101 *et seq.*).

Purpose of the Meeting and Matters To Be Considered

The meeting will be open to the public pursuant to Section 10(a)(1) of the FACA. During the meeting, the Committee will hear Commercial Satellite Imaging regulation from

International Regulators, and from U.S. government leadership on their vision for the development of the Remote Sensing industry.

Additional Information and Public Comments

The meeting will be held over two half-days and will be conducted via GoToWebinar. Please register for the meeting through the link: *https://attendee.gotowebinar.com/rt/4789727055944349455*. This event is accessible to individuals with disabilities. For all other special accommodation requests, please contact *CRSRA@noaa.gov*. This webinar is a NOAA ACCRES public meeting and will be recorded and transcribed. If you have a public comment, you acknowledge you may be recorded and are aware you can opt out of the meeting. Both the meeting minutes and presentations will be posted to the ACCRES website. The agenda, speakers and times are subject to change. For updates, please check online at *https://www.nesdis.noaa.gov/CRSRA/accresMeetings.html.*

Public comments are encouraged. Individuals or groups who would like to submit advance written comments, please email them to *Tahara.Dawkins@noaa.gov,* and *CRSRA@noaa.gov.*

Stephen M. Volz,

Assistant Administrator for Satellite and Information Services.

[FR Doc. 2021–22907 Filed 10–20–21; 8:45 am]

BILLING CODE 3510–HR–P

DENALI COMMISSION

Denali Commission Fiscal Year 2022 Draft Work Plan

AGENCY: Denali Commission.

ACTION: Notice.

SUMMARY: The Denali Commission (Commission) is an independent Federal agency based on an innovative Federal-state partnership designed to provide critical utilities, infrastructure and support for economic development and training in Alaska by delivering federal services in the most cost-effective manner possible. The Commission is required to develop an annual work plan for future spending which will be published in the **Federal Register**, providing an opportunity for a 30-day period of public review and written comment. This **Federal Register** notice serves to announce the 30-day opportunity for public comment on the Denali Commission Draft Work Plan for Federal Fiscal Year 2022 (FY 2022).

DATES: Comments and related material to be received by November 12, 2021.

ADDRESSES: Submit comments to the Denali Commission, Attention: Anne Stanislowski, 510 L Street, Suite 410, Anchorage, AK 99501.

FOR FURTHER INFORMATION CONTACT: Anne Stanislowski, Denali Commission, 510 L Street, Suite 410, Anchorage, AK 99501. Telephone: (907) 271–3011. Email: *astanislowski@denali.gov.*

SUPPLEMENTARY INFORMATION: *Background:* The Denali Commission's mission is to partner with tribal, federal, state, and local governments and collaborate with all Alaskans to improve the effectiveness and efficiency of government services, to build and ensure the operation and maintenance of Alaska's basic infrastructure, and to develop a well-trained labor force employed in a diversified and sustainable economy.

By creating the Commission, Congress mandated that all parties involved partner together to find new and innovative solutions to the unique infrastructure and economic development challenges in America's most remote communities. Pursuant to the Denali Commission Act, the Commission determines its own basic operating principles and funding criteria on an annual federal fiscal year (October 1 to September 30) basis. The Commission outlines these priorities and funding recommendations in an annual work plan. The FY 2022 Work Plan was developed in the following manner.

- A workgroup comprised of Denali Commissioners and Commission staff developed a preliminary draft work plan.
- The preliminary draft work plan was published on *Denali.gov* for review by the public in advance of public testimony.
- A public hearing was held to record public comments and recommendations on the preliminary draft work plan.
- Written comments on the preliminary draft work plan were accepted for another ten days after the public hearing.
- All public hearing comments and written comments were provided to Commissioners for their review and consideration.
- Commissioners discussed the preliminary draft work plan in a public meeting and then voted on the work plan during the meeting.
- The Commissioners forwarded their recommended work plan to the Federal Co-Chair, who then prepared the draft work plan for publication in the **Federal Register** providing a 30-day period for public review and written comment. During this time, the draft work plan will also be disseminated to Commission program partners including, but not limited to, the Bureau of Indian Affairs (BIA), the Economic Development Administration (EDA), Department of Agriculture—Rural Utilities Service (USDA/RUS), and the State of Alaska.
- At the conclusion of the Federal Register Public comment period Commission staff provides the Federal Co-Chair with a summary of public comments and recommendations, if any, on the draft work plan.
- If no revisions are made to the draft, the Federal Co-Chair provides notice of approval of the work plan to the Commissioners and forwards the work plan to the Secretary of Commerce for approval; or, if there are revisions the Federal Co-Chair provides notice of modifications to the Commissioners for their consideration and approval, and upon receipt of approval from Commissioners, forwards the work plan to the Secretary of Commerce for approval.
- The Secretary of Commerce approves the work plan.
- The Federal Co-Chair then approves grants and contracts based upon the approved work plan.

FY 2022 Appropriations Summary

The Commission has historically received federal funding from several sources. The two primary sources at this time include the Energy & Water Appropriation Bill (''base'' or ''discretionary'' funds) and an annual allocation from the Trans-Alaska Pipeline Liability (TAPL) fund. The proposed FY 2022 Work Plan assumes the Commission will receive $15,000,000 of base funds, which is the amount referenced in the reauthorization of the Commission passed by Congress in 2016 (ref: Pub. L. 114–322), and a $2,917,000 TAPL allocation based on discussions with the Office of Management and Budget (OMB). Approximately $4,000,000 of the base funds will be used for administrative expenses and non-project program support, leaving $11,000,000 available for program activities. The total base funding shown in the Work Plan also includes an amount typically available from project closeouts and other de-obligations that occur in any given year. Approximately $117,000 of the TAPL funds will be utilized for administrative expenses and non-project program support, leaving $2,800,000 available for program activities. Absent any new specific direction or limitations provided by Congress in the current Energy & Water Appropriations Bill, these funding sources are governed by

the following general principles, either by statute or by language in the Work Plan itself:

- Funds from the Energy & Water Appropriation are eligible for use in all programs.
- TAPL funds can only be used for bulk fuel related projects and activities.
- Appropriated funds may be reduced due to Congressional action, rescissions by OMB, and other federal agency actions.
- All Energy & Water and TAPL investment amounts identified in the work plan, are ''up to'' amounts, and may be reassigned to other programs included in the current year work plan, if they are not fully expended in a program component area or a specific project.
- Energy & Water and TAPL funds set aside for administrative expenses that subsequently become available, may be used for program activities included in the current year work plan.

DENALI COMMISSION FY2022 FUNDING SUMMARY

Source	Available for program activities
Energy & Water Funds:	
FY 2022 Energy & Water Appropriation [1]	$11,000,000
Subtotal	11,000,000
TAPL Funds:	
FY 2022 Annual Allocation	2,800,000
Grand Total	13,800,000

Notes:
[1] If the final appropriation is less than $15 million the Federal Co-Chair shall reduce investments to balance the FY 2022 Work Plan.

	Base	TAPL	Total
Energy Reliability and Security:			
Diesel Power Plants and Interties	$2,900,000		$2,900,000
Wind, Hydro, Biomass, Other Proven Renewables and Emerging Technologies	750,000		750,000
Audits, TA, & Community Energy Efficiency Improvements	375,000		375,000
RPSU Maintenance and Improvement Projects	900,000		900,000
Subtotal	4,925,000		4,925,000
Bulk Fuel Safety and Security:			
New/Refurbished Facilities		1,500,000	1,500,000
Maintenance and Improvement Projects		700,000	700,000
Subtotal	0	2,200,000	2,200,000
Village Infrastructure Protection	500,000		500,000
Transportation	1,000,000		1,000,000
Sanitation:			
Village Water, Wastewater and Solid Waste	1,500,000		1,500,000
Subtotal	1,500,000		1,500,000
Health Facilities	750,000		750,000
Housing	500,000		500,000
Broadband	750,000		750,000
Workforce Development:			
Energy and Bulk Fuel	375,000	600,000	975,000
Other	700,000		700,000
Subtotal	1,075,000	600,000	1,675,000
Totals	11,000,000	2,800,000	13,800,000

Authority: Pub. L. 105–277 Section 304(b)(1).

John Whittington,

General Counsel.

[FR Doc. 2021–22977 Filed 10–20–21; 8:45 am]

BILLING CODE 3300–01–P

DEPARTMENT OF EDUCATION

Tests Determined To Be Suitable for Use in the National Reporting System for Adult Education

AGENCY: Office of Career, Technical, and Adult Education, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary announces tests, test forms, and delivery formats that the Secretary determines to be suitable for use in the National Reporting System for Adult Education (NRS). This notice relates to the approved information collections under OMB control numbers 1830–0027 and 1830–0567.

FOR FURTHER INFORMATION CONTACT: John LeMaster, Department of Education, 400

Maryland Avenue SW, Room 10–223, Potomac Center Plaza, Washington, DC 20202–7240. Telephone: (202) 245–6218. Email: *John.LeMaster@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 January 14, 2008, and as amended on August 19, 2016, we published in the **Federal Register** final regulations for 34 CFR part 462, Measuring Educational Gain in the National Reporting System for Adult Education (NRS regulations) (73 FR 2305, January 14, 2008, as amended at 81 FR 55552, August 19, 2016). The NRS regulations established the process the Secretary uses to determine the suitability of tests for use in the NRS by States and local eligible providers. We annually publish in the **Federal Register**, and post on the internet at *www.nrsweb.org,* a list of the names of tests and the educational functioning levels the tests are suitable to measure in the NRS as required by § 462.12(c)(2).

On August 7, 2020, the Secretary published in the **Federal Register** (85 FR 47952) an annual notice consolidating information from previous notices that announced tests determined to be suitable for use in the NRS, in accordance with § 462.13 (August 2020 notice). Also, in the August 2020 notice, the Secretary announced that ESL tests and test forms approved for an extended period through February 2, 2021, are approved for an additional extended period through February 2, 2023, and that an Adult Basic Education (ABE) test and test forms previously approved for a three-year period through March 7, 2021, are approved for an extended period through March 7, 2023.

The Secretary took this action with respect to the previously approved tests and test forms, due to the Department's desire to minimize potential disruption in access to new tests for its grantees caused by the Novel Coronavirus Disease (COVID–19).

In this notice, the Secretary publishes the same list of approved tests and test forms as was published in the August 2020 notice.

Adult education programs must use only the forms and computer-based delivery formats for the tests approved in this notice. If a particular test form or computer delivery format is not explicitly specified for a test in this notice, it is not approved for use in the NRS. TESTS DETERMINED TO BE SUITABLE FOR USE IN THE NRS FOR A SEVEN-YEAR PERIOD FROM THE PUBLICATION DATE OF THE ORIGINAL NOTICE IN WHICH THEY WERE ANNOUNCED:

The Secretary has determined that the following test is suitable for use in Literacy/English Language Arts and Mathematics at all ABE levels of the NRS until September 7, 2024:

(1) *Tests of Adult Basic Education (TABE 11/12).* Forms 11 and 12 are approved for use on paper and through a computer-based delivery format. Publisher: Data Recognition Corporation—CTB, 13490 Bass Lake Road, Maple Grove, MN 55311. Telephone: 800–538–9547. Internet: *www.ctb.com/.*

The Secretary has determined that the following test is suitable for use in Literacy/English Language Arts at all ABE levels of the NRS until February 5, 2025:

(1) *Comprehensive Adult Student Assessment System (CASAS) Reading GOALS Series.* Forms 901, 902, 903, 904, 905, 906, 907, and 908 are approved for use on paper and through a computer-based delivery format. Publisher: CASAS, 5151 Murphy Canyon Road, Suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org/.*

The Secretary has determined that the following tests are suitable for use at ABE levels 2 through 6 of the NRS until May 2, 2026:

(1) *Massachusetts Adult Proficiency Test—College and Career Readiness (MAPT–CCR) for Reading.* This test is approved for use through a computer-adaptive delivery format. Publisher: Massachusetts Department of Elementary and Secondary Education and University of Massachusetts Amherst, College of Education, N110, Furcolo Hall, 813 North Pleasant Street, Amherst, MA 01003. Telephone: (413) 545–0564. Internet: *www.doe.mass.edu/acls/assessment/.*

(2) *Massachusetts Adult Proficiency Test—College and Career Readiness (MAPT–CCR) for Mathematics.* This test is approved for use through a computer-adaptive delivery format. Publisher: Massachusetts Department of Elementary and Secondary Education and University of Massachusetts Amherst, College of Education, N110, Furcolo Hall, 813 North Pleasant Street, Amherst, MA 01003. Telephone: (413) 545–0564. Internet: *www.doe.mass.edu/acls/assessment/.* TEST DETERMINED TO BE SUITABLE FOR USE IN THE NRS FOR A THREE-YEAR PERIOD FROM THE PUBLICATION DATE OF THE ORIGINAL NOTICE IN WHICH IT WAS ANNOUNCED AND APPROVED FOR AN EXTENDED PERIOD THROUGH MARCH 7, 2023:

The Secretary has determined that the following test is suitable for use in Mathematics at all ABE levels of the NRS until March 7, 2023:

(1) *Comprehensive Adult Student Assessment System (CASAS) Math GOALS Series.* Forms 900, 913, 914, 917, and 918 are approved for use on paper and through a computer-based delivery format. Publisher: CASAS, 5151 Murphy Canyon Road, Suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org/.* ESL TESTS PREVIOUSLY APPROVED FOR AN EXTENDED PERIOD THROUGH FEBRUARY 2, 2021, AND APPROVED FOR AN ADDITIONAL EXTENDED PERIOD THROUGH FEBRUARY 2, 2023:

The Secretary has determined that the following tests are suitable for use at all ESL levels of the NRS until February 2, 2023:

(1) *Basic English Skills Test (BEST) Literacy.* Forms B, C, and D are approved for use on paper. Publisher: Center for Applied Linguistics, 4646 40th Street NW, Washington, DC 20016–1859. Telephone: (202) 362–0700. Internet: *www.cal.org.*

(2) *Basic English Skills Test (BEST) Plus 2.0.* Forms D, E, and F are approved for use on paper and through the computer-adaptive delivery format. Publisher: Center for Applied Linguistics, 4646 40th Street NW, Washington, DC 20016–1859. Telephone: (202) 362–0700. Internet: *www.cal.org.*

(3) *Comprehensive Adult Student Assessment Systems (CASAS) Life and Work Listening Assessments (LW Listening).* Forms 981L, 982L, 983L, 984L, 985L, and 986L are approved for use on paper and through the computer-based delivery format. Publisher: CASAS, 5151 Murphy Canyon Road, Suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org.*

(4) *Comprehensive Adult Student Assessment Systems (CASAS) Reading Assessments (Life and Work, Life Skills, Reading for Citizenship, Reading for Language Arts—Secondary Level).* Forms 27, 28, 81, 82, 81X, 82X, 83, 84, 85, 86, 185, 186, 187, 188, 310, 311, 513, 514, 951, 952, 951X, and 952X of this test are approved for use on paper and through the computer-based delivery format. Publisher: CASAS, 5151 Murphy Canyon Road, Suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org.*

(5) *Tests of Adult Basic Education Complete Language Assessment System-English (TABE/CLAS–E).* Forms A and B

are approved for use on paper and through a computer-based delivery format. Publisher: Data Recognition Corporation—CTB, 13490 Bass Lake Road, Maple Grove, MN 55311. Telephone: (800) 538–9547. Internet: *www.tabetest.com.*

Revocation of Tests

Under certain circumstances, the Secretary may revoke the determination that a test is suitable (see § 462.12(e)). If the Secretary revokes the determination of suitability, the Secretary announces the revocation, as well as the date by which States and local eligible providers must stop using the revoked test, through a notice published in the **Federal Register** and posted on the internet at *www.nrsweb.org.*

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.

Program Authority: 29 U.S.C. 3292.

Jennifer Mishory,

Chief of Staff, delegated the authority to perform the functions and duties of the Assistant Secretary for Career, Technical, and Adult Education.

[FR Doc. 2021–22951 Filed 10–20–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Membership of the Performance Review Board

AGENCY: Office of Finance and Operations, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary publishes a list of persons who may be named to serve on the Performance Review Board that oversees the evaluation of performance appraisals for Senior Executive Service members of the Department of Education (Department).

DATES: These appointments are effective on October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Jennifer Geldhof, Director, Executive Resources Division, Office of Human Resources, Office of Finance and Operations, U.S. Department of Education, 400 Maryland Avenue SW, Room 210–00, LBJ, Washington, DC 20202–4573. Telephone: (202) 580–9669. Email: *Jennifer.Geldhof@ed.gov.*

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

SUPPLEMENTARY INFORMATION:

Membership

Under the Civil Service Reform Act of 1978, Public Law 95–454 (5 U.S.C. 4314(c)(4)), the Department must publish in the **Federal Register** a list of persons who may be named to serve on the Performance Review Board that oversees the evaluation of performance appraisals for Senior Executive Service members of the Department. The following persons may be named to serve on the Performance Review Board:

BYRD–JOHNSON, LINDA E.
CHANG, LISA E.
HARRIS, ANTONIA T.
LOPEZ, LUIS RONALDO
LUCAS, RICHARD J.
MALAWER, HILARY EVE
SANTY, ROSS C. JR.

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.

Miguel Cardona,

Secretary of Education.

[FR Doc. 2021–22917 Filed 10–20–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Intent To Revise Power Marketing Policy Cumberland System of Projects

AGENCY: Southeastern Power Administration (Southeastern), Department of Energy (DOE).

ACTION: Notice of intention to begin a public process.

SUMMARY: Pursuant to its Procedure for Public Participation in the Formulation of Marketing Policy, published in the **Federal Register** of July 6, 1978, Southeastern Power Administration (Southeastern) intends to revise its marketing policy by including provisions regarding renewable energy certificates (RECs) from its Cumberland System of Projects. The current power marketing policy was published on August 5, 1993, for the Southeastern Cumberland System, and is reflected in contracts for the sale of system power, which are maintained in the Southeastern headquarters office. Southeastern solicits written comments and proposals in formulating the proposed marketing policy revision.

DATES: Comments and proposals must be submitted on or before December 20, 2021.

ADDRESSES: Written comments or proposals should be submitted to Virgil G. Hobbs III, Administrator, Southeastern Power Administration, 1166 Athens Tech Road, Elberton, GA 30635–6711, (706) 213–3800, *Comments@sepa.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Leon Jourolmon IV, General Counsel, (706) 213–3800, *Comments@sepa.doe.gov.*

SUPPLEMENTARY INFORMATION: A ''Final Power Marketing Policy Cumberland System of Projects'' was developed and published in the **Federal Register** on August 5, 1993, 58 FR 41762, by Southeastern. The policy establishes the marketing area for system power and addresses the utilization of area utility systems for essential purposes. The policy also addresses wholesale rates, resale rates, and conservation measures, but does not address RECs.

Under Section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s), Southeastern is responsible for the transmission and disposition of electric power and energy from reservoir projects operated by the Department of the Army. Furthermore, Southeastern must transmit and dispose of such power and energy in a manner that offers the most widespread use at the lowest possible rates to consumers consistent with sound business principles. Rate schedules are drawn with regards to the recovery of the cost of producing and transmitting such electric energy.

The Cumberland System consists of nine projects: Barkley, Center Hill, Cheatham, Cordell Hull, Dale Hollow, Laurel, Old Hickory, J. Percy Priest, and Wolf Creek. The power from the projects is currently marketed to Preference Customers located in the service areas of the Tennessee Valley Authority, Big Rivers Electric Corporation, Duke Energy Progress, East Kentucky Power Cooperative, Kentucky Utilities, Municipal Electric Agency of Mississippi, Mississippi Delta Energy Agency, the seven-member Cooperative Energy currently receiving Cumberland power, and Southern Illinois Power Cooperative.

Southeastern has been using the Generation Attribute Tracking System (GATS) provided through PJM Interconnection, LLC, for the Kerr-Philpott System of Projects. The attributes are unbundled from the megawatt-hour of energy produced and recorded onto a certificate. These certificates may be used by electricity suppliers and other energy market participants to comply with relevant state policies and regulatory programs and to support voluntary ''green'' electricity markets. Southeastern is considering using the similar M–RETS® product or another product for distributing certificates to current Preference Customers with allocations of power from the Cumberland System.

The REC tracking system Southeastern selects should be capable of tracking environmental attributes used for voluntary claims in all states, provinces, and territories in North America.

Upon formulating a proposed revision to the Cumberland System marketing policy to address RECs, Southeastern will publish the proposal in the **Federal Register** and begin a sixty-day comment period pursuant to its Procedures for Public Participation in the Formulation of Marketing Policy.

Signing Authority

This document of the Department of Energy was signed on October 12, 2021, by Virgil G. Hobbs III, Administrator for Southeastern Power Administration, pursuant to delegated authority from the Secretary of Energy. That document, with the original signature and date, is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on October 15, 2021.

Treena V. Garrett,

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

[FR Doc. 2021–22873 Filed 10–20–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP21–134–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Schedule for Environmental Review of the Happytown Abandonment Project

On April 8, 2021, Transcontinental Gas Pipe Line Company, LLC filed an application in Docket No. CP21–134–000 requesting authorization pursuant to Section 7(b) of the Natural Gas Act to abandon certain natural gas pipeline facilities. The proposed project is known as the Happytown Abandonment Project (Project) and would involve abandoning pipeline segments totaling approximately 29.6 miles, as well as appurtenant facilities. The Project would abandon inactive facilities, which would have no impact on Transco's operations and the ability of Transco's Mainlines A, B, and C to provide natural gas service.

On April 22, 2021, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA—January 7, 2022

90-day Federal Authorization Decision Deadline—April 7, 2022

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

Transco proposes to abandon approximately 29.6 miles of pipeline comprising of 8-, 10-, and 12-inch-diameter pipeline segments in Pointe Coupée Parish, Louisiana. Of the 29.6 miles, approximately 28.8 miles would be abandoned in place, and the remaining 0.8 mile of pipeline would be abandoned by removal. Additionally, Transco would remove meter stations 2040, 2328, 3267, and 2327 also located in Pointe Coupée Parish. According to Transco, the facilities proposed to be abandoned have not been utilized in over a year and are not expected to be used in the future.

Background

On August 19, 2021, the Commission issued a *Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Happytown Abandonment Project* (NOS). The NOS was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the NOS, the Commission received comments from the U.S. Environmental Protection Agency, the Alabama-Coushatta Tribe of Texas, the Choctaw Nation of Oklahoma, and a Mr. Dave F. Butler. The primary issues raised by the commentors are environmental justice and concern regarding the Louisiana black bear. All substantive comments will be addressed in the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC website (*www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' excluding the last three digits (*i.e.,* CP21–134), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: October 15, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–22968 Filed 10–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12758–007]

BOST5 Hydroelectric LLC; Notice of Effectiveness of Withdrawal of Application for Amendment of License

On February 9, 2021, BOST5 Hydroelectric LLC (BOST5) filed an application to amend the license for the Red River Lock and Dam No. 5 Hydroelectric Project. On September 20, 2021, BOST5 filed a notice of withdrawal of its application for amendment of license.

No motion in opposition to the notice of withdrawal has been filed, and the Commission has taken no action to disallow the withdrawal. Pursuant to Rule 216(b) of the Commission's Rules of Practice and Procedure,[1] the withdrawal of the amendment application became effective on October 6, 2021, and this proceeding is hereby terminated.

Dated: October 15, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–22962 Filed 10–20–21; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR 385.216(b) (2020).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC22–3–000.
Applicants: MPH AL Pierce, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act of MPH AL Pierce, LLC.
Filed Date: 10/15/21.
Accession Number: 20211015–5119.
Comment Date: 5 p.m. ET 11/5/21.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG22–8–000.
Applicants: Sagebrush Line, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Sagebrush Line, LLC.
Filed Date: 10/15/21.
Accession Number: 20211015–5148.
Comment Date: 5 p.m. ET 11/5/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2532–017.
Applicants: Crescent Ridge LLC.
Description: Notice of Non-Material Change in Status of Crescent Ridge LLC.
Filed Date: 9/16/21.
Accession Number: 20210916–5175.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER20–1298–001.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Compliance filing: 2021–10–15_MISO TOs Order 864 Compliance Amendment filing to be effective 1/27/2020.
Filed Date: 10/15/21.
Accession Number: 20211015–5132.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER20–1505–004.
Applicants: Basin Electric Power Cooperative.
Description: Amendment to June 29, 2021 Triennial Market Power Analysis for Southwest Power Pool, Inc. Region of Basin Electric Power Cooperative.
Filed Date: 10/8/21.
Accession Number: 20211008–5246.
Comment Date: 5 p.m. ET 10/29/21.

Docket Numbers: ER21–2888–001.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: Tariff Amendment: Errata to Amendment to Rate Schedule FERC No. 71 to be effective 9/16/2021.
Filed Date: 10/15/21.
Accession Number: 20211015–5103.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–98–000.
Applicants: Empire Offshore Wind LLC.
Description: Request for Limited Waiver and Expedited Action of Empire Offshore Wind LLC.
Filed Date: 10/13/21.
Accession Number: 20211013–5208.
Comment Date: 5 p.m. ET 11/3/21.

Docket Numbers: ER22–112–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3517R3 Plum Creek Wind, LLC GIA to be effective 9/29/2021.
Filed Date: 10/15/21.
Accession Number: 20211015–5014.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–113–000.
Applicants: ISO New England Inc.
Description: § 205(d) Rate Filing: ISO–NE; 2022 Capital Budget & Rev Tariff Sheets for Recovery of 2022 Admin Costs to be effective 1/1/2022.
Filed Date: 10/15/21.
Accession Number: 20211015–5023.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–114–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6194; Queue AD1–140 to be effective 10/18/2021.
Filed Date: 10/15/21.
Accession Number: 20211015–5027.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–115–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: § 205(d) Rate Filing: METC Rate Schedule No. 79 TSA with Midland Cogeneration Venture to be effective 12/15/2021.
Filed Date: 10/15/21.
Accession Number: 20211015–5039.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–116–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Compliance filing: 2021–10–15_Request for Order re: OMS Authorized Agency status to be effective N/A.
Filed Date: 10/15/21.

Accession Number: 20211015–5050.
Comment Date: 5 p.m. ET 10/22/21.

Docket Numbers: ER22–117–000.
Applicants: ISO New England Inc.
Description: § 205(d) Rate Filing: ISO–NE; Revised Tariff Sheets for Recovery of Costs for 2022 Operation of NESCOE to be effective 1/1/2022.
Filed Date: 10/15/21.
Accession Number: 20211015–5054.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–118–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: Third Amended LGIA SA No. 98 Maverick Solar (Correction) to be effective 12/15/2021.
Filed Date: 10/15/21.
Accession Number: 20211015–5059.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–119–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1977R17 Nemaha-Marshall Electric Cooperative NITSA and NOA to be effective 10/1/2021.
Filed Date: 10/15/21.
Accession Number: 20211015–5079.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–120–000.
Applicants: Southern California Edison Company.
Description: Tariff Amendment: Amended GIA Tours Solar, LLC SA No. 980 & Termination of eTariff Record to be effective 10/16/2021.
Filed Date: 10/15/21.
Accession Number: 20211015–5082.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–121–000.
Applicants: Southern California Edison Company.
Description: Tariff Amendment: Amended GIA Syracuse Solar, LLC SA No. 978 & Termination of eTariff Record to be effective 10/16/2021.
Filed Date: 10/15/21.
Accession Number: 20211015–5100.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–122–000.
Applicants: LS Power Grid New York Corporation I, New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: LS Power Grid New York Corporation I submits tariff filing per 35.13(a)(2)(iii: LSPGNY 205 filing: Commencement of Collection of Regulatory Assets to be effective 1/1/2022.
Filed Date: 10/15/21.
Accession Number: 20211015–5121.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–123–000.
Applicants: Hecate Energy Highland LLC.
Description: Baseline eTariff Filing: Application for MBR Authorization and Requests for Certain Waivers, et al. to be effective 10/16/2021.
Filed Date: 10/15/21.
Accession Number: 20211015–5131.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–124–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 5319; Queue No. AB2–015 to be effective 3/7/2019.
Filed Date: 10/15/21.
Accession Number: 20211015–5163.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ER22–125–000.
Applicants: ISO New England Inc.
Description: ISO New England Inc., submits Third Quarter 2021 Capital Budget Report.
Filed Date: 10/15/21.
Accession Number: 20211015–5164.
Comment Date: 5 p.m. ET 11/5/21.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES22–9–000.
Applicants: Baltimore Gas and Electric Company.
Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Baltimore Gas and Electric Company.
Filed Date: 10/15/21.
Accession Number: 20211015–5134.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ES22–10–000.
Applicants: Commonwealth Edison Company.
Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Commonwealth Edison Company.
Filed Date: 10/15/21.
Accession Number: 20211015–5141.
Comment Date: 5 p.m. ET 11/5/21.

Docket Numbers: ES22–11–000.
Applicants: PECO Energy Company.
Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of PECO Energy Company.
Filed Date: 10/15/21.
Accession Number: 20211015–5142.
Comment Date: 5 p.m. ET 11/5/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 15, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–22986 Filed 10–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2246–094]

Yuba County Water Agency; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Application for Temporary Variance of Pulse Flow Requirement.
b. *Project No:* 2246–094.
c. *Date Filed:* October 8, 2021.
d. *Applicant:* Yuba County Water Agency (licensee).
e. *Name of Project:* Yuba River Project.
f. *Location:* The project is located on the Middle Yuba River, North Fork Yuba River, and Oregon Creek in Nevada, Yuba, and Sierra counties, California.
g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.
h. *Applicant Contact:* Mr. Willie Whittlesey, General Manager, Yuba County Water Agency, (530) 741–5026, *wwhittlesey@yubawater.org.*
i. *FERC Contact:* John Aedo, (415) 369–3335, *john.aedo@ferc.gov.*
j. *Deadline for filing comments, motions to intervene, and protests:* November 15, 2021.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the

eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–2246–094. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The licensee requests a temporary variance of its winter pulse flow requirement. Specifically, the licensee proposes to forego its required 1,000 cubic feet per second (cfs) flow pulse from January 1–15, 2022. The licensee proposes to instead, release a flow of 550 cfs in the lower Yuba River from the Englebright Dam. In addition, the licensee requests that compliance during the variance period be based on the 5-day running average of daily average flows, with the 15-minute flow not less than 90 percent of the adjusted flow requirement. The licensee requests the variance in order to conserve limited water resources at the project as a result of current drought conditions.

l. *Locations of the Application:* This filing may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: October 15, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–22963 Filed 10–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP22–3–000]

Columbia Gas Transmission, LLC; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on October 4, 2021, Columbia Gas Transmission, LLC (Columbia), 700 Louisiana Street, Suite 1300, Houston, Texas 77002, filed in the above referenced docket a prior notice pursuant to sections 157.205 and 157.208(b) of the Federal Energy Regulatory Commission's regulations under the Natural Gas Act (NGA), and Columbia's blanket certificate issued in Docket No. CP83–76–000, for authorization to: (i) Install approximately 3.25-mile-long, 24-inch-diameter pipeline extension from Columbia's existing crossover between Line A–159 and Line A–79 (Crossover) eastward to the existing Mt. Sterling Regulator Station (RS); (ii) replace approximately 20 feet of existing 20-inch-diameter pipeline at the Crossover; (iii) replace one existing mainline valve and two non-piggable elbows at three separate locations along existing Line A–159; and (iv) install new aboveground bi-directional launcher/receiver settings and associated piping at the existing Mt. Sterling RS and Howell RS. All of the above facilities are located in Madison and Greene Counties, Ohio (Line A–159 Extension Project). The project will allow Columbia to reconfigure gas flow, eliminate 36 pounds per square inch gauge (psig) pressure drop between the existing Mt. Sterling RS and the existing start of Line A–159, and maximize delivery capabilities on its system. Columbia states that the maximum operating pressure (MAOP) for the project will not exceed the current MAOP of 500 psig. The estimated cost for the project is $27.3 million, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application should be directed to David Alonzo, Manager, Project

Authorizations, Columbia Gas Transmission, LLC, 700 Louisiana Street, Suite 1300, Houston, Texas 77002–2700, at (832) 320–5477 or *david_alonzo@tcenergy.com.*

Public Participation

There are three ways to become involved in the Commission's review of this project: You can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5:00 p.m. Eastern Time on December 14, 2021. How to file protests, motions to intervene, and comments is explained below.

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[1] any person [2] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is December 14, 2021. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is December 14, 2021. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before December 14, 2021. The filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP22–3–000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select General'' and then select ''Protest'', ''Intervention'', or ''Comment on a Filing''; or [6]

(2) You can file a paper copy of your submission by mailing it to the address below.[7] Your submission must reference the Project docket number CP22–3–000. Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: David Alonzo, Manager, Project Authorizations, Columbia Gas Transmission, LLC, 700 Louisiana Street, Suite 1300, Houston, Texas 77002–2700, at (832) 320–5477 or *david_alonzo@tcenergy.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

[1] 18 CFR 157.205.

[2] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[3] 18 CFR 157.205(e).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

[6] Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

[7] Hand-delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: October 15, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–22961 Filed 10–20–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP22–46–000.
Applicants: Carolina Gas Transmission, LLC.
Description: § 4(d) Rate Filing: CGT—October 14, 2021 Negotiated Rate Agreement to be effective 10/16/2021.
Filed Date: 10/14/21.
Accession Number: 20211014–5055.
Comment Date: 5 p.m. ET 10/26/21.

Docket Numbers: RP22–47–000.
Applicants: ANR Pipeline Company.
Description: § 4(d) Rate Filing: TVA Negotiated Rate Agreement No. 126586 to be effective 10/15/2021.
Filed Date: 10/14/21.
Accession Number: 20211014–5109.
Comment Date: 5 p.m. ET 10/26/21.

Docket Numbers: RP22–48–000.
Applicants: Kiwetinohk Marketing US Corp., Kiwetinokh Energy Corp.
Description: Joint Petition for Limited Waiver of Capacity Release Regulations, *et al.* of Kiwetinohk Energy Corp, *et al.*
Filed Date: 10/14/21.
Accession Number: 20211014–5137.
Comment Date: 5 p.m. ET 10/26/21.

Docket Numbers: RP22–49–000.
Applicants: National Fuel Gas Supply Corporation.
Description: § 4(d) Rate Filing: Tariff Records for the FM100 Project to be effective 12/1/2021.
Filed Date: 10/15/21.
Accession Number: 20211015–5057.
Comment Date: 5 p.m. ET 10/27/21.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 15, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–22980 Filed 10–20–21; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9133–01–OA]

Farm, Ranch, and Rural Communities Advisory Committee (FRRCC); Notice of Virtual Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), the Environmental Protection Agency (EPA) is announcing a virtual, open, public meeting of the Farm, Ranch, and Rural Communities Advisory Committee (FRRCC) on November 15–16, 2021, with remote participation only. There will be no in-person gathering for this meeting.

DATES: This virtual public meeting will be held on Monday, November 15, 2021, from 11:00 a.m. to approximately 5:00 p.m., and Tuesday, November 16, 2021, from 11:00 a.m. to approximately 5:00 p.m., Eastern Daylight Time. Members of the public seeking to view the meeting (but not provide oral comments) may register any time prior to the meeting. Members of the public seeking to make oral comments during the virtual meeting must register and contact the Designated Federal Officer directly by 12:00 p.m. Eastern Daylight Time on November 8, 2021 to be placed on a list of registered commenters and receive special instructions for participation.

ADDRESSES: To register and receive information on how to attend this virtual meeting, please visit: *www.epa.gov/faca/frrcc.* Attendees must register online prior to the meeting to receive instructions for participation.

FOR FURTHER INFORMATION CONTACT: Emily Selia, Designated Federal Officer (DFO), at *FRRCC@epa.gov* or 202–564–7719. Please note that, due to Coronavirus (COVID–19), there are currently practical limitations on the ability of EPA personnel to collect and respond to mailed ''hard copy'' correspondence. General information regarding the FRRCC can be found on the EPA website at: *www.epa.gov/faca/frrcc.*

SUPPLEMENTARY INFORMATION:

I. General Information

The purpose of the FRRCC is to provide policy advice, information, and recommendations to the EPA Administrator on a range of environmental issues and policies that are of importance to agriculture and rural communities. The purpose of this meeting is to discuss topics of relevance to agriculture and rural communities, specifically the FRRCC's recommendations on the two charge topics (1) creating a holistic pesticide program for the future and (2) supporting inter-agency environmental benchmarks with interagency partners on the issues of water quality and quantity and food loss and waste. A copy of the FRRCC charges and meeting agenda will be posted at *www.epa.gov/faca/frrcc.* This will be the third public meeting of the membership of the FRRCC which was appointed in June of 2020. Potentially interested entities may include: farmers, ranchers, and rural communities and their allied industries; as well as the academic/research community who research environmental issues impacting agriculture; state, local, and tribal government agencies; and nongovernmental organizations.

II. How do I participate in the virtual public meeting?

A. Virtual Meeting

This meeting will be conducted as a virtual conference. You may attend by registering online before the meeting to receive information on how to participate. You may also submit written or oral comments for the committee by contacting the DFO directly per the processes outlined below.

B. Registration

Attendees should register via the link on this website prior to the meeting to receive information on how to participate in the virtual meeting: *www.epa.gov/faca/frrcc.*

C. Procedures for Providing Public Comments

Oral Statements: Oral comments at this virtual conference will be limited to the Public Comments portions of the Meeting Agenda. Members of the public may provide oral comments limited to three minutes per individual or group

and submit further information in written comments. Persons interested in providing oral statements should register as attendees at the link provided above, and also contact the DFO directly at *FRRCC@epa.gov* by 12:00 p.m. Eastern Daylight Time on November 8, 2021 to be placed on the list of registered speakers and receive special instructions for participation. Oral commenters will be provided an opportunity to speak in the order in which their request was received by the DFO.

Written Statements: Persons interested in providing written statements pertaining to this committee meeting may email them to the DFO at *FRRCC@epa.gov* prior to 11:59 p.m. Eastern Daylight Time on November 30, 2021.

D. Availability of Meeting Materials

The Meeting Agenda and other materials for the virtual conference will be posted on the FRRCC website at *www.epa.gov/faca/frrcc.*

E. Accessibility

Persons with disabilities who wish to request reasonable accommodations to participate in this event may contact the DFO at *FRRCC@epa.gov* or 202–564–7719 by 12:00 p.m. Eastern Daylight Time on November 10, 2021. All final meeting materials will be posted to the FRRCC website in an accessible format following the meeting, as well as a written summary of this meeting.

Rosemary Enobakhare,

Associate Administrator for Public Engagement and Environmental Education.

[FR Doc. 2021–23002 Filed 10–20–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[ET Docket No. 21–352; FCC 21–100; FR ID 53409]

FCC Requests 6 GHz Automated Frequency Coordination Proposals

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission begins the process of authorizing standard power unlicensed operations in the 6 GHz band by inviting proposals from parties interested in operating an automated frequency coordination (AFC) system in accordance with the *6 GHz Report and Order.* This *Public Notice* summarizes the requirements for AFC systems as set forth in that order, describes the information that must be provided with proposals to operate an AFC system, and describes the procedures for designating AFC system operators.

DATES: Initial AFC system proposals are due on November 30, 2021, and comments regarding the proposals are due on December 21, 2021.

ADDRESSES: Federal Communications Commission, 45 L Street NE, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Nicholas Oros, Office of Engineering and Technology, 202–418–0636, *Nicholas.Oros@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, *Public Notice,* FCC 21–100, ET Docket No. 21–352, released September 28, 2021. The full text of this document is available for public inspection and can be downloaded at: *https://www.fcc.gov/document/fcc-requests-6-ghz-automated-frequency-coordination-proposals* or by using the search function for ET Docket No. 21–352 on the Commission's ECFS web page at *www.fcc.gov/ecfs. People with Disabilities.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

1. The *6 GHz Report and Order* (FCC 20–51; 35 FCC Rcd 3852 (2020); 85 FR 31390 (May, 26 2020)) authorized two different types of unlicensed operations—standard-power and indoor low-power operations. Standard-power operations, which encompass standard-power access points and fixed client devices (collectively referred to as standard-power devices in this *Public Notice*), are permitted in the 5.925–6.425 GHz and 6.525–6.875 GHz portions of the 6 GHz band and must operate under the control of an automated frequency coordination (AFC) system to prevent harmful interference to fixed microwave links that operate in the band. The standard-power devices are required to have a geo-location capability and, at least once per day, must communicate their location to an AFC system, which will provide them with the frequencies and maximum power levels at which they may operate without causing harmful interference to any microwave links. The AFC system will also prevent operation of standard-power devices in the 6.6500–6.6752 GHz band near a limited number of radio astronomy observatories.

EXPANDED UNLICENSED USE OF THE 6 GIGAHERTZ BAND

Device class	Operating bands	Maximum EIRP	Maximum EIRP power spectral density
Standard-Power Access Point (AFC Controlled)	U–NII–5 (5.925–6.425 GHz)	36 dBm	23 dBm/MHz.
Fixed Client (AFC Controlled)	U–NII–7 (6.525–6.875 GHz)	36 dBm	23 dBm/MHz.
Client Connected to Standard-Power Access Point		30 dBm	17 dBm/MHz.
Low-Power Access Point (indoor only)	U–NII–5 (5.925–6.425 GHz)	30 dBm	5 dBm/MHz.
Client Connected to Low-Power Access Point	U–NII–6 (6.425–6.525 GHz) U–NII–7 (6.525–6.875 GHz) U–NII–8 (6.875–7.125 GHz)	24 dBm	−1 dBm/MHz.

2. The *6 GHz Report and Order* specifies how the AFC systems will determine which frequencies are available for use by standard-power devices. Once per day each AFC system is required to access the Commission's Universal Licensing System (ULS) to obtain the most up-to-date information on licensed microwave links including their transmitter and receiver locations, frequencies, bandwidths, polarizations, transmitter EIRP, antenna height, and the make and model of the antenna and equipment used. The AFC systems will use this information, along with the propagation models specified in the *6 GHz Report and Order,* to determine on which frequencies and at what power levels standard-power devices may operate. In making this determination, the AFC systems will ensure that the

predicted interference-to-noise (I/N) ratio at any microwave receiver does not exceed −6 dB. The AFC systems must be capable of determining frequency availability for the standard-power device at the maximum permitted EIRP of 36 dBm and also at power levels as low as 21 dBm.

3. Section 15.407(l)(1) of the Commission's rules specifies the propagation model the AFC system must use for determining frequency availability and power levels, which depends on the distance between the standard-power device and the licensed microwave station. For separation distances of 30 meters or less, the AFC system will use a free space pathloss model. When the separation distance is greater than 30 meters, but less than 1 kilometer, the AFC system will use the WINNER II model. The WINNER II model is one of the most widely used and well-known channel models in the world and was developed from measurements conducted by the WINNER organization, as well as results from academic literature. When using the WINNER II model, the AFC system should use site-specific information, including building and terrain data, for determining the line-of-sight/non-line-of-sight path component where this information is available. For evaluating paths where this data is not available, the rules specify probabilistic combining of the line-of-sight and non-line-of-sight path into a single path-loss. For distances greater than 1 kilometer, the AFC system will use the Irregular Terrain Model (ITM) combined with a clutter model for the local environment. The ITM has been widely available and accepted since the early 1980s, has been used by the Commission for interference prediction in other proceedings, and is the propagation model currently used to determine spectrum availability by the spectrum access systems (SAS) that are managing spectrum access for the 3550–3700 MHz band in the Citizens Broadband Radio Service. When using the ITM, the rules specify that AFC systems are to use 1 arc-second digital elevation terrain data and, for locations where such data is not available, use the most granular digital elevation terrain data available. To account for the effects of clutter, such as from buildings and foliage, the AFC system should combine use of the ITM with statistical clutter model ITU–R P.2108 for urban and suburban environments and the ITU–R P.452–16 clutter model for rural environments.

4. In accordance with the *6 GHz Report and Order,* the Office of Engineering and Technology (OET) can designate one or more AFC system operators. AFC system operators will be required to serve for a five-year term which can be renewed by the Commission based on the operator's performance during the term. If an AFC system operator discontinues service or its term is not renewed, it must transfer its database along with the information necessary to access the database to another designated AFC system operator. AFC system operators are permitted to charge a fee for providing service to standard-power access devices.

I. AFC Proposals and Approval Process

5. As specified in the *6 GHz Report and Order,* OET will follow a multistep process to approve AFC systems in which each prospective AFC system operator must demonstrate its ability to perform the required functions pursuant to the Commission's 6 GHz unlicensed rules. The Commission requests that parties interested in becoming an AFC system operator as part of the initial evaluation process submit their proposals no later than November 30, 2021. The public will then have an opportunity to review and comment on these proposals, including on each prospective operator's fitness to operate an AFC system as well as the technical and operational description of each proposed AFC system. Comments on these proposals must be submitted by December 21, 2021. OET will review all proposals submitted by November 30, 2021 concurrently and with equal priority. Proposals submitted after this date will be considered by OET, but they may not be considered concurrently with proposals submitted by November 30, 2021. For any proposal received after November 30, 2021, OET will issue a public notice announcing receipt of the proposal and establishing a period for the public to review and comment on the proposal. Proposals will not be considered mutually exclusive and OET will conditionally approve as many proposals as are found to satisfy all AFC system requirements.

6. Applicants who receive a conditional approval will then be required to allow access to their AFC system for a public trial period to provide interested parties an opportunity to check that it provides accurate results. This trial period will include thorough testing, both in a controlled environment (*e.g.,* lab testing) and through demonstration projects (*e.g.,* field testing). OET may also require prospective AFC system operators to attend workshops and meetings as part of the assessment process. Prospective AFC system operators must comply with all instructions from OET and must provide any requested information in a timely manner.

7. The AFC system proposals must describe how the prospective AFC system operator will comply with the requirements and core functions described in § 15.407(k) of the Commission's rules and the *6 GHz Report and Order.* To demonstrate compliance, the Commission expects the proposal to include, for example:

1. AFC system operator contact information, including name, phone number and email address that Commission staff may use for all AFC system related inquiries, such as information and data requests or to provide enforcement instructions.

2. A technical diagram showing the architecture of the AFC system with a brief description of its operation.

3. A description of whether the AFC system software is based on a propriety implementation or open source.

4. A demonstration that the prospective AFC system operator possesses sufficient technical expertise to operate an AFC system.

5. A description of the prospective AFC system operator's recordkeeping policies, including registration record retention as well as retention of historical frequency availability data.

6. A description of how the prospective AFC system operator will handle unanticipated situations that may disrupt performance of the system's required functions—ranging from exceptional cases that affect the system's ability to perform its required functions in isolated instances to cases involving the type of widespread disruption that an event like a system failure might cause.

7. A description of the methods (*e.g.,* interfaces, protocols) that will be used for secure communication between the AFC system and its associated standard-power devices and to ensure that unauthorized parties cannot access or alter the database or the list of available frequencies and power levels sent to the standard-power devices.

8. If the prospective AFC system operator will not be performing all AFC functions, information on (1) the entities that will be responsible for operating other functions of the AFC system; and (2) how the Commission can ensure that all of the requirements for AFC systems in the rules are satisfied when AFC functions are divided among multiple entities.

9. A description of how the prospective AFC system operator will provide access to their AFC system for a public trial period which will include thorough testing.

10. An affirmation that the prospective AFC system operator, and any entities responsible for operating other functions of the AFC system under the control of the AFC system operator, will comply with all of the applicable rules as well as applicable enforcement mechanisms and procedures.

8. Prospective AFC system operators must file proposals, and any supplements thereto, with the Commission using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998). To be considered concurrently with the other initial proposals, proposals must be filed on or before the date indicated on the first page of this *Public Notice.* Prospective AFC system operators may request confidential treatment of information contained in their proposals consistent with § 0.459 of the Commission's rules. Comments regarding the AFC system proposals should also be filed using ECFS by the dates indicated on the first page of this *Public Notice.* All such filings should refer to ET Docket 21–352.

9. *Congressional Review Act.* The Commission has determined and Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that this rule is ''non-major'' under the Congressional Review Act, 5. U.S.C. 804(2). The Commission will send a copy of this Public Notice to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2021–22765 Filed 10–20–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064–0018;–0165;–0183;–0195]

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Agency Information Collection Activities: Submission for OMB Review; Comment Request.

SUMMARY: The FDIC, as part of its obligations under the Paperwork Reduction Act of 1995, invites the general public and other Federal agencies to take this opportunity to comment on the request to renew the existing information collections described below (OMB Control No. 3064–0018;–0165;–0183; and–0195).

DATES: Comments must be submitted on or before November 22, 2021.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *Agency website: https://www.fdic.gov/resources/regulations/federal-register-publications/.*
- *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.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: 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:* Application Pursuant to Section 19 of the Federal Deposit Insurance Act.

OMB Number: 3064–0018.

Form Number: 6710–07.

Affected Public: Individuals and FDIC-insured depository institutions.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated average frequency of response	Estimated time per response (hours)	Estimated annual burden (hours)
Application Pursuant to Section 19 of the Federal Deposit Insurance Act.	Reporting	Mandatory	73	1	16	1,168

Total Estimated Annual Burden: 1,168 hours.

General Description of Collection: Section 19 of the Federal Deposit Insurance Act (FDI), 12 U.S.C. Section 1829, requires the FDIC's consent prior to any participation in the affairs of an insured depository institution by an individual who has been convicted of crimes involving dishonesty or breach of trust, and included drug-related convictions. To obtain that consent, certain individuals and insured depository institutions must submit an application to the FDIC for approval on Form FDIC 6710/07.

2. *Title:* Pillar 2 Guidance—Advanced Capital Framework.

OMB Number: 3064–0165.

Form Number: None.

Affected Public: Insured state nonmember banks and certain subsidiaries of these entities.

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)
Pillar 2 Guidance	Recordkeeping	Voluntary	1	4	105	420

Total Estimated Annual Burden: 420 hours.

General Description of Collection: There has been no change in the method or substance of this information collection. The number of institutions subject to the record keeping requirements has decreased from eight (8) to two (2). In 2008 the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the FDIC issued a supervisory guidance document related to the supervisory review process of capital adequacy (Pillar 2) in connection with the implementation of the Basel II Advanced Capital Framework.1 Sections 37, 41, 43 and 46 of the guidance include possible information collections. Section 37 provides that banks should state clearly the definition of capital used in any aspect of its internal capital adequacy assessment process (ICAAP) and document any changes in the internal definition of capital. Section 41 provides that banks should maintain thorough documentation of its ICAAP. Section 43 specifies that the board of directors should approve the bank's ICAAP, review it on a regular basis and approve any changes. Section 46 recommends that boards of directors periodically review the assessment of overall capital adequacy and analyze how measures of internal capital adequacy compare with other capital measures such as regulatory or accounting.

3. *Title:* Credit Risk Retention.

OMB Number: 3064–0183.

Form Number: None.

Affected Public: Insured state nonmember banks, state savings institutions, insured state branches of foreign banks, and any subsidiary of the aforementioned entities.

General Description of Collection: This information collection request comprises disclosure and recordkeeping requirements under the credit risk retention rule issued pursuant to section 15G of the Securities Exchange Act of 1934 (15 U.S.C. 78o–11), as added by Section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank'').[1] The Credit Risk Retention rule (''the Rule'') was jointly issued in 2015 by the Federal Deposit Insurance Corporation (''FDIC''), the Office of the Comptroller of the Currency (''OCC''), the Federal Reserve Board (''Board''), the Securities and Exchange Commission (''SEC'') and, with respect to the portions of the Rule addressing the securitization of residential mortgages, the Federal Housing Finance Agency (''FHFA'') and the Department of Housing and Urban Development (''HUD'').[2] The FDIC regulations corresponding to the Rule are found at 12 CFR part 373.[3]

Section 941 of Dodd-Frank requires the Board, the FDIC, the OCC (collectively, the ''Federal banking agencies''), the Commission and, in the case of the securitization of any ''residential mortgage asset,'' together with HUD and FHFA, to jointly prescribe regulations that (i) require a an issuer of an asset-backed security or a person who organizes and initiates an asset backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer (''issuer or organizer'') to retain not less than five percent of the credit risk of any asset that the issuer or organizer, through the issuance of an asset-backed security (''ABS''), transfers, sells or conveys to a third party and (ii) prohibit an issuer or organizer from directly or indirectly hedging or otherwise transferring the credit risk that the issuer or organizer is required to retain under section 941 and the agencies' implementing rules. Exempted from the credit risk retention requirements of section 941 are certain types of securitization transactions, including ABS collateralized solely by qualified residential mortgages (''QRMs''), as that term is defined in the Rule. In addition, Section 941 provides that the agencies must permit an issuer or organizer to retain less than five percent of the credit risk of residential mortgage loans, commercial real estate (''CRE'') loans, commercial loans and automobile loans that are transferred, sold or conveyed through the issuance of ABS by the issuer or organizer, if the loans meet underwriting standards established by the Federal banking agencies.

The FDIC implemented Section 941 of Dodd-Frank through 12 CFR part 373 (the ''Rule''). The Rule defines a securitizer as (1) The depositor of the asset-backed securities (if the depositor is not the sponsor); or (2) The sponsor of the asset-backed securities.[4] The Rule provides a menu of credit risk retention options from which securitizers can choose and sets out the standards, including disclosure, recordkeeping, and reporting requirements, for each option; identifies the eligibility criteria, including certification and disclosure requirements, that must be met for ABS offerings to qualify for the QRM and other exemptions; specifies the underwriting standards for CRE loans, commercial loans and automobile loans, as well as disclosure, certification and recordkeeping requirements, that must be met for ABS issuances collateralized by such loans to qualify for reduced credit risk retention; and sets forth the circumstances under which retention obligations may be allocated by sponsors to originators, including disclosure and monitoring requirements.

Part 373 contains several requirements that qualify as information collections under the Paperwork Reduction Act of 1995 (''PRA''). The information collection requirements are found in §§ 373.4; 373.5; 373.6; 373.7; 373.8; 373.9; 373.10; 373.11; 373.13; 373.15; 373.16; 373.17; 373.18; and 373.19(g). The recordkeeping requirements relate primarily to (i) the adoption and maintenance of various policies and procedures to ensure and monitor compliance with regulatory requirements and (ii) certifications, including as to the effectiveness of internal supervisory controls. The required disclosures for each risk retention option are intended to provide investors with material information concerning the sponsor's retained interest in a securitization transaction (*e.g.,* the amount, form and nature of the retained interest, material assumptions

[1] Public Law 111–2–3, 124 Stat. 1376 (2010).

[2] 79 FR 77740.

[3] Each agency adopted the same rule text but each agency's version of its rule is codified in different parts of the Code of Federal Regulations with substantially identical section numbers (*e.g.*__.01; .02, etc.) Rule citations herein are to FDIC's version of the Rule which is codified at 12 CFR part 373.

[4] 12 CFR 373.2.

and methodology, representations and warranties). Compliance with the information collection requirements is mandatory, responses to the information collections will not be kept confidential and, with the exception of the recordkeeping requirements in sections 373.4(d), 373.5(k)(3) and 373.15(d), the Rule does not specify a mandatory retention period for the information.

Burden Estimate

Change Is Burden Estimation Methodology

(1) Prior Methodology

To determine the total paperwork burden for the requirements contained in the Credit Risk Retention Rule, FDIC first estimated the universe of sponsors that would be required to comply with the disclosure and recordkeeping requirements. FDIC estimated that approximately 270 unique sponsors conduct ABS offerings each year.[5] This estimate was based on the average number of ABS offerings from 2007 through 2017 reported by the ABS database Asset-Backed Alert for all non-CMBS transactions and by Commercial Mortgage Alert for all CMBS transactions.[6] Of the 270 sponsors, the agencies assigned 8 percent of these sponsors to the Board, 12 percent to FDIC, 13 percent to the OCC, and 67 percent to the Commission.[7]

Next, FDIC estimated how many respondents keep records and make required disclosures by estimating the proportionate amount of offerings per year for each agency. The estimate was based on the average number of ABS offerings from 2007 through 2017. The agencies estimated the total number of annual offerings per year to be 1,400[8] which resulted in the following:

(a) 13 Offerings per year will be subject to disclosure and recordkeeping requirements under § 373.11, which are divided equally among the four agencies (*i.e.,* 3.25 offerings per year per agency);

(b) 110 offerings per year were estimated to be subject to disclosure and recordkeeping requirements under §§ 373.13 and 373.19(g), which were divided proportionately among the agencies based on the entity percentages described above:

(i) Nine (9) offerings per year for the Board (8%);

(ii) 13 offerings per year for the FDIC (12%);

(iii) 14 offerings per year for the OCC (13%);

(iv) 74 offerings per year for the Commission (67%).

(c) 132 offerings per year were estimated to be subject to the disclosure requirements under § 373.15, which were divided proportionately among the agencies based on the entity percentages described above:

(i) 11 Offerings per year for the Board (8%);

(ii) 16 offerings per year for the FDIC (12%);

(iii) 17 offerings per year for the OCC (13%);

(iv) 88 offerings per year for the Commission (67%).

(d) Of these 132 offerings per year, 44 offerings per year were estimated to be subject to disclosure and recordkeeping requirements under §§ 373.16, 373.17, and 373.18, respectively, which were divided proportionately among the agencies based on the entity percentages described above:

(i) 4 offerings per year for each section for the Board (8%);

(ii) 6 offerings per year for each section for the FDIC (12%);

(iii) 6 offerings per year for each section for the OCC (13%);

(iv) 29 offerings per year for each section for the Commission (67%).

To obtain the estimated number of responses (equal to the number of offerings) for each option in subpart B of the rule, FDIC multiplied the number of offerings estimated to be subject to the base risk retention requirements (*i.e.,* 1,158)[9] by the sponsor percentages described above. The result was the number of base risk retention offerings per year per agency. For the FDIC, this was calculated by multiplying 1,158 offerings per year by 12 percent, which equals 139 offerings per year. This number was then divided by the number of base risk retention options under subpart B of the rule (*i.e.,* nine)[10] to arrive at the estimate of the number of offerings per year per agency per base risk retention option. For the FDIC, this was calculated by dividing 139 offerings per year by nine options, resulting in 15 offerings per year per base risk retention option.

The agencies assumed that 90% of institutions use the vertical interest form of risk retention while the remaining 10% use the combined vertical and horizontal form of risk retention. The burden tables above use this allocation and of the 45 responses attributed to § 373.4, we allocated 40 (90%) to the vertical form of risk retention and 5 (10%) to the other two options (1 response to the horizontal form of risk retention and 4 responses to the combined vertical and horizontal form of risk retention.

FDIC believes that the burden estimation methodology previously used overestimates the number of ABS offerings by FDIC-supervised institutions. Furthermore, the OCC has confirmed that the estimates it used for its 2021 renewal of OCC's Credit Risk Retention information collection are based on the expertise of the OCC's subject matter experts rather than the 2015 interagency methodology.[11] As a result of these two factors, the FDIC has decided to diverge from the interagency methodology used in 2015 and 2018 and instead use the new methodology described below to estimate burden for this information collection.

(2) New Methodology

Potential respondents to this information collection (IC) are FDIC-supervised insured depository institutions (''IDIs'') including state nonmember banks, state savings institutions, insured state branches of foreign banks, and any subsidiary of the aforementioned entities. As of December 31, 2020, the FDIC supervised 3,227 state nonmember banks, state savings institutions, and insured state branches of foreign banks. Of these 3,227 IDIs, 2,382 are small for the purposes of the Regulatory Flexibility Act (RFA).[12]

[5] By agreement among the agencies, the FDIC's Division of Insurance Research, in consultation with its counterparts at the other agencies, prepared and documented the burden estimation methodology used by all agencies in their respective ICRs.

[6] Data was provided by the Securities and Exchange Commission. See SEC supporting statement for its information collection for the Credit Risk Retention rule (3235–0712) available at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201803-3235-014.*

[7] The allocation percentages among the agencies were based on the agencies' latest assessment of data as of August 13, 2018, including the securitization activity reported by FDIC-insured depository institutions in the June 30, 2017 Consolidated Reports of Condition.

[8] Based on ABS issuance data from Asset-Backed Alert on the initial terms of offerings, supplemented with information from Commercial Mortgage Alert. This estimate included registered offerings, offerings made under Securities Act Rule 144A, and traditional private placements. This estimate was for offerings not exempted under §§ _.19(a)–(f) and _.20 of the Rule.

[9] Estimate of 1,400 offerings per year, minus the estimate of the number of offerings qualifying for an exemption under §§ 373.13, 373.15, and 19(g) as described in (b) and (c) above (*i.e.* 1,400 minus (b) 110 minus (c) 132 equals 1,158).

[10] For purposes of this calculation, the horizontal, vertical, and combined horizontal and vertical risk retention methods under the standard risk retention option (§ 373.4) are each counted as a separate option under subpart B of the rule. The other six are: §§ 373.5; 373.6; 373.7; 373.8; 373.9; and 373.10.

[11] The supporting statement for the OCC's 2021 renewal is titled ''1557–0249 Credit Risk Retention Supporting Statement 5–18–21 1244.docx''and can be found at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202101-1557-003.*

[12] The SBA defines a small banking organization as having $600 million or less in assets, where an

Continued

Respondents to this information collection are FDIC-supervised IDIs that are securitizers of ABS. To generate a universe of potential securitizers, FDIC obtained data from Call Reports for the quarter ending on December 31 for the years 2018, 2019, and 2020, for all FDIC-supervised IDIs that reported a non-zero amount in either: (a) Outstanding principal balance of assets sold and securitized with servicing retained or with recourse or other seller-provided credit enhancements; [13] or (b) amount of loans and leases held for investment, net of allowance, and held for sale held by consolidated variable interest entities (VIEs).[14] This search resulted in a list of 79 IDIs that were potential securitizers. Using this list, FDIC searched for each IDI's name in FitchConnect's repository of ABS offerings (''deals'') [15] and compiled a list of deals for which an IDI was listed as the issuer, sponsor, originator, or servicer of the offering. For IDIs for which deals were not found on FitchConnect, the following method was followed: The queried Call Report item labeled ''(a)'' above includes assets sold with recourse or other seller-provided credit enhancements, which are outside the scope of the Credit Risk Retention rule. To identify IDIs which securitized from those that did not, a $75 million threshold of year over year growth in that item is used to identify new securitizations in 2018, 2019, and 2020, as FDIC assumes that growth of less than $75 million would be unlikely to reflect sponsorship or issuance of new term ABS offerings during that period. This method yielded a list of 20 institutions. FDIC reviewed examination records for the 20 IDIs identified as potential securitizers to determine which institutions actually securitize. FDIC cross-referenced the list of securitizing IDIs and the list of aforementioned ABS offering naming conventions found using FitchConnect with Intex's database of prospectuses.[16] From this cross-referencing, FDIC found a count of deals associated with each deal name. Finally, FDIC determined whether the sponsor or depositor for each deal was an FDIC-supervised IDI or subsidiary of an FDIC-supervised institution by reading the prospectus of each deal.

Once the set of deals, with corresponding FDIC-supervised securitizers, was constructed, FDIC matched each deal with the sections in Part 373 that imposed one or more PRA requirements on that deal. Most sections impose both disclosure and recordkeeping requirements.[17] For those sections, FDIC separately estimated the burdens for each of the two types of PRA requirements. The following details the estimated respondent counts for each of these sections:

(a) Two FDIC-supervised IDIs were involved in deals in which credit risk was retained through horizontal interest (§ 373.4(a)(2) Standard Risk Retention—Horizontal Interest). These two IDIs were involved in four, three, and four such deals in 2018, 2019, and 2020, respectively. FDIC therefore estimates two annual respondents, with an average annual response rate of two responses per respondent, for the disclosure requirement associated with § 373.4(a)(2) and the corresponding reporting requirement in § 373.4(d).[18]

(b) Two FDIC-supervised IDIs were involved in deals in which credit risk was retained through vertical interest (§ 373.4(a)(1) Standard Risk Retention—Vertical Interest). These two IDIs were involved in 0, 0, and 13 such deals in 2018, 2019, and 2020, respectively. FDIC therefore estimates two annual respondents, with an average annual response rate of two responses per respondent, for the disclosure requirement associated with § 373.4(a)(1) and the corresponding reporting requirement in § 373.4(d).[19]

(c) Three FDIC-supervised IDIs were involved in deals in which credit risk was retained through revolving master trusts (§ 373.5 Revolving Master Trusts). These three IDIs were involved in eight, six, and zero such deals in 2018, 2019, and 2020, respectively. FDIC therefore estimates three annual respondents, with an average annual response rate of two responses per respondent, for the disclosure requirement associated with § 373.5 and the corresponding reporting requirement in § 373.5(k)(3).[20]

Using the above methodology, FDIC could not find any ABS offerings that (1) involved an FDIC-supervised IDI or subsidiary of an FDIC-supervised IDI as a securitizer and (2) were subject to the PRA requirements listed in one or more of the following ten sections: §§ 373.4(a)(3); 373.6; 373.7; 373.10; 373.11; 373.13; 373.15; 373.16; 373.17; and 373.18. It is possible that an FDIC-supervised IDI or subsidiary of an FDIC-supervised IDI would be a respondent to burden items related to these sections in the next three years. As such, FDIC is using one respondent and one annual response per respondent for the disclosure and recordkeeping requirements related to each of these ten sections to preserve the associated burden estimate.

Of the seven unique institutions with securitizations between 2018 and 2020, none are considered small for the purposes of the RFA.[21]

The estimated time per response varies by burden item, and these estimates are unchanged from the previous renewal which remains in line with the burden estimated adopted by the agencies.

Two burden items included in the 2018 information collection request have been removed from this renewal request. The disclosure burden related to § 373.8 Fannie Mae and Freddie Mac was removed as FDIC has determined that it is not possible for FDIC-supervised IDIs or subsidiaries of FDIC-supervised IDIs to be respondents to this burden item. The disclosure burden related to § 373.9 Open Market Collateralized Loan Obligations (''CLOs'') was removed because the D.C. Circuit Court invalidated section 941 of Dodd-Frank as it applies to CLOs.[22]

The estimated annual burden, in hours, is the product of the estimated number of respondents, number of responses per respondent, and time per response, as summarized in the table below. The total estimated annual burden for this information collection is 376 hours, a 3,075-hour reduction from the 2018 burden estimate, which reflects

organization's ''assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' See 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' See 13 CFR 121.103. Following these regulations, the FDIC uses a respondent's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the respondent is ''small'' for the purposes of RFA.

[13] Schedule RC–S, item 1 on forms 031 and 041; Supplemental Info, item 4(a) on form 051;

[14] Schedule RC–V, item 1(c) on forms 031 and 041;

[15] *http://app.fitchconnect.com,* using ''ABS'', ''CMBS'', and ''RMBS'' sections under the ''Sectors'' tab, last accessed on June 11, 2021.

[16] *https://www.intex.com/main/.*

[17] With the noted exception of § 373.10 Qualified Tender Option Bonds, which has no recordkeeping burden associated with it.

[18] 4 + 3 + 4 = 11 total deals. 11/(3 years * 2 respondents) = 1.83 responses per respondent annually.

[19] 0 + 0 + 13 = 13 total deals. 13/(3 years * 2 respondents) = 2.17 responses per respondent annually.

[20] 8 + 6 + 0 = 14 total deals. 14/(3 years * 3 respondents) = 1.56 responses per respondent annually.

[21] As of December 31, 2020.

[22] The Loan Syndication and Trading Association v. Securities and Exchange Commission and Board of Governors of the Federal Reserve System (No. 17–5004).

the aforementioned change in methodology.

SUMMARY OF ESTIMATED ANNUAL BURDEN

IC description	Type of burden (obligation to respond)	Frequency of response	Estimated number of respondents	Number of responses/ respondent	Hours per response	Total annual estimated burden
Disclosure Burdens						
§ 373.4(a)(2) Standard Risk Retention—Horizontal Interest.	Disclosure (Mandatory).	On Occasion	2	2	5.5	22
§ 373.4(a)(1) Standard Risk Retention—Vertical Interest.	Disclosure (Mandatory).	On Occasion	2	2	2.0	8
§ 373.4(a)(3) Standard Risk Retention—Combined Interest*.	Disclosure (Mandatory).	On Occasion	1	1	7.5	8
§ 373.5 Revolving Master Trusts	Disclosure (Mandatory).	On Occasion	3	2	7.0	42
§ 373.6 Eligible ABCP Conduits*	Disclosure (Mandatory).	On Occasion	1	1	3.0	3
§ 373.7 Commercial MBS*	Disclosure (Mandatory).	On Occasion	1	1	20.75	21
§ 373.10 Qualified Tender Option Bonds*.	Disclosure (Mandatory).	On Occasion	1	1	6.0	6
§ 373.11 Allocation of Risk Retention to an Originator*.	Disclosure (Mandatory).	On Occasion	1	1	2.5	3
§ 373.13 Exemption for Qualified Residential Mortgages*.	Disclosure (Mandatory).	On Occasion	1	1	1.25	1
§ 373.15 Exemption for Qualifying Commercial Loans, Commercial Real Estate and Automobile Loans*.	Disclosure (Mandatory).	On Occasion	1	1	20.0	20
§ 373.16 Underwriting Standards for Qualifying Commercial Loans*.	Disclosure (Mandatory).	On Occasion	1	1	1.25	1
§ 373.17 Underwriting Standards for Qualifying Commercial Real Estate Loans*.	Disclosure (Mandatory).	On Occasion	1	1	1.25	1
§ 373.18 Underwriting Standards for Qualifying Automobile Loans*.	Disclosure (Mandatory).	On Occasion	1	1	1.25	1
Disclosure Subtotal						137
Recordkeeping Burdens						
§ 373.4(a)(2) Standard Risk Retention—Horizontal Interest.	Recordkeeping (Mandatory).	On Occasion	2	2	0.5	2
§ 373.4(a)(1) Standard Risk Retention—Vertical Interest.	Recordkeeping (Mandatory).	On Occasion	2	2	0.5	2
§ 373.4(a)(3) Standard Risk Retention—Combined Interest*.	Recordkeeping (Mandatory).	On Occasion	1	1	0.5	1
§ 373.5 Revolving Master Trusts	Recordkeeping (Mandatory).	On Occasion	3	2	0.5	3
§ 373.6 Eligible ABCP Conduits*	Recordkeeping (Mandatory).	On Occasion	1	1	20.0	20
§ 373.7 Commercial MBS*	Recordkeeping (Mandatory).	On Occasion	1	1	30.0	30
§ 373.11 Allocation of Risk Retention to an Originator*.	Recordkeeping (Mandatory).	On Occasion	1	1	20.0	20
§ 373.13 Exemption for Qualified Residential Mortgages*.	Recordkeeping (Mandatory).	On Occasion	1	1	40.0	40
§ 373.15 Exemption for Qualifying Commercial Loans, Commercial Real Estate and Automobile Loans*.	Recordkeeping (Mandatory).	On Occasion	1	1	0.5	1
§ 373.16 Underwriting Standards for Qualifying Commercial Loans*.	Recordkeeping (Mandatory).	On Occasion	1	1	40.0	40
§ 373.17 Underwriting Standards for Qualifying Commercial Real Estate Loans*.	Recordkeeping (Mandatory).	On Occasion	1	1	40.0	40
§ 373.18 Underwriting Standards for Qualifying Automobile Loans*.	Recordkeeping (Mandatory).	On Occasion	1	1	40.0	40
Recordkeeping Subtotal						239

SUMMARY OF ESTIMATED ANNUAL BURDEN—Continued

IC description	Type of burden (obligation to respond)	Frequency of response	Estimated number of respondents	Number of responses/ respondent	Hours per response	Total annual estimated burden
Total Annual Burden Hours.	.....	.....	.....	.....	.....	376

Source: *FDIC.* * There are currently zero estimated respondents for these items however, FDIC is using 1 as a placeholder to preserve the burden estimate in case an institution becomes subject to these provisions.

4. *Title:* Minimum Requirements for Appraisal Management Companies.

OMB Number: 3064–0195.

Form Number: None.

Affected Public: Individuals or households; business or other for profit.

General Description of Collection: This information collection comprises recordkeeping and disclosure requirements under regulations issued by the Federal Deposit Insurance Corporation (FDIC), jointly with the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), the National Credit Union Administration (NCUA), the Bureau of Consumer Financial Protection (CFPB), and the Federal Home Finance Agency (FHFA) (collectively, ''the agencies'') that implement the minimum requirements in Section 1473 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or the Act) to be applied by states [23] in the registration and supervision of appraisal management companies (AMCs). The regulations also implement the requirement in Section 1473 of the Dodd-Frank Act for states to report to the Appraisal Subcommittee (ASC) of the Federal Financial Institutions Examination Council (FFIEC) the information required by the ASC to administer the new national registry of appraisal management companies (AMC National Registry or Registry). The information collection (IC) requirements are established in part 323 of the FDIC's codified regulations.

This information collection was last approved for renewal on October 16, 2018 (''2018 ICR'') with a total annual burden estimate of 421 hours. The 2018 ICR contains two recordkeeping and two reporting IC requirements. The FDIC notes that the ASC has issued its own regulations or guidance implementing the requirements from the Act related to the information to be presented to the ASC by the participating states, and submitted an IC related to this reporting requirement.[24] Accordingly, the FDIC is not taking PRA burden for the associated IC (previously included as ''State Reporting Requirements to Appraisal Subcommittee'') and has removed it from its current ICR submission.

For each of the remaining ICs, FDIC's estimation methodology is to compute the total estimated burden hours for that IC and then assign an agreed-upon share of the burden hours to each of the regulatory agencies (FDIC, FRB, OCC, and FHFA). [25] The FDIC's estimated annual burden is calculated by finding the product of the estimated annual number of respondents, the estimated annual number of responses per respondent, the estimated burden hours per response and the share of the burden attributable to the FDIC.

Burden Estimate:

Estimated Number of Respondents

IC #1: Written Notice of Appraiser Removal From Network or Panel

This IC relates to the written notice of appraiser removal from the network or panel pursuant to § 323.10. The number of respondents is estimated to be equal to the number of appraisers who leave the profession each year multiplied by the estimated percentage of appraisers who work for AMCs. The number of appraisers who leave is calculated by adding the number of appraisers who are laid off or resign to the number of appraisers that have had their licenses revoked or surrendered. This estimation methodology is similar to the methodology used in the 2018 ICR.

The number of appraisers who are laid off or resign each year is estimated by multiplying the annual rate of ''Total separations'' by the number of appraisers for each year. Using data from the Bureau of Labor Statistics (BLS) for the finance and insurance industry, shown in Table 1 below, the annual rate of ''Total separations'' in 2020 is 25.1 percent.[26] The rate for 2020 is within the range of annual rates between 2011 and 2020 (20.4 to 26.0 percent, with a median of 24.8 percent) and is a reasonable estimate for future periods.

TABLE 1—ANNUAL RATE OF TOTAL SEPARATIONS FOR THE FINANCE AND INSURANCE INDUSTRY IN THE UNITED STATES

Year	Value (in %)
2011	20.4
2012	23.6
2013	26.0
2014	25.0
2015	24.5
2016	23.9
2017	25.2
2018	24.2
2019	24.6
2020	25.1

Source: BLS, ''Job Openings and Labor Turnover Survey: Finance and Insurance'' (Series ID: JTU520000000000000TSR), available at *https://www.bls.gov/data/* (accessed June 4, 2021).

The number of appraisers is estimated by using the number of appraisers in 2020 as a proxy for the level of appraiser employment over the next three years.[27] In 2020, the total number of appraisers was 86,000 and is similar to the annual average of 87,000 appraisers between 2011 and 2020. Table 2 contains data on annual employment level for appraisers in the U.S. between 2011 and 2020:

TABLE 2— ANNUAL LEVEL OF EMPLOYMENT FOR APPRAISERS IN THE UNITED STATES

Year	Value (in thousands)
2011	88
2012	93

[23] States include the 50 U.S. states, the District of Columbia, and the territories of Guam, Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. *See* 12 CFR 323.9.

[24] *See* OMB No. 3139–0009 and the accompanying Supporting Statement submitted by the ASC in 2021, available at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202102-3139-001* (accessed June 2, 2021).

[25] The agencies agreed to this burden-sharing methodology in 2018.

[26] Bureau of Labor Statistics (BLS), ''Job Openings and Labor Turnover Survey: Finance and Insurance'' (Series ID: JTU520000000000000TSR), available at *https://www.bls.gov/data/* (accessed June 4, 2021).

[27] BLS, ''Employed—Appraisers and assessors of real estate'' (Series ID: LNU02038218), available at *https://beta.bls.gov/dataViewer/view/timeseries/LNU02038218* (accessed June 2, 2021).

TABLE 2— ANNUAL LEVEL OF EMPLOYMENT FOR APPRAISERS IN THE UNITED STATES—Continued

Year	Value (in thousands)
2013	98
2014	95
2015	76
2016	73
2017	97
2018	84
2019	84
2020	86

Source: BLS, ''Employed—Appraisers and assessors of real estate'' (Series ID: LNU02038218), available at *https://beta.bls.gov/dataViewer/view/timeseries/LNU02038218* (accessed June 2, 2021).

Given the data summarized above, the number of appraisers who are laid off or resign is estimated by multiplying the annual number of appraisers by the annual separation rate 86,000 × 25.1 percent = 21,586.

As stated above, respondents to this IC also include appraisers who have their license revoked or surrendered each year. According to the ASC, between January 1, 2010 and December 31, 2019, the counts of appraisers who have had their license revoked or surrendered are 804 and 576, respectively.[28] Therefore, the annual average over the ten-year span is 138 licenses revoked or surrendered per year.[29]

The number of appraisal removal notices for AMCs is then calculated by adding the estimate of appraisers who are laid off or resign to the number of appraisers who have their licenses revoked or surrendered, and multiplying by the estimated percent of total appraisers who work for AMCs. According the Appraisal Institute, approximately 81 percent of appraisers are sole proprietors, executives in a firm, or are listed as having other forms of employment status.[30] The remaining 19 percent of appraisers are employees or staff members in firms such as AMCs, appraisal services companies, or other companies. Using 19 percent as the estimate of the percentage of appraisers who work for AMCs, the estimated total number of appraiser removal notices for AMCs is 4,130 notices per year, rounded to the nearest ten.[31] Thus, the estimated number of annual respondents for this information collection is 4,130. The respondents to this IC are either natural persons or AMCs. There are no data available currently on the number of AMCs that are considered ''small,'' for the purposes of the Regulatory Flexibility Act (RFA), and none of the respondents who are natural persons are small for the purposes of the RFA. As a rough approximation, to estimate the number of small respondents to this IC FDIC uses the percentage of insured depository institutions that are small (70 percent) for purposes of the RFA,[32] and assume that all respondents are AMCs. Thus, FDIC estimates that 2,891 respondents to this IC are small for purposes of the RFA.[33] This is likely a conservative estimate of small respondents for this information collection because not all respondents to this IC are AMCs.

The estimated number of notices per year is lower than the 2018 ICR estimate by 5,751 notices.[34] Two factors contributed to the drop in estimated notices: First, the number of appraisers who are laid off or resign, and the number that have had their licenses revoked or surrendered (138 and 21,586, respectively) are lower than the estimates in the 2018 ICR (245 and 23,280); second, there is more granular data available to calculate the share of appraisers employed by AMCs, appraisal services companies, or other companies. The most recent data from the Appraisal Institute contains nine separate categories for Appraiser Employment Status, whereas the data available for the 2018 ICR contained only four categories.[35] Given the level of aggregation available in 2018, the estimate of the share of appraisers in the 2018 ICR likely included appraisers who are employees or staff members in a government or regulatory agency, and individuals with employment statuses such as valuation consultant, professor or other academic professional, semi-retired or retired, or student. The FDIC notes that appraisers or individuals with the five employment statuses listed above would not be subject to this IC. Consequently, the share (19 percent) is much lower than the share (42 percent) used in the 2018 ICR.

IC #2: Develop and Maintain a State Licensing Program

The second information collection pertains to developing and maintaining a state licensing program for AMCs pursuant to § 323.14. Section 323.14 requires that each state electing to register AMCs for purposes of permitting AMCs to provide appraisal management services relating to covered transactions in the state must submit to the ASC certain information required under the Rule and any additional information required by the ASC concerning AMCs. Thus, this burden falls on the states, especially those that have not developed a system to register and oversee AMCs. According to the ASC there are four states (the territories of Guam, Mariana Islands, Puerto Rico, and the U.S. Virgin Islands) that have not developed a system to register and oversee AMCs.[36] Thus, the estimated number of annual respondents for this burden is four. Since respondents to this IC are states, none of the respondents are considered ''small'' for purposes of the RFA.

IC #3: AMC Disclosure Requirements (State-regulated AMCs)[37]

The third information collection relates to disclosure requirements for

[28] Federal Financial Institution Examination Council: Appraisal Subcommittee, ''Annual Report 2019: Appendix E Appraiser Disciplinary Actions Reported by State,'' available at *https://www.asc.gov/About-the-ASC/AnnualReports.aspx* (accessed June 2, 2021).

[29] The average over the ten years is calculated as (1,380, or 804 + 576) divided by 10.

[30] Appraisal Institute, ''U.S. VALUATION PROFESSION FACT SHEET Q1 2019,'' available at *https://www.appraisalinstitute.org/file.aspx?DocumentId=2342,* (accessed June 2, 2021).

[31] The estimated total number of appraiser removal notices for AMCs is calculated as (21,586 + 138) × 19 percent, which yields 4,127.56 notices, or 4,130 after rounding to the nearest ten. The estimate is rounded to the nearest ten because 10 percent of the respondents will be allocated to FHFA, and OMB systems require whole number inputs.

[32] December 31, 2020, Call Report data. The Small Business Administration (SBA) defines a small banking organization as having $600 million or less in assets, where an organization's ''assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is ''small'' for the purposes of RFA.

[33] The estimated number of small respondents to this IC is calculated by multiplying the estimated number of respondents (4,130) by 70 percent.

[34] *See* OMB No. 3064–0195 and the accompanying Supporting Statement submitted by the FDIC in 2018, available at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201804-3064-013* (accessed June 2, 2021).

[35] The most recent data available from the Appraisal Institute includes five new categories (employee or staff member in a government or regulatory agency, valuation consultant, professor or other academic professional, semi-retired or retired, and student), in addition to the four categories that match closely to the data in the 2018 ICR (employee or staff member of a firm, sole proprietor of own business (no employees/partners), executive in a firm, and other).

[36] ASC, ''States' Status on Implementation of AMC Programs,'' available at *https://www.asc.gov/National-Registries/StatesStatus.aspx* (accessed June 2, 2021).

[37] Based on conversations between the SMEs at the FDIC, FRB, OCC, and FHFA, the current ICR splits the IC #3 from the 2018 ICR (titled ''AMC Reporting Requirements (State and Federal AMCs)

Continued

AMCs that are not federally regulated AMCs[38] (''state-regulated AMCs'') pursuant to Section 323.12, which involves information sent by AMCs to third parties, including states and the AMC National Registry. The disclosure requirement for this IC includes registration limitations/requirements. According to the National Registry, accessed on June 2, 2021, there are 3,854 active AMCs, of which 3,817 are state-regulated AMCs.[39] FDIC does not have the data to estimate the change in the number of active state-regulated AMCs using historical information because the National Registry became available for the states to populate in July 2018, and the states' reporting characteristics vary over time.[40] For the purposes of this analysis FDIC assumes the number of state-regulated AMCs to remain approximately the same over the next three years. Thus, the estimated number of annual respondents for this burden is 3,820, after rounding up to the nearest ten.[41] There are no data available currently on the number of AMCs that are small. As a rough approximation, FDIC uses the percentage of insured depository institutions that are small (70 percent) for purposes of the RFA to estimate the number of small respondents to this IC. Using this methodology FDIC estimates that 2,674 respondents to this IC are small for purposes of the RFA.[42]

IC #4: AMC Disclosure Requirements (Federally regulated AMCs)

The fourth information collection relates to AMC disclosure requirements for federally regulated AMCs pursuant to Section 323.13(c). The disclosure requirements for this IC include registration limitations/requirements as well as information regarding the determination of the AMC National Registry fee. Of the 3,854 active AMCs, 37 are federally regulated AMCs.[43] FDIC does not have the data to estimate the change in the number of active federally regulated AMCs using historical information because the National Registry became available for the states to populate in July 2018, and the states' reporting characteristics vary over time.[44] For the purposes of this analysis FDIC assumes the number of federally regulated AMCs to remain approximately the same over the next three years. Thus, the estimated number of annual respondents for this burden is 39, after rounding up to the nearest multiple of three.[45] There are no data available currently on the number of AMCs that are small. As a rough approximation, FDIC uses the percentage of insured depository institutions that are small (70 percent) for purposes of the RFA to estimate the number of small respondents to this IC. Accordingly, FDIC estimates that 27 respondents to this IC are small for purposes of the RFA.[46]

Estimated Number of Responses

For IC #1, FDIC assumes an AMC receives one written notice from each appraiser[47] asking to be removed from the appraiser panel, or sends one notice to each appraiser removing him/her from the panel. Thus, the estimated number of responses per respondent is one.

For IC #2, FDIC assumes that states without a registration and licensing program would develop and maintain a single program for each state. Thus, the estimated number of responses per respondent is one.

For IC #3 and IC #4, FDIC estimates the number of responses per respondent as the number of states that do not have an AMC registration program in which the average state-regulated or federally regulated AMC operates. As discussed previously, there are four states that currently do not have an AMC registration program. As noted in the Supporting Statement accompanying the 2018 ICR, a 2013 survey conducted by the CFPB found that the average AMC operates in 19.56 states.[48] Thus, the average state-regulated or federally regulated AMC operates in approximately 2 states that do not have AMC registration systems: (4 states/55 states) × 19.56 states = 1.422 states ~ rounded up to 2 states.

Frequency of Responses

For IC #1, as discussed above, the AMC receives (or sends) a written notice in the event an appraiser no longer serves on the panel. Since this event occurs on occasion, FDIC uses ''On Occasion'' as the Frequency of Reponses for this IC and assumes a frequency of one.

For IC #2, FDIC assumes the states that have currently elected not to register and oversee AMCs could choose to do so at any time. Since this event occurs on occasion, FDIC uses ''On Occasion'' as the Frequency of Reponses for this IC and assumes a frequency of one.

For IC #3 and IC #4, FDIC assumes the state-regulated or federally regulated AMCs that are currently operating in a state but have not yet registered with that state could choose to do so any time. Since this event occurs on occasion, FDIC uses ''On Occasion'' as the Frequency of Reponses for this IC and assumes a frequency of one.

Estimated Time per Response

The 2018 ICR estimate of the hour burden per written notice of appraiser removal was 0.08 hours. The FDIC believes this estimate remains reasonable and appropriate for this IC and uses 0.08 hours as the estimated time per response for IC #1.

The 2018 ICR estimate of the hour burden for a state without a registration program or system to establish one was 40 hours. The FDIC believes this estimate remains reasonable and appropriate for this IC and uses 40

(323.12 & 13(c))'') in to two separate ICs, one each for state-regulated AMCs, and federally regulated AMCs.

[38] Section 323.9 defines a federally regulated AMC as ''an AMC that is owned and controlled by an insured depository institution, as defined in 12 U.S.C. 1813 and regulated by [the OCC, FRB, or FDIC].''

[39] ASC nonpublic data, obtained as of June 3, 2021, stored under this memo's workpapers on FDIC SharePoint.

[40] The most recent Annual Report of the ASC notes that as of December 31, 2019, the National Registry contained 1,374 AMCs registered from 14 states. As of June 2, 2021, the date I accessed the ASC's website, there are 40 states currently populating the National Registry. *See* Federal Financial Institution Examination Council: Appraisal Subcommittee, ''Annual Report 2019: Appendix E Appraiser Disciplinary Actions Reported by State,'' available at *https://www.asc.gov/About-the-ASC/AnnualReports.aspx* (accessed June 2, 2021); and ASC, ''States' Status on Implementation of AMC Programs,'' available at *https://www.asc.gov/National-Registries/StatesStatus.aspx* (accessed June 2, 2021).

[41] The estimate is rounded to the nearest ten because 10 percent of the respondents will be allocated to FHFA, and OMB systems require whole number inputs.

[42] The estimated number of small respondents to this IC is calculated by multiplying the estimated number of respondents (3,820) by 70 percent.

[43] ASC nonpublic data, obtained as of June 3, 2021.

[44] *See* footnote 40.

[45] The estimate is rounded to the nearest multiple of three because the estimated respondents will be allocated equally to the FDIC, FRB, and OCC, and OMB systems require whole number inputs. The aggregate estimated number of respondents for IC #3 and IC #4 in the current ICR (state-regulated and federally regulated AMCs) is higher than the corresponding estimate in the 2018 ICR by 3,659. The increase in the number of respondents in the current ICR is attributable to the definitive information available from the National Registry after 2018, when AMC registration requirements became effective.

[46] The estimated number of small respondents to this IC is calculated by multiplying the estimated number of respondents (39) by 70 percent.

[47] In the event of an appraiser's death or incapacitation, the AMC receives notice of death or incapacity. *See* 12 CFR 323.10.

[48] *See* OMB No. 3064–0195 and the accompanying Supporting Statement submitted by the FDIC in 2018, available at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201804-3064-013* (accessed June 2, 2021). Additional details on the survey can be found in the text accompanying the final rule. *See* Minimum Requirements for Appraisal Management Companies, 80 FR 32,677 (June 9, 2015).

hours as the estimated time per response for IC #2.

The 2018 ICR estimate of the hour burden for a state-regulated or federally regulated AMC to register in a state in which it operates was one hour. The FDIC believes this estimate remains reasonable and appropriate for IC #3 and IC #4 and uses one hour each as the estimated time per response for IC #3 and IC #4.

The estimated annual burden, in hours, for the four agencies (FDIC, FRB, OCC, and FHFA) is the product of the estimated number of respondents per year allocated to each agency, the number of responses per respondent per year, and the hours per response, as summarized in Tables 3 and 4 below. For IC #1, and IC #3, the estimated respondents are split between the four agencies the FDIC, FRB, OCC, and FHFA, at a ratio of 3:3:3:1.[49] Thus, the estimated number of annual respondents attributable to the FDIC, FRB, and OCC for IC #1, and IC #3 are 1,239, and 1,146 each, respectively. Similarly the estimated number of annual respondents attributable to the FHFA for IC #1, and IC #3 are 413, and 382, respectively. For IC #2, the estimated number of respondents is split equally amongst the four agencies which amounts to one respondent each.[50] For IC #4, the estimated number of respondents (39) is split equally amongst the three banking agencies (13 each) as § 323.9 defines a federally regulated AMC as an AMC owned and controlled by an insured depository institution, which is regulated by the FDIC, FRB, or OCC. The total estimated annual burden for this information collection is 8,208 hours.[51] The FDIC, FRB, and OCC will each have equally-sized shares of the total estimated burden, with each agency responsible for 2,457 hours. The FHFA is responsible for the remaining 837 hours.

TABLE 3—SUMMARY OF ESTIMATED ANNUAL BURDENS—FDIC, FRB, AND OCC SHARE

[OMB No. 3064–0195]

IC Description	Type of burden (obligation to respond)	Frequency of response	Number of respondents	Number of responses per respondent	Hours per response	Annual burden (hours)
IC #1—Written Notice of Appraiser Removal From Network or Panel (12 CFR part 323.10).	Disclosure [52] (Mandatory).	On occasion	1,239	1	0.08	99
IC #2—State Recordkeeping Requirements (12 CFR parts 323.11(a) and 323.11(b)).	Recordkeeping (Mandatory).	On occasion	1	1	40	40
IC #3—AMC Disclosure Requirements (State-regulated AMCs) (12 CFR part 323.12).	Disclosure [53] (Mandatory).	On occasion	1,146	2	1	2,292
IC #4—AMC Disclosure Requirements (Federally regulated AMCs) (12 CFR parts 323.12 and 323.13(c)).	Disclosure (Mandatory).	On occasion	13	2	1	26
Total Annual Burden Hours (FDIC, FRB, and OCC Share):.	.....	.....	.....	.....	.....	2,457

Source: FDIC.

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 October 15, 2021.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021–22944 Filed 10–20–21; 8:45 am]

BILLING CODE 6714–01–P

[49] The assumption to divide the burden hours between the agencies is based on conversations between the subject matter experts at the FDIC, FRB, OCC, and FHFA and is based on the approximate proportion of AMCs supervised by the three banking agencies and evenly split among the three banking agencies. The burden hours are shared using the same ratio as the 2018 ICR. The ratio does not affect the total amount of burden imposed by the collections of information under the joint AMC regulations, and relates only to the appropriate distribution among the rulemaking agencies of responsibility (under the PRA) for a portion of the total estimated burden. *See* OMB No. 2590–0013 and the accompanying Supporting Statement submitted by the FHFA in 2018, available at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201807-2590-002* (accessed June 16, 2021).

[50] For IC #2, the assumption to divide the burden hours equally between the agencies is based on conversations between the SMEs at the FDIC, FRB, OCC, and FHFA. The burden hours are shared using the same ratio as the 2018 ICR.

[51] The estimated total annual burden hours of 8,208 is obtained by aggregating the estimated total annual burden hours for the FDIC, FRB, and OCC in Table 3 (7,371, or 2,457 × 3) with the corresponding value for the FHFA in Table 4 (837).

The estimated hour burden in the current ICR (8,208) higher than the 2018 ICR estimate by 6,763 hours. The increase is predominantly driven by the increase in the aggregate estimated number of respondents to IC #3 and IC #4. As discussed previously, the estimated number of respondents in higher than the estimate in the 2018 ICR due to the definitive information available from the National Registry after 2018.

[52] The 2018 ICR erroneously classified IC #1 as a Recordkeeping requirement. The burden for this IC has been changed to a Disclosure requirement.

[53] The 2018 ICR erroneously classified IC #3 as a Reporting requirement. The burden for this IC has been changed to a Disclosure requirement. The 2018 ICR erroneously classified IC #1 as a Recordkeeping requirement. The burden for this IC has been changed to a Disclosure requirement.

[53] The 2018 ICR erroneously classified IC #3 as a Reporting requirement. The burden for this IC has been changed to a Disclosure requirement.

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

TIME AND DATE: Tuesday, October 26, 2021 at 10:00 a.m. and its continuation at the conclusion of the open meeting on October 28, 2021.

PLACE: 1050 First Street NE, Washington, DC (This meeting will be a virtual meeting).

STATUS: This Meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Compliance matters pursuant to 52 U.S.C. 30109.

Matters concerning participation in civil actions or proceedings or arbitration.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer. Telephone: (202) 694–1220.

Laura E. Sinram,

Acting Secretary and Clerk of the Commission.

[FR Doc. 2021–23078 Filed 10–19–21; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than November 4, 2021.

A. Federal Reserve Bank of Dallas (Karen Smith, Director, Applications) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *The Richard Thomas White 2021 Trust, the Birdie Lucille White 2021 Trust, the William Hogan White 2021 Trust, the Sydney Suzanne Griffith 2021 Trust, and the Johnathan Brockway Griffith 2021 Trust, Curtis C. Griffith, individually, and as trustee to all trusts, and the Curtis Clay Griffith 2021 Irrevocable Trust, Cynthia Ann Griffith, individually, and as trustee, all of Lubbock, Texas;* to become the Griffith Family control group, a group acting in concert, to retain voting shares of South Plains Financial, Inc., and thereby indirectly retain voting shares of City Bank, both of Lubbock, Texas.

Board of Governors of the Federal Reserve System, October 18, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–22979 Filed 10–20–21; 8:45 am]

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FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue, NW, Washington DC 20551–0001, not later than November 5, 2021.

A. Federal Reserve Bank of Dallas (Karen Smith, Director, Applications) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *The 2018 Ryan Legacy Trust, Round Rock, Texas, Nolan Reese Ryan, Austin, Texas, Wendy Ryan Bivins, Amarillo, Texas; both individually, and as co-trustees, and Robert Reid Ryan, as co-trustee, Houston, Texas;* to join the Ryan Family Group, a group acting in concert, to acquire voting shares of R Corp Financial, and thereby indirectly acquire voting shares of R Bank, both of Round Rock, Texas.

B. Federal Reserve Bank of St. Louis (Holly A. Rieser, Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org*:

1. *Kristanne Joy Becker Hoffman Family Trust 2021, Kristanne Joy Becker Hoffman, individually, and as trustee, and the Elizabeth French Hoffman Family Trust 2021, Elizabeth French Becker, individually, and as trustee, all of Jacksonville, Illinois;* to acquire voting shares of Farmers Holding Company, and thereby indirectly acquire voting shares of The Farmers State Bank and Trust Company, both of Jacksonville, Illinois.

C. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *The Dorothy J. Living Trust, Dorothy J. Pierce, as trustee, both of Oklahoma City, Oklahoma;* to join the Pierce Family Group, a group acting in concert, to acquire voting shares of First Bethany Bancorp, Inc., and thereby indirectly acquire voting shares of First Bethany Bank & Trust, both of Bethany, Oklahoma.

Board of Governors of the Federal Reserve System, October 15, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–22915 Filed 10–20–21; 8:45 am]

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FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the

assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than November 22, 2021.

A. Federal Reserve Bank of St. Louis (Holly A. Rieser, Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Home BancShares, Inc., Conway, Arkansas;* to merge with Happy Bancshares, Inc., Canyon, Texas, and thereby indirectly acquire Happy State Bank, Happy, Texas.

Board of Governors of the Federal Reserve System, October 15, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–22916 Filed 10–20–21; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

[File No. 202 3179]

Resident Home, LLC; Analysis of Proposed Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before November 22, 2021.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write ''Resident Home LLC; File No. 202 3179'' on your comment, and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Julia Solomon Ensor (202–326–2377), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained at *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before November 22, 2021. Write ''Resident Home LLC; File No. 202 3179'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to the COVID–19 pandemic and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Resident Home; File No. 202 3179'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the *https://www.regulations.gov* website—as legally

required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *http://www.ftc.gov* to read this document and the news release describing the proposed settlement. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before November 22, 2021. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''FTC'' or ''Commission'') has accepted, subject to final approval, an agreement containing a consent order from Resident Home LLC, also d/b/a Nectar Sleep, DreamCloud Sleep, Awara Sleep, Level Sleep, Bundle Living, 1771 Living, Cloverlane, Wovenly Rugs, Sleep Authority, and Home Well Designed, and Ran Reske (''Respondents''). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves Respondents' advertising of DreamCloud mattresses as of U.S. origin. According to the FTC's complaint, Respondents represented that DreamCloud mattresses were ''proudly made with 100% USA-made premium quality materials.'' However, the complaint alleges that, in numerous instances, DreamCloud mattresses are wholly imported or incorporate significant imported materials. In all instances, DreamCloud mattresses are finished overseas. Based on the foregoing, the complaint alleges that Respondents engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future. Consistent with the FTC's Enforcement Policy Statement on U.S.-Origin Claims, Part I prohibits Respondents from making U.S.-origin claims for their products unless either: (1) The final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

Part II prohibits Respondents from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and Respondents have a reasonable basis substantiating the representation.

Parts III through V are monetary provisions. Part III imposes a judgment of $753,300. Part IV includes additional monetary provisions relating to collections. Part V requires Respondents to provide sufficient customer information to enable the Commission to administer consumer redress, if appropriate.

Part VI is a notice provision requiring Respondents to identify and notify certain DreamCloud mattress purchasers of the FTC's action within 30 days after the issuance of the order, or within 30 days of the customer's identification, if identified later. Respondents are also required to submit reports regarding their notification program.

Parts VII through IX are reporting and compliance provisions. Part VII requires Respondents to acknowledge receipt of the order, to provide a copy of the order to certain current and future principals, officers, directors, and employees, and to obtain an acknowledgement from each such person that they have received a copy of the order. Part VIII requires Respondents to file a compliance report within one year after the order becomes final and to notify the Commission within 14 days of certain changes that would affect compliance with the order. Part IX requires Respondents to maintain certain records, including records necessary to demonstrate compliance with the order. Part X requires Respondents to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview Respondents' personnel.

Finally, Part XI is a ''sunset'' provision, terminating the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission, Commissioners Phillips and Wilson dissenting.

April J. Tabor,
Secretary.

Joint Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter

The parties named in this matter are no strangers to the Commission. In 2018, the FTC finalized a settlement with Nectar Brand LLC (also doing business as DreamCloud, LLC, and DreamCloud Brand LLC) (''Nectar'') related to false ''Assembled in USA'' claims about the company's wholly imported mattresses. Shortly after that settlement, CEO Ran Reske and Nectar's other officers reorganized the company and its subsidiaries under a new ultimate parent entity, Resident Home LLC (''Resident''). Despite the reorganization and being under active compliance monitoring as part of the 2018 Nectar order, old habits die hard. Misleading made in USA (''MUSA'') claims continued to appear on the website of DreamCloud Brand LLC in 2019 and 2020, contrary to Reske's statements made under penalty of perjury as part of required compliance reports. Today's action sends an unambiguous message about the importance of complying with prior Commission orders. In addition to injunctive provisions, the proposed settlement contains monetary relief of $753,300 and requires Resident to notify consumers of the FTC's action. Together with the Commission's recent MUSA rule,[1] these remedies signal to businesses that MUSA abuses—which harm both consumers and honest competitors—will not be tolerated by the FTC. Our dissenting colleagues suggest that the proposed settlement is not authorized by statute. This is incorrect. The settlement is squarely within the Commission's statutory

[1] See Press Release, Fed Trade Comm'n, FTC Issues Rule to Deter Rampant Made in USA Fraud (July 1, 2021), *https://www.ftc.gov/news-events/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud.*

authority. The dissent contends that the monetary relief in this settlement goes beyond what is permitted by Section 19 of the FTC Act. In fact, Section 19 expressly authorizes payment of redress and damages. The dissent attempts to sidestep this clear statutory authority by narrowly equating ''damages'' with restoration of money to particular consumers. However, such an interpretation runs contrary to the standard legal meaning of the term.[2] Furthermore, MUSA fraud can result in significant consequential damages, both to consumers and, especially, to honest businesses that lose out on sales. Against this backdrop, the proposed monetary relief, far from being a penalty of the sort prohibited by Section 19, is reasonable and well within the Commission's legal authority. The dissent also presents a highly restrictive reading of the types of relief ''explicitly authorized'' by Section 19. But despite admonishing the Commission ''that the words of a statute matter'', the dissent misses the statute's language expressly stating that the relief available is not limited to the types explicitly enumerated (''Such relief may include, but shall not be limited to . . .''). Thus, even if the dissent were not mistaken about what is covered under ''damages'', the relief obtained here still would not be foreclosed by the statutory language. Finally, even if the dissent were not incorrect about the extent of the relief the Commission could obtain under Section 19 at trial, it would still be wrong about the lawfulness of the relief obtained in this settlement. Supreme Court precedent makes clear that federal courts may approve settlements that include relief beyond what could have been awarded at trial.[3] We agree with our dissenting colleagues that Congress should act swiftly to restore our Section 13(b) authority, and like them we have directly urged Congress to do so.[4] But, as we have also consistently emphasized, the FTC needs to use all its tools to protect consumers and competition within the bounds of our existing authority.[5] While Congress works to deliver a Section 13(b) fix, Section 19 and other extant statutory tools[6] will be crucial in allowing the FTC to obtain monetary redress in consumer protection cases.

Statement of Commissioner Rohit Chopra

Wow, that was fast. Soon after the Federal Trade Commission ''punished'' Nectar Sleep through a no-money, no-fault order, the company and its affiliates clearly realized the FTC wasn't serious about Made in USA fraud, so here we are again.

FTC orders are not suggestions, but many bad actors view them as such.[1] And when companies do not adhere to agency orders, it is often a sign of more serious problems.[2] Violations of FTC orders are punishable with civil penalties and a broad range of other relief.

The Commission is proposing to settle the matter by ordering Resident Home, Nectar Sleep's new parent company, to pay $753,300. The Commission's complaint also charges Resident's CEO, Ran Reske, with serious wrongdoing. Reske signed a report, under penalty of perjury, stating that Resident Home had removed all covered Made in USA claims from its subsidiaries' websites and that Resident had never made Made in USA claims about its DreamCloud mattress. This was false.

The proposed settlement binds Nectar Sleep, as well as its new parent company, ensuring that any corporate musical chairs will not allow the company to dodge the FTC's order. The proposed order also requires the companies to provide notice to consumers who purchased a mattress while the false claims appeared.

Commissioner Slaughter has rightfully noted that the Commission must use all of its tools to protect the marketplace and make victims whole. This case is no exception. The settlement is reasonable and squarely within the Commission's legal authority.

[1] This follows a slew of other repeat offenders when it comes to Made in USA requirements, a clear demonstration of the need for the policy shift the FTC is now making. See Rohit Chopra, Commissioner, Fed. Trade Comm'n., Statement of Commissioner Rohit Chopra Regarding the Notice of Proposed Rulemaking on Made in USA (June 22, 2020), *https://www.ftc.gov/system/files/documents/public_statements/1577107/p074204musachoprastatementrev.pdf.* See *e.g., In the Matter of Williams-Sonoma, Inc.,* No. C–4724 (July 2020), *https://www.ftc.gov/system/files/documents/cases/2023025c4724williamssonomaorder.pdf.* The Commission opened an investigation but, after some behavior alterations by Williams-Sonoma, the 2018 investigation was closed, only to be renewed in 2020 when Williams-Sonoma was at it again. See also *U.S.* v. *iSpring Water Systems, LLC, et al.,* No. 1:16-cv-1620–AT (N.D. Ga. 2019). After making false claims that its water filtration systems were made in the United States and entering into an administrative order with the FTC in 2017, iSpring went back to making false claims only a year later, triggering the violation of the 2017 order.

[2] Rohit Chopra, Comm'r, Fed. Trade Comm'n. Repeat Offenders Memo (May 14, 2018), *https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.*

[2] *See* Rohit Chopra and Samuel Levine, The Case for Resurrecting the FTC Act's Penalty Offense Authority, U. PA. L. REV. (forthcoming), fn. 37, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 3721256* (''Black's Law Dictionary defines consequential damages as '[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act.' DAMAGES, Black's Law Dictionary (11th ed. 2019). We have been unable to identify a Section 19 matter where the FTC pursued damages, which is traditionally understood to be a legal remedy rather than an equitable remedy. Unlike equitable relief, damages can conceivably capture a broad range of harms, including indirect consequences of deception. As the FTC faces threats to its authority to seek equitable relief, the agency should consider pursuing this alternative form of relief in more cases.'').

[3] *Firefighters* v. *City of Cleveland,* 478 U.S. 501, 525 (1986) (''a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial'').

[4] *See* Press Release, Fed. Trade Comm'n, FTC Asks Congress to Pass Legislation Reviving the Agency's Authority to Return Money to Consumers Harmed by Law Violations and Keep Illegal Conduct from Reoccurring (Apr. 27, 2021), *https://www.ftc.gov/news-events/press-releases/2021/04/ftc-asks-congress-pass-legislation-reviving-agencysauthority. See also* Hearing on ''Strengthening the Federal Trade Commission's Authority to Protect Consumers'': Before the U.S. Senate Committee on Commerce, Science, and Transportation, Prepared Oral Statement of FTC Commissioner Noah Joshua Phillips, Fed. Trade Comm'n (Apr. 20, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1589176/formatted_prepared_statement_0420_senate_hearing_42021_final.pdf;* Hearing on ''Strengthening the Federal Trade Commission's Authority to Protect Consumers'': Before the U.S. Senate Committee on Commerce, Science, and Transportation, Oral Statement of Commissioner Christine S. Wilson, Fed. Trade Comm'n (Apr. 20, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf;* Hearing on ''Strengthening the Federal Trade Commission's Authority to Protect Consumers'': Before the U.S. Senate Committee on Commerce, Science, and Transportation, Opening Statement of Acting Chairwoman Rebecca Kelly Slaughter, Fed. Trade Comm'n (Apr. 20, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1589184/opening_statement_april_20_senate_oversight_hearing_420_final.pdf;* Hearing on ''Strengthening the Federal Trade Commission's Authority to Protect Consumers'': Before the U.S. Senate Committee on Commerce, Science, and Transportation, Prepared Opening Statement of Commissioner Rohit Chopra, Fed. Trade Comm'n (Apr. 20, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1589172/final_chopra_opening_statement_for_senate_commerce_committee_20210420.pdf.*

[5] *See, e.g.,* Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter Concurring in Part, Dissenting in Part, In the Matter of Flo Health, Inc., Fed. Trade Comm'n (Jan. 13, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1586018/20210112_final_joint_rmrks_statement_on_flo.pdf;* Remarks of Commissioner Rebecca Kelly Slaughter, FTC Data Privacy Enforcement: A Time of Change, Cybersecurity and Data Privacy Conference, New York University School of Law (Oct. 16, 2020), *https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf.*

[6] For instance, violators of administrative orders are subject to penalties and various forms of relief under Section 5(l) of the FTC Act. *See* Statement of Rohit Chopra In the Matter of Resident Home LLC Commission File No. 202 3179, Oct. 8, 2021.

Disguised Opposition

My dissenting colleagues purport that this proposed action—which was agreed to by Resident Home and Reske—is not authorized by statute. Their arguments fail on policy and legal grounds.

Commissioners Phillips and Wilson have consistently supported no-money, no-fault settlements, even in cases of egregious Made in USA fraud.[3] I understand that, as a matter of policy, they do not support serious consequences for Made in USA fraud and have expressed support for the longstanding permissive policy of the past.[4] However, their dissenting statement disguises this policy opposition as an argument about the Commission's legal authority. There are several pieces of evidence to suggest that Commissioners Phillips and Wilson's resistance is based on policy grounds, not on legal grounds.

First, Commissioners Phillips and Wilson argue they must have express statutory authorization to accept monetary remedies in settlements. However, less than two months after the Supreme Court ruled that the FTC cannot obtain monetary relief in certain federal court actions, both Commissioners Phillips and Wilson voted for an $18 million order to settle a complaint brought under Section 13(b) of the FTC Act—the exact authority the Supreme Court explicitly ruled against the FTC on.[5] This not the only example where Commissioners Phillips and Wilson have agreed to settle complaints with remedies that are not specifically enumerated by statute.

To further disguise the nature of their opposition, Commissioners Phillips and Wilson assert that the Commission is accepting monetary remedies in an administrative settlement not permitted by Section 19 of the Federal Trade Commission Act. In reality, Section 19 of the FTC Act expressly authorizes the payment of redress and damages. Consequential damages in Made in USA fraud can be considerable, particularly when it comes to harms to law-abiding businesses whose sales were siphoned. In settlements, parties can save time and resources by making the best estimates—adjusted for risk—on the right resolution. It would have been costly to specifically identify each harmed consumer and business, but it is clear the proposed monetary relief is reasonable, given our legal authority.

In addition, Commissioners Phillips and Wilson imply that to obtain the proposed remedies, the Commission must file multiple complaints in our administrative tribunal and in federal court. However, Commissioner Phillips and Wilson know that the Commission does not regularly prosecute the same conduct in multiple fora. Commissioners need not concurrently charge an entity for the same consumer protection violation of law in its administrative tribunal and in federal court, even when it may be authorized, like in civil penalty actions under Section 5(l).

The facts and evidence clearly show that DreamCloud violated an administrative order, triggering penalties and a broad range of relief under Section 5(l) of the FTC Act. Even if Section 19 of the FTC Act did not authorize damages, it is perfectly appropriate for the Commission to settle all of these claims at once, rather than pursue an additional action for civil penalties. It is obvious that today's proposed action is legally sound. If Commissioners Phillips and Wilson are voting against the proposed settlement because of their preference for no-consequences settlements in Made in USA fraud matters, then they should be upfront with the public and state so plainly.

Conclusion

The FTC has a troubling history of strong-arming small and independent business owners—including church organists[6] and skating teachers[7]—into settlements, while allowing those who repeatedly break the law to escape unscathed,[8] often with the help of high-priced FTC alumni. In this matter, the Commission is proposing a settlement to hold accountable a repeat offender represented by a sophisticated law firm. I am pleased that the agency's abusive and inappropriate double standard is starting to fade away.

Finally, for decades, there was a bipartisan consensus among FTC Commissioners that Made in USA fraud should not be penalized. In 1994, Congress granted the FTC strong tools to combat Made in USA fraud, but Commissioners essentially ignored them. Fortunately, that era is also over.

Effective August 13, 2021, individuals and companies engaging in Made in USA fraud, including first-time offenders, will be subject to stricter sanctions under the FTC's Made in USA Labeling Rule. I hope my colleagues will fully support enforcement actions to hold bad actors accountable under this rule. The families and honest businesses—long ignored by past Commissioners—are counting on us to live up to the law.

Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

That didn't take long. Soon after the Supreme Court unanimously rebuked the Federal Trade Commission for seeking monetary remedies not permitted by Section 13(b) of the FTC Act[1]—remedies that, in fairness to the agency, were blessed by appellate courts for decades[2]—the Commission now votes to accept monetary remedies not permitted by Section 19.

We commend staff for their diligent work on this case, and remain committed to continued Made in the U.S.A. enforcement.[3] But we believe that the monetary redress in this case

[3] See Press Release, Fed Trade Comm'n, FTC Approves Final Consents Settling Charges that Hockey Puck Seller, Companies Selling Recreational and Outdoor Equipment Made False 'Made in USA' Claims (Apr. 17, 2019), *https://www.ftc.gov/news-events/press-releases/2019/04/ftc-approves-final-consentssettling-charges-hockey-puck-seller; In the Matter of Sandpiper Gear of California, Inc. et al.,* No. 182–3095, *https://www.ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter; In the Matter of Underground Sports d/b/a Patriot Puck, et al.,* No. 182–3113 (Apr. 2019), *https://www.ftc.gov/enforcement/casesproceedings/182-3113/underground-sports-inc-doing-business-patriot-puck-et-al.*

[4] *Id.*

[5] See Press Release, Fed Trade Comm'n, LendingClub Agrees to Pay $18 Million to Settle FTC Charges (July 14, 2021), *https://www.ftc.gov/news-events/press-releases/2021/07/lendingclub-agrees-pay-18-million-settle-ftccharges.* Given the alternative paths the Commission could have pursued to address the conduct at hand, I believe the settlement was appropriate even in spite of the Supreme Court's ruling. Indeed, the Commission's proposed stipulated judgment was entered by the court.

[6] *In the Matter of American Guild of Organists,* Fed. Trade Comm'n, *https://www.ftc.gov/enforcement/casesproceedings/151-0159/american-guild-organists.*

[7] In the Matter of Professional Skaters Association, Inc., Fed. Trade Comm'n, *https://www.ftc.gov/enforcement/cases-proceedings/131-0168/professional-skaters-association-inc-matter.*

[8] *See e.g.* Devin Coldewey, 9 reasons the Facebook FTC settlement is a joke, TechCrunch (July 24, 2019), *https://techcrunch.com/2019/07/24/9-reasons-the-facebook-ftc-settlement-is-a-joke/.*

[1] *AMG Capital Management, LLC* v. *FTC,* 141 S. Ct. 1341 (2021).

[2] *See, e.g., FTC* v. *H.N. Singer, Inc.,* 668 F.2d 1107, 1112–1113 (9th Cir. 1982); *FTC* v. *Rare Coin & Bullion Corp.,* 931 F.2d 1312, 1314–1315 (8th Cir. 1991); *FTC* v. *Bronson Partners, LLC,* 654 F.3d 359, 365 (2d Cir. 2011).

[3] See, *In the matter of Chemence, Inc.,* File No. X1600321 (Feb. 2021), *https://www.ftc.gov/enforcement/casesproceedings/X160032/chemence-inc; In the matter of Gennex Media,* File No. 2023122 (Apr. 2021), *https://www.ftc.gov/enforcement/cases-proceedings/2023122/gennex-media-matter; In the matter of Williams-Sonoma, Inc.,* File No. 2023025 (July 2020), *https://www.ftc.gov/enforcement/cases-proceedings/202-3025/williams-sonoma-inc-matter.* Unlike Commissioners Chopra and Slaughter, we have supported every Made in U.S.A. enforcement action brought during our tenure.

exceeds our authority, and so we respectfully dissent.

In 2018, the Commission entered an administrative order against Nectar Brand LLC, also d/b/a Nectar Sleep, DreamCloud LLC, and DreamCloud Brand LLC (''Nectar Order'') and its successors and assigns for making ''Assembled in USA'' claims for wholly-imported mattresses. Despite being under order, over at least two periods between December 2018 and June 2020, the Complaint alleges that Nectar deceptively advertised DreamCloud mattresses as ''proudly made with 100% USA-made premium quality materials''.

Since entry of the Nectar Order, the 2018 Respondent underwent several changes to its corporate structure. In 2019, Resident Home LLC was created as the parent company of Nectar Brand LLC and DreamCloud Brand LLC. We do not have reason to believe that Resident Home LLC is a successor or assign of Nectar Brand LLC and is covered by the Nectar Order.

This state of play left the Commission with at least two choices. It could choose to pursue an order enforcement action in federal court and seek civil penalties.[4] Alternatively, or in addition to taking action against Nectar Brand, LLC, it could choose to pursue a de novo administrative action and seek a new order that would cover the company, its corporate parent Resident Home LLC, and Resident Home's CEO Ran Reske, while ensuring that any future violations would result in a civil penalty. While valid justifications support any of these approaches, the Commission ultimately determined that seeking a new, broader order would best protect consumers.

The Commission statement and Commissioner Chopra's separate statement assert that evidence clearly showed that DreamCloud violated an administrative order. Despite the majority's paean to the value of vindicating Commission orders, we do not plead an order violation in the complaint. We support the FTC's longstanding view that order obligations should reflect pleadings.

In choosing to proceed only administratively, the Commission gave up its ability to obtain civil penalties; but it can still seek redress on behalf of injured consumers pursuant to Section 19 of the FTC Act. While the process is somewhat convoluted, Section 19 permits the Commission to secure certain monetary relief, including, *inter alia,* ''the refund of money'' and ''the payment of damages''.[5] As the legislative history underscores, the purpose of this relief is to allow the Commission to act ''to make specific consumers whole . . .''.[6] Section 19 allows the Commission to obtain refunds for specific, identified injured consumers.[7] It expressly precludes ''the imposition of any exemplary or punitive damages''.[8] Under Section 19, the FTC does not have authority to obtain disgorgement of ill-gotten gains, another (more penal)[9] form of equitable monetary relief.

Despite these clear limitations, the Commission's proposed order includes monetary redress of $753,300, with any remainder not used for redress to be disgorged to the Treasury. The complaint does not include details that would help the public understand how the Commission arrived at this amount, and we are not at liberty to reveal non-public information. But our view of the facts is that the figure obtained far exceeds any injury suffered by those consumers who saw the deceptive statement and purchased a DreamCloud mattress or any reasonable estimate of damages. The majority points to language in Section 19 that also authorizes redress of injury to ''other persons'' (besides consumers) resulting from the unlawful practices alleged.[10] We have seen no evidence of such harm in this matter. No one quibbles that the amount of money here exceeds any reasonable estimate of injury.[11] It might plausibly be consistent with a penalty or with the disgorgement of ill-gotten gains, but we have no authority to obtain such relief under Section 19.[12] The Commission makes clear in its statement that the purpose of the monetary relief in question is to penalize, not to make consumers whole.[13]

The Supreme Court handed down its decision in *AMG Capital Management, LLC* v. *FTC* in April,[14] and made clear that the words of a statute matter. Those words trump the policy preferences of commissioners. That decision should have been a wake-up call, a reminder to the Commission that, no matter how egregious the conduct or righteous our cause, the Commission is not entitled to go beyond the bounds of what the law permits. If we continue to flout the limits of our authority, the Commission should fully expect additional rebukes from the courts.

The *AMG* decision has significantly impacted the ability of the FTC to pursue wrongdoers and remediate law violations through the imposition of monetary relief. So we reiterate our call to Congress to pass legislation to restore the ability of the FTC to seek monetary remedies under Section 13(b) of the FTC Act in appropriate circumstances. But the law says what it says, and we do not support using the cloak of a settlement to overstep the authority we have.[15]

[4] The Commission statement and Commissioner Chopra's separate statement assert that evidence clearly showed that DreamCloud violated an administrative order. Despite the majority's paean to the value of vindicating Commission orders, we do not plead an order violation in the complaint. We support the FTC's longstanding view that order obligations should reflect pleadings.

[5] 15 U.S.C. 57b(b).

[6] S. Rept. 93–151, 93d Cong., 2d Sess., at 27–28 (May 14, 1973).

[7] See *FTC* v. *Figgie Int'l, Inc.,* 994 F.2d 595 (9th Cir. 1993).

[8] 15 U.S.C. 57b(b).

[9] See *Liu* v. *Securities and Exchange Commission,* 140 S. Ct. 1936 (2020).

[10] 15 U.S.C. 57b(b) (''The court . . . shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be.''); see also Joint Statement of Commissioner Slaughter, Chair Khan, and Commissioner Chopra *In the Matter of Resident Home,* 2, FN4 File No. 202317.

[11] In his separate statement, Commissioner Chopra misrepresents our position in *LendingClub.* In that case, the Commission would have been entitled to consumer redress for injuries under Section 19. In *LendingClub,* unlike here, the settlement amount was not punitive; it reflected the monetary harm suffered by consumers. See, *In the matter of LendingClub Corporation,* File No. 1623088 (July 2021), *https://www.ftc.gov/enforcement/casesproceedings/162-3088/federal-trade-commission-v-lendingclub-corporation.*

[12] The majority is correct that Section 19 permits ''damages''. The majority, though, is not entitled to its own facts. The facts alleged in the complaint and Analysis to Aid Public Comment provide no basis for a Section 19 damages remedy of this amount. Although we cannot share the underlying analysis with the reader, the monetary remedy far exceeds any reasonable estimate of Section 19 damages. As the majority makes clear in the Commission statement, it is assessing a penalty under cover of Section 19.

[13] In his separate statement, Commissioner Chopra also claims that we do not support consequences for Made in the U.S.A. fraud. By that logic, Commissioner Chopra's votes against privacy enforcement in cases like *Facebook* and *Google/YouTube* show his enthusiasm for their business models and distaste for enforcement against large technology platforms. The issue here is the Commission trying to eat its Section 19 cake and have its civil penalties too. We cannot do both, however we feel about policy. See Statement of Rohit Chopra *In the Matter of Resident Home LLC,* Commission File No. 202317. See also, Dissenting Statement of Commissioner Rohit Chopra *In re: Facebook, Inc.,* Commission File No. 1823109 (July 24, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_facebook_7-24-19.pdf;* Dissenting Statement of Commissioner Rohit Chopra *In the Matter of Google LLC and YouTube, LLC,* Commission File No. 1723083 (Sep. 4, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1542957/chopra_google_youtube_dissent.pdf.*

[14] *AMG Capital Mgmt., LLC* v. *FTC,* 141 S. Ct. 1341 (2021).

[15] The majority is correct that, as a practical matter, the government has the ability to extort that to which it is not entitled under law. As we have said on other occasions, though, just because we can does not mean that we should. Joint Statement

Continued

If the goal in this case were to maximize money paid by the Respondents as punishment and to deter others from engaging in similar conduct, the Commission was free to enforce the original Nectar Order and seek civil penalties. That was the road not taken. In choosing this road, with a new and broader order, the Commission is obligated to limit monetary relief to the amount necessary to redress injury, as explicitly authorized by Section 19. Because this settlement exceeds those clearly delineated bounds, we must respectfully dissent.

[FR Doc. 2021–22887 Filed 10–20–21; 8:45 am]

BILLING CODE 6750–01–P

of Commissioners Noah Joshua Phillips and Christine S. Wilson, *U.S.* v. *iSpring Water Systems, LLC,* Commission File No. C4611 (Apr. 12, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1513499/ispring_water_systems_llc_c4611_modified_joint_statementof_commissioners_phillips_and_wilson_4-12.pdf.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Nominations to the Presidential Advisory Council on HIV/AIDS; Solicitation of Nominations for Appointment to Presidential Advisory Council on HIV/AIDS (PACHA)

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, U. S. Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Office of the Assistant Secretary for Health (OASH) is seeking nominations for membership on the Presidential Advisory Council on HIV/AIDS (referred to as PACHA and/or the Council). The PACHA is a federal advisory committee within the U.S. Department of Health and Human Services (HHS). Management support for the activities of this Council is the responsibility of the OASH. The qualified individuals will be nominated to the Secretary of Health and Human Services for consideration for appointment as members of the PACHA. Members of the Council, including the Chair and or Co-Chairs, are appointed by the Secretary. Members are invited to serve on the Council for up to four-year terms. The Council was established to provide advice, information, and recommendations to the Secretary regarding programs and policies intended to promote effective prevention and care of HIV infection and AIDS. The functions of the Council are solely advisory in nature.

DATES: Nominations for membership on the PACHA must be received no later than 8:00 p.m. (ET) Monday, January 3, 2022. Packages received after this time will not be considered for the current membership cycle.

ADDRESSES: All nominations should be electronically mailed in one email to *PACHA@hhs.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Caroline Talev, Management Analyst and Alternate Designated Federal Officer to PACHA; email *Caroline.Talev@hhs.gov* and include in the subject line ''PACHA Application.'' Additional information about PACHA can be obtained by accessing the Council's website at About PACHA | *HIV.gov*.

SUPPLEMENTARY INFORMATION: PACHA was established by Executive Order 12963, dated June 14, 1995 as amended by Executive Order 13009, dated June 14, 1996. The Council was established to provide advice, information, and recommendations to the Secretary regarding programs and policies intended to promote effective prevention of HIV disease and AIDS. The functions of the Council are solely advisory in nature.

The Council consists of not more than 25 members. Council members are selected from prominent community leaders with particular expertise in, or knowledge of, matters concerning HIV and AIDS, public health, global health, population health, faith, philanthropy, marketing or business, as well as other national leaders held in high esteem from other sectors of society. PACHA selections will also include persons with lived HIV experience and racial/ethnic and sexual and gender minority persons disproportionately affected by HIV. Council members are appointed by the Secretary or designee, in consultation with the White House Office on National AIDS Policy. Pursuant to advance written agreement, Council members shall receive no stipend for the advisory service they render as members of PACHA. However, as authorized by law and in accordance with Federal travel regulations, PACHA members may receive per diem and reimbursement for travel expenses incurred in relation to performing duties for the Council.

This announcement is to solicit nominations of qualified candidates to fill current and upcoming vacancies on the PACHA.

Nominations

Nominations are being sought for individuals who have expertise and qualifications necessary to contribute to the accomplishments of PACHA's objectives. Federal employees will not be considered for membership. The U.S. Department of Health and Human Services policy stipulates that committee membership be balanced in terms of points of view represented, and the committee's function. Appointments shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, gender identity, HIV status, disability, and cultural, religious, or socioeconomic status. Nominees must be U.S. citizens, and cannot be full-time employees of the U.S. Government. Committee members are Special Government Employees (SGEs), requiring the filing of financial disclosure reports at the beginning and annually during their terms. Individuals who are selected for appointment will be required to provide detailed information regarding their financial interests. Note that the need for different expertise varies from year to year and a candidate who is not selected for an open position may be reconsidered for a subsequent open position. SGE nominees must be U.S. citizens, and cannot be full-time employees of the U.S. Government. Candidates should submit the following items to be considered of appointment:

- Current curriculum vitae or resume, including complete contact information (telephone numbers, mailing address, email address).
- A biographical sketch of the nominee (500 words or fewer).
- A letter of interest or personal statement from the nominee stating how their expertise would inform the work of PACHA.
- At least one letter of recommendation from person(s) not employed by the U.S. Department of Health and Human Services.

Individuals can nominate themselves for consideration of appointment to the Council. All nominations must include the required information in *one email* sent to *PACHA.hhs.gov* with the subject line, ''PACHA Application.'' Incomplete nomination applications will not be processed for consideration.

The Department is legally required to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the functions to be performed by the advisory committee. Appointment to the Council shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status. The Standards of Ethical Conduct for Employees of the Executive Branch are applicable to individuals

who are appointed as members of the Council.

Dated: October 5, 2021.

Caroline Talev,

Management Analyst, Office of Infectious Disease and HIV/AIDS Policy, Alternate Designated Federal Officer, Presidential Advisory Council on HIV/AIDS, Office of the Assistant Secretary for Health, Department of Health and Human Services.

[FR Doc. 2021–22950 Filed 10–20–21; 8:45 am]

BILLING CODE 4150–43–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier OS–0955–New]

Agency Generic Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, Health and Human Service, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before November 22, 2021.

ADDRESSES: Submit your comments to *OIRA_submission@omb.eop.gov* or via facsimile to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Sherrette Funn, *Sherrette.Funn@hhs.gov* or (202) 795–7714. When requesting information, please include the document identifier 0955–New–30D and project title for reference.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Access, Exchange and Use of Social Determinants of Health Data in Clinical Notes.

Type of Collection: New.

OMB No.: 0955–NEW—Office of the National Coordinator for Health Information Technology.

Abstract: The Department of Health and Human Services (HHS), Office of the Secretary, Office of the National Coordinator for Health Information Technology (ONC), promotes the access, exchange, and use of electronic health information to improve health care. There are ongoing efforts to determine what types of information should be recorded in patients' electronic medical records and how that information can be utilized to improve health and healthcare. Data reflecting Social Determinants of Health (SDOH)—the conditions in which people live, learn, work, and play—is limited across healthcare yet is vital to collect and understand for both individual care and public health. There is a growing recognition that by capturing and accessing SDOH data during the course of care, providers can more easily address non-clinical factors, such as food, housing, and transportation insecurities, which can have a profound impact on a person's overall health.

The 21st Century Cures Act (Cures Act) requires HHS and ONC to improve the interoperability of health information. ONC's Cures Act final rule identifies important data elements that should be made electronically available and exchanged through the use of health information technology (IT).

In support of these efforts, ONC seeks to better understand patients' and health care providers' knowledge of SDOH, how SDOH data are currently documented in the electronic health record and how this information is used in patient care. Additionally, ONC seeks to understand challenges experienced and preferences for SDOH data collection, sharing and utilization from both the provider and patient perspectives.

A series of 20 focus groups, a mix of asynchronous (discussion board) and synchronous (live), will be conducted among groups of healthcare professionals (10 groups) and patients/care partners (10 groups), representing various backgrounds, demographics, and healthcare professions, to learn more about their experiences and thoughts relating to the capture and utilization of SDOH data. A prescreening questionnaire will be sent to 1,500 individuals and 200 of those 1,500 people will be chosen to participate in the focus groups. Each individual will participate in one 90-minute focus group.

ESTIMATED ANNUALIZED BURDEN TABLE

Form name	Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Prescreening Questionnaire (English).	Patients and Care Partners	675	1	5/60	56
Prescreening Questionnaire (Spanish).	Patient and Care Partners (Spanish speakers).	75	1	5/60	6
Prescreening Questionnaire	Clinicians and Healthcare Professionals.	750	1	5/60	63
Asynchronous Focus Group	Patients and Care Partners	10	1	90/60	15
Synchronous Focus Group (English)	Patients and Care Partners	80	1	90/60	120
Synchronous Focus Group (Spanish)	Patients and Care Partners (Spanish speakers).	10	1	90/60	15
Asynchronous Focus Group	Clinicians and Healthcare Professionals.	90	1	90/60	135
Synchronous Focus Group	Clinicians and Healthcare Professionals.	10	1	90/60	15
Total		1700	1		425

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2021–22946 Filed 10–20–21; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; NIDA-L Conflicts SEP.

Date: November 29, 2021.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Gerald L. McLaughlin, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 827–5819, *gm145a@nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; HEAL Initiative: America's Startups and Small Businesses Build Technologies to Stop the Opioid Crisis (R41/R42/R43/R44—Clinical Trial Optional).

Date: December 14–15, 2021.

Time: 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Gerald L. McLaughlin, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 827–5819, *gm145a@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: October 15, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–22956 Filed 10–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Prokaryotic Cell and Molecular Biology Study Section, November 3, 2021, 10:00 a.m. to November 4, 2021, 7:00 p.m., National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on October 4, 2021, FRN Doc #2021–21459, V–86—Page 54703.

This notice is being amended to change the meeting date from November 3–4, 2021 to November 3, 2021. The meeting time and place remains the same. The meeting is closed to the public.

Dated: October 18, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–22965 Filed 10–20–21; 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; Small Business: Biological Chemistry, Biophysics and Assay Development.

Date: November 18–19, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: John Harold Laity, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 402–8254, *john.laity@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR20–103: Collaborative Program Grant for Multidisciplinary Teams (RM1).

Date: November 22, 2021.

Time: 11:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: David R. Jollie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4150, MSC 7806, Bethesda, MD 20892, (301)–435–1722, *jollieda@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Tumor Progression, Metastasis, and Microenvironment.

Date: November 22, 2021.

Time: 1:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Manzoor Zarger, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6208, MSC 7804, Bethesda, MD 20892, (301) 435–2477, *zargerma@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: October 15, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst Office of Federal Advisory Committee Policy.

[FR Doc. 2021–22955 Filed 10–20–21; 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; Overflow: Cardiac Sciences.
Date: November 16, 2021.
Time: 11:00 a.m. to 2:00 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: Sara Ahlgren, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, RM 4136, Bethesda, MD 20892, 301–435–0904, *sara.ahlgren@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Vascular and Hematology.
Date: November 17, 2021.
Time: 9:30 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Larry Pinkus, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892, (301) 435–1214, *pinkusl@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: October 18, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–22992 Filed 10–20–21; 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; Small Business: The Cancer Drug Development and Therapeutics (CDDT).
Date: November 18–19, 2021.
Time: 9:00 a.m. to 8:00 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: Lilia Topol, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6192, MSC 7804, Bethesda, MD 20892, 301–451–0131, *ltopol@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Aging and Development, Auditory Vision and Low Vision Technologies.
Date: November 18–19, 2021.
Time: 9:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Barbara Susanne Mallon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1042, *mallonb@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–PA HD–22–010: Technologies to Advance Precision Medicine for Reproductive Health and Infertility.
Date: November 18, 2021.
Time: 9:00 a.m. to 12:00 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: Elaine Sierra-Rivera, Ph.D., Scientific Review Officer, EMNR IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6182, MSC 7892, Bethesda, MD 20892, 301 435–2514, *riverase@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Clinical Neurophysiology, Devices, Neuroprosthetics and Biosensors.
Date: November 18–19, 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: Cristina Backman, Ph.D., Scientific Review Officer, ETTN IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5211, MSC 7846, Bethesda, MD 20892, 301–480–9069, *cbackman@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Brain Disorders and Related Neurosciences.
Date: November 18–19, 2021.
Time: 9:30 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: Vilen A. Movsesyan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040M, MSC 7806, Bethesda, MD 20892, 301–402–7278, *movsesyanv@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR20–300: Maternal and Pediatric Pharmacology and Therapeutics.
Date: November 18, 2021.
Time: 10:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Dianne Hardy, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6175, MSC 7892, Bethesda, MD 20892, 301–435–1154, *dianne.hardy@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cardiovascular Sciences.
Date: November 18, 2021.
Time: 10:00 a.m. to 2:00 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: Margaret Chandler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7814, Bethesda, MD 20892, (301) 435–1743, *margaret.chandler@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Reproductive Sciences.
Date: November 18, 2021.
Time: 12:00 p.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: Elaine Sierra-Rivera, Ph.D., Scientific Review Officer, EMNR IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6182,

MSC 7892, Bethesda, MD 20892, 301 435–2514, *riverase@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: October 18, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–22964 Filed 10–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; 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 Mental Health Special Emphasis Panel; BRAIN Initiative: Kirschstein NRSA Individual Postdoctoral Fellowships (F32).

Date: November 23, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Jasenka Borzan, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Mental Health, 6001 Executive Blvd., Neuroscience Center, Room 6150, Bethesda, MD 20892, 301–435–1260, *jasenka.borzan@nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: October 18, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–22966 Filed 10–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Multi-Component Project.

Date: November 9, 2021.

Time: 1:30 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Dario Dieguez, Jr., Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 827–3101, *dario.dieguez@nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Aging Special Emphasis Panel; Infrastructure Development for Aging Studies.

Date: November 12, 2021.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Isis S. Mikhail, MD, MPH, DrPH, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 402–7704, *mikhaili@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: October 18, 2021.

Miguelina Perez,

Program Analyst Office of Federal Advisory Committee Policy.

[FR Doc. 2021–22990 Filed 10–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Peter Tung at 240–669–5483 or *peter.tung@nih.gov*. Licensing information and copies of the patent applications listed below may be obtained by communicating with the indicated licensing contact at the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rockville, MD 20852; tel. 301–496–2644. A signed Confidential Disclosure Agreement will be required to receive copies of unpublished patent applications related to this invention.

SUPPLEMENTARY INFORMATION: Technology description follows.

Novel VAR2CSA Immunogens and Methods of Use Thereof

Description of Technology

The invention provides immunogen polypeptides comprising fragments of VAR2CSA protein expressed by *P. falciparum* as potential second-generation placental malaria vaccine candidates. VAR2CSA is the leading antigen target for a placental malaria vaccine, where associated antibody titers are correlated with protection. Aspects of the inventive immunogen polypeptides comprise all or portions of the chondroitin sulfate A (CSA) binding regions of VAR2CSA, as identified by a structural study of VAR2CSA conducted by the inventors, that possess great sequence conservation among P. falciparum strains when compared to competing clinical vaccine candidates PRIMVAC and PAMVAC. Also provided are methods of using the immunogen polypeptides for vaccination and treatment of disease.

Oncology Application

The VAR2CSA immunogens bind to oncofetal CSA, a putative therapeutic target for multiple cancers, including NSCLC, breast, bladder and 40–50% of all pediatric solid tumors. Oncofetal CSA is only expressed solely in the placenta, except in several cancerous tissues, making it an ideal target for targeted therapeutics such as immunogens that are cross linked to cytotoxic agents.

This technology is available for licensing for commercial development in accordance with 35 U.S.C. 209 and 37 CFR part 404, as well as for further development and evaluation under a research collaboration.

Potential Commercial Applications:

- Placental malaria vaccine
- CSA-binding proteins for cancer therapeutics

Competitive Advantages:

- Strain-transcending immunogens for vaccination
- Improved immunogen production through expression of key protein regions

Development Stage:

- Immunogens successfully tested in a small animal model

Inventors: Dr. Niraj Tolia and Dr. Rui Ma, both of NIAID.

Publications: Ma, R. et al., ''Structural basis for placental malaria mediated by Plasmodium falciparum VAR2CSA'', Nat Microbiol 6, 380–391, 2021.

Intellectual Property: HHS Reference No. E–021–2021–0–US–01—U.S. Provisional Application No. 63/115,729, filed November 19, 2020.

Licensing Contact: To license this technology, please contact Peter Tung at 240–669–5483 or *peter.tung@nih.gov.*

Collaborative Research Opportunity: The National Institute of Allergy and Infectious Diseases is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize the invention. For collaboration opportunities, please contact Peter Tung at 240–669–5483; *peter.tung@nih.gov.*

Dated: October 15, 2021.

Surekha Vathyam,

Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.

[FR Doc. 2021–22918 Filed 10–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Limited Interaction Targeted Epidemiology (LITE–2): To Advance HIV Prevention (UG3/UH3 Clinical Trial Optional).

Date: November 17, 2021.

Time: 10:00 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G22B, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Kristina S. Wickham, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G22B, Rockville, MD 20852, 301–761–5390, *kristina.wickham@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 15, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst Office of Federal Advisory Committee Policy.

[FR Doc. 2021–22953 Filed 10–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye 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 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 Eye Institute Special Emphasis Panel; NEI Institutional Training Grants I.

Date: November 2, 2021.

Time: 12:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Eye Institute, National Institutes of Health, 6700B Rockledge Drive, Suite 3400 Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ashley Fortress, Ph.D., Designated Federal Official, Division of Extramural Activities, National Eye Institute, National Institutes of Health, 6700B Rockledge Drive, Suite 3400, Bethesda, MD 20892, (301) 451–2020, *ashley.fortress@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. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: October 15, 2021.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–22919 Filed 10–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant

applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Clinical Trial Implementation Cooperative Agreement (U01); NIAID SBIR Phase II Clinical Trial Implementation Cooperative Agreement (U44); Investigator Initiated Extended Clinical Trial (R01).

Date: October 28–29, 2021.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Mohammed S. Aiyegbo, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70, Rockville, MD 20852, (301) 761–7106, *mohammed.aiyegbo@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 15, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–22954 Filed 10–20–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Senior Executive Service Performance Review Boards

AGENCY: Office of the Secretary, Department of Homeland Security.

ACTION: Correction notice.

SUMMARY: This notice announces the appointment of members of the Senior Executive Service (SES) Performance Review Boards (PRBs) for the Department of Homeland Security (DHS). The purpose of the PRBs is to make recommendations to the appointing authority (*i.e.,* Component head) on the performance of senior executives (career, noncareer, and limited appointees), including recommendation on performance ratings, performance-based pay adjustments, and performance awards. The PRBs will also make recommendations on the performance of Transportation Security Executive Service, Senior Level, and Scientific and Professional employees. To make its recommendations, the PRBs will review performance appraisals, initial summary ratings, any response by the employee, and any higher-level official's findings.

DATES: This Notice is effective as of October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Greg Ruocco, Director, Executive Resources, Office of the Chief Human Capital Officer, *greg.ruocco@hq.dhs.gov,* (202) 897–8470.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c) and 5 CFR 430.311, each agency must establish one or more PRBs to make recommendations to the appointing authority (*i.e.,* Component head) on the performance of its senior executives. Each PRB must consist of three or more members. More than one-half of the membership of a PRB must be SES career appointees when reviewing appraisals and recommending performance-based pay adjustments or performance awards for career appointees. Composition of the specific PRBs will be determined on an ad hoc basis from among the individuals listed below:

List of Names (Alphabetical Order)

Adamcik, Carol A
Aguilar, Max
Alfonso-Royals, Angelica
Allen, Matthew C
Alles, Randolph D
Anderson, Sandra D
Antognoli, Anthony
Archambeault, Gregory J
Armstrong, Gloria R
Arratia, Juan
Baden, Mary
Bailey, Angela S
Baker, Jeremy D
Baker, Paul E
Barksdale-Perry, Nicole C
Baroukh, Nader
Barrera, Staci A
Barrett, Lawrence R
Beagles, James M
Berg, Peter B
Berger, Katrina W
Bernstein, Meira
Bhagowalia, Sanjeev
Bible, Daniel A
Bible, Kenneth
Blackwell, Juliana J
Blessey, Caroline
Bobich, Jeffrey M
Bonner, Bryan
Borkowski, Mark S
Boyd, John
Boyer, Stephen A
Bradshaw, Patricia S
Brane, Michelle
Braun, Jacob H
Brewer, Julie S
Bright, Andrea J
Brito, Roberto
Brown, Alan S
Browne, Rene E
Brundage, William
Bryan, Michelle C
Bucholtz, Kathleen L
Bullock, Edna
Bunker, Michael D
Burgess, Kenneth
Burks, Atisha
Burns, Robert P
Burriesci, Kelli A
Bush, Thomas L
Bush, William B
Cagen, Steven W
Caggiano, Marshall L
Caine, Jeffrey
Cameron, Michael K
Campo, Brian
Canevari, Holly E
Canty, Rachel E
Cappello, Elizabeth A
Carnes, Alexandra
Carpio, Philip F
Carraway, Melvin J
Castro, Raul M
Chaleki, Thomas D
Cheatle, Kimberly A
Cheng, Wen-Ting
Clark, Alaina
Cleary Stannard, Jennifer S
Cline, Richard K
Cloe, David
Cofield, Valerie M
Cohen, John D
Collins, James L
Condon, John A
Cook, Charles
Coronado, Luis
Corrado, Janene M
Cotter, Daniel
Courey, Marc B
Courtney, Paul
Coven, Phyllis
Cox, Adam
Cox, Debra S
Cronen, Christopher M
Cross, Catherine C
Crumpacker, Jim H
Culliton-Gonzalez, Katherine
Cunningham, John D
Dainton, Albert J
Dargan, John L
Das, Sharmistha
Daskal, Jennifer
Davidson, Michael J
Davis, Michael P
Davis, Michael P
Dawson, Inga I
Decker, Thomas R
Dembling, Ross W
DeNayer, Larry C
Denton, David L
DeQuattro, Pat
Di Pietro, Joseph R
DiFalco, Frank J
Dipippa, Kathy L
Dobitsch, Stephanie M
Doran, Thomas J
Dornburg, Erica M
Dorr, Robert
Dragani, Nancy J
Dunbar, Susan C
Dupree, Lynn
Eaton, Joseph J
Ederheimer, Joshua A
Edwards, Benjamin R

Edwards, Eric L
Ejiasa, Cyprian
Eldredge, Deborah N
Ellison, Jennifer
Emrich, Matthew D
Escobar Carrillo, Felicia A
Essaheb, Kamal
Evetts, Mark V
Falk, Scott K
Fallon, William T
Fenton, Jennifer M
Ferrara, William A
Fitzmaurice, Stacey D
Fitzpatrick, Ronnyka
Fluit, Heather
Fong, Heather
Francis, Steve K
Fujimura, Paul
Gabbrielli, Tina
Gabbrielli, Tina W
Gabriel, Russell
Gaches, Michael
Gantt, Kenneth D
Geer, Harlan
Gersten, David
Gladwell, Angela R
Glass, Veronica
Gountanis, John
Granger, Christopher
Grazzini, Christopher
Groom, Molly
Gunter, Brett A
Guzman, Nicole
Guzman, Nicole G
Habersaat, Mark S
Hall, Christopher J
Hampton, Stephanie L
Harris, Melvin
Harvey, Melanie K
Hatch, Peter
Havranek, John F
Heinz, Todd W
Henderson, Rachelle B
Hess, David A
Hickey, Gary
Higgins, Jennifer B
Highsmith, AnnMarie R
Hinkle-Bowles, Paige
Hochman, Kathleen
Holzer, James
Hoover, Crinley S
Horton, Michael G
Horyn, Iwona B
Howard, Tammy
Hoy, Serena
Huang, Paul P
Huffman, Benjamine C
Hughes, Clifford T
Hunter, Adam
Huse, Thomas F
Hysen, Eric
Ileto, Carlene
Jackson, Arnold D
James, Michele M
Jawetz, Tom
Jenkins, Donna
Jennings, David W
Jeronimo, Jose M
Johnson, James V
Johnson, Tae D
Jones, Eric C
Kaufman, Steven
Kelley, Angela M
Kelly, Kevin M
Kerner, Francine
King, Matthew H
King, Tatum S
Klein, Matthew
Koumans, Marnix R
Kronisch, Matthew L
Kuepper, Andrew
Kuhn, Karen A
LaJoye, Darby R
Lambeth, John
Lanum, Scott F
Larrimore, David
Laurance, Stephen A
Lawrence, Jamie
Lechleitner, Patrick J
Lederer, Calvin M
Lee, Kimya S
Leonard, John P
Letowt, Philip J
Lewis, James
Loiacono, Adam V
Lundgren, Karen E
Lynch, Steven M
Lyon, Shonnie R
Lyons, Todd M
Maday, Brian
Magrino, Christopher
Maher, Joseph B
Mapar, Jalal
Marcott, Stacy
Martin, Joseph F
Maurer, Tim
McComb, Richard
McCullar, Shannon
McDermott, Thomas
McDonald, Christina E
McElwain, Patrick J
McEntee, Jonathan
McGovern, Helen Mary
McLane, JoAnn
Meade, Michael W
Meckley, Tammy M
Medina, Yvonne R
Mehringer, Holly C
Meyer, Joel T
Michelini, Dennis J
Miles, Jere T
Miles, John D
Miller, Alice
Miller, Gail
Miller, Matthew S
Millona, Eva A
Mina, Peter E
Mitchell, Kathryn C
Moman, Christopher C
Moncarz, Benjamin D
Mulligan, George D
Murphy, Brian J
Murphy, Mark
Murray, James M
Mussington, Brian D
Nally, Kevin J
Natarajan, Nitin
Navarro, Donna M
Neitzel, Beth
Neumeister, James
Newman, Robert B
Nolan, Connie L
O'Connor, Kimberly
Ogden, Jason T
Olick, Karen L
Olson, David
Ondocin, Michael A
Ornato, Anthony M
Ortiz, Raul L
Padilla, Kenneth
Padilla, Kenneth
Padilla Jr, Manuel
Palmer, David J
Paramore, Faron K
Paschall, Robert D
Patel, Kalpesh A
Patterson, Leonard E
Pavlik-Keenan, Catrina
Perez, Nelson
Perry, Timothy
Picarelli, John
Piccone, Colleen C
Pineiro, Marlen
Podonsky, Glenn S
Pohlman, Teresa R
Porto, Victoria
Powell, Jonathan
Price, Corey A
Prosnitz, Susan M
Punteney, James
Purifoy, Felicia
Quinn, Timothy J
Rasicot, Gary
Raymond, John J
Renaud, Daniel M
Renaud, Tracy L
Rezmovic, Jeffrey M
Rodi III, Louis A
Rodriguez, Waldemar
Roncone, Stephen A
Rosenblum, Marc R
Rubino, Jaclyn
Rynes, Joel C
Sabatino, Diane J
Sahakian, Diane V
Salazar, Rebecca A
Salazar, Ronald M
Saltalamachea, Michael
Salvano-Dunn, Dana
Scardaville, Michael
Scott, Kika M
Sejour, Soldenise
Selby, Cara M
Sequin, Debbie W
Sevier, Adrian
Shahoulian, David
Shaw, David C
Shearer, Ruth C
Sheridan, Jeremy C
Short, Victoria D
Skelton, Kerry T
Smislova, Melissa
Smith, Frederick B
Spradlin, Ryan L
Stephens, Celisa M
Stevenson, Tirelle D
Stiefel, Nathaniel I
Stough, Michael S
Stuntz, Shelby
Sulc, Brian
Sunstein, Cass
Sutherland, Dan W
Swartz, Neal J
Sykes, Gwendolyn
Tabaddor, Afsaneh
Tapscott, Wallicia
Taylor, Robin M
Todd, Sarah
Tomney, Christopher J
Toris, Randolph B
Trasvina, John
Try, Gregory W
Tschampel, Richard
Valverde, Michael
Van Houten, Ann
Venture, Veronica
Villanueva, Raymond
Vinograd, Samantha

Wales, Brandon
Wallen, Steven
Walton, Kimberly A
Washington, Karinda
Wasowicz, John A
Watkins, Tracey L
Watson, Andre R
Wawro, Joseph D
Wells, James
Whalen, Mary Kate
Wheaton, Kelly D
Williams, Marta
Williams II, Jesse J
Witte, Diane L
Wolfe, Herbert
Wong, Sharon M
Wright, Christopher J
Yarwood, Susan A

Dated: October 18, 2021.

Greg Ruocco,

Director, Executive Resources, Office of the Chief Human Capital Officer.

[FR Doc. 2021–23007 Filed 10–20–21; 8:45 am]

BILLING CODE 9112–FC–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2021–0041]

Privacy Act of 1974; System of Records

AGENCY: Office of Inspector General, U.S. Department of Homeland Security.

ACTION: Notice of a modified Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the U.S. Department of Homeland Security (DHS), Office of Inspector General (OIG), proposes to modify and reissue a current DHS system of records titled, ''DHS/OIG–002 Investigative Records System of Records.'' This system of records allows DHS OIG to collect and maintain records related to alleged violations of criminal, civil, and administrative laws and regulations pertaining to DHS programs, operations, and employees, as well as contractors and other individuals and entities associated with DHS; monitor complaint and investigation assignments, status, disposition, and results; manage investigations and information provided during the course of such investigations; audit actions taken by DHS management regarding employee misconduct and other allegations; audit legal actions taken following referrals to the U.S. Department of Justice (DOJ) for criminal prosecution or litigation; provide information relating to any adverse action or other proceeding that may occur as a result of the findings of an investigation; and provide a system for calculating and reporting statistical information. DHS OIG is updating this system of records notice to provide notice of changes to the Authorities, Categories of Records, Record Source Categories, and Routine Uses. Additionally, DHS is issuing an updated Notice of Proposed Rulemaking to exempt this system of records from certain provisions of the Privacy Act, elsewhere in the **Federal Register**. This modified system will be included in DHS's inventory of record systems.

DATES: Submit comments on or before November 22, 2021. This modified system will be effective upon publication. New or modified routine uses will be effective November 22, 2021.

ADDRESSES: You may submit comments, identified by docket number DHS–2021–0041 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Lynn Parker Dupree, Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528–0655.

Instructions: All submissions received must include the agency name and docket number DHS–2021–0041. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general and privacy questions, please contact: Lynn Parker Dupree, (202) 343–1717, Chief Privacy Officer, U.S. Department of Homeland Security, Washington, DC 20528–0655.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Department of Homeland Security (DHS), Office of Inspector General (OIG), is modifying and reissuing this system of records notice under the Privacy Act of 1974 (5 U.S.C. 552). DHS OIG is responsible for a wide range of oversight functions, including to initiate, conduct, supervise, and coordinate audits, investigations, inspections, and other reviews relating to the programs and operations of DHS. DHS OIG promotes economy, efficiency, and effectiveness within DHS and prevents, detects, and investigates employee corruption, fraud, waste, and abuse in its programs and operations. DHS OIG is responsible for investigating allegations of criminal, civil, and administrative misconduct involving DHS employees, contractors, grantees, and DHS programs and activities. These investigations can result in criminal prosecutions, fines, civil monetary penalties, and administrative sanctions. While DHS OIG is operationally a part of DHS, it operates independently of DHS and all offices within it.

The DHS/OIG–002 Investigative Records System of Records assists DHS OIG with receiving and processing allegations of misconduct, including violations of criminal and civil laws, as well as administrative policies and regulations pertaining to DHS employees, contractors, grantees, and other individuals and entities within DHS. The system includes complaints and investigation-related files. DHS OIG manages information provided during the course of its investigations to: Create records showing dispositions of allegations; audit actions taken by DHS management regarding employee misconduct; audit legal actions taken following referrals to the U.S. Department of Justice (DOJ) for criminal prosecution or civil action; calculate and report statistical information; manage OIG investigators' training; and manage Government-issued investigative property and other resources used for investigative activities.

DHS OIG is modifying the DHS/OIG–002 Investigative Records System of Records to update the Authorities, Categories of Records, Record Source Categories, and Routine Uses. The Authorities section is being updated to provide more precise statutes for collection: 6 U.S.C. 113(b); 6 U.S.C. 795; 6 U.S.C. 142; 6 U.S.C. 345; and the Inspector General Act of 1978, as amended 5 U.S.C. App. §§ 1–13. The Categories of Records are being updated to include: (1) Information obtained from social media; (2) video and photographic digital images; (3) case administrative information (*e.g.,* status, reference number, method complaint received); (4) demographic information (*e.g.,* gender, race, ethnicity); and (5) other types of credentials (*e.g.,* driver's license, state ID, passport). The Categories of Records have also been updated to clarify the types of relevant information from inspections, reviews, and inquiries that may be collected.

The Record Source Categories has been updated to clarify that records may be obtained from a variety of sources, to include: Subjects, witnesses and others associated with investigations; other DHS Components and Federal, state, local, nongovernmental and foreign agencies; educational institutions; credit bureaus; medical service providers; financial institutions; commercial

sources; and open source or publicly available information.

Routine use (E) is being modified and a new routine use (F) is being added to conform to Office of Management and Budget Memorandum M–17–12. Routine use (P) was added to describe sharing required when testing new technologies, under the approval of the Chief Privacy Officer. In addition, a redundant routine use has been removed. All subsequent routine uses have been renumbered to account for these changes. Additionally, this notice includes non-substantive changes to simplify the formatting and text of the previously published notice.

Consistent with DHS's information sharing mission, information stored in the DHS/OIG–002 Investigative Records System of Records may be shared with other DHS Components that have a need to know the information to carry out their national security, law enforcement, immigration, intelligence, or other homeland security functions. In addition, DHS OIG may share information with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies consistent with the routine uses set forth in this system of records notice.

There will be no change to the Privacy Act exemptions currently in place for this system of records and therefore they remain in effect. This modified system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act codifies fair information practice principles in a statutory framework governing the means by which Federal Government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. Additionally, the Judicial Redress Act (JRA) provides covered persons with a statutory right to make requests for access and amendment to covered records, as defined by the JRA, along with judicial review for denials of such requests. In addition, the JRA prohibits disclosures of covered records, except as otherwise permitted by the Privacy Act.

Below is the description of the DHS/OIG–002 Investigative Records System of Records. In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

SYSTEM NAME AND NUMBER:

U.S. Department of Homeland Security (DHS)/Office of Inspector General (OIG)-002 Investigative Records System of Records.

SECURITY CLASSIFICATION:

Classified, sensitive, unclassified.

SYSTEM LOCATION:

Records are maintained at the DHS OIG Headquarters in Washington, DC and field offices. Generally, OIG maintains electronic records in the OIG Enterprise Data System (EDS).

SYSTEM MANAGER(S):

Chief System Security Officer, U.S. Department of Homeland Security, Office of Inspector General, Washington, DC 20528.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

6 U.S.C. 113(b); 6 U.S.C. 795; 6 U.S.C. 142; 6 U.S.C. 345; and the Inspector General Act of 1978, as amended 5 U.S.C. App. §§ 1–13.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to collect and maintain records concerning DHS OIG investigations, including allegations of misconduct, violations of criminal, civil, and administrative laws and regulations pertaining to DHS programs, operations, employees, contractors, and other individuals or entities associated with DHS. This system of records is intended to support and protect the integrity of DHS OIG operations; to ensure compliance with applicable laws, regulations, and policies; and to ensure the integrity of DHS employees' conduct and those acting on behalf of DHS.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any individual filing complaints of or related to criminal, civil, or administrative violations, including employee misconduct, fraud, waste, or mismanagement; current or former DHS employees and contractors; current or former employees of other federal agencies; contractor applicants; contractors, grantees, and individuals whose association with current and former employees relate to alleged violations under investigation; witnesses, complainants, sources of information, suspects, defendants, or parties who have been identified by DHS OIG, other DHS Components, other agencies, or members of the general public in connection with complaints, audits, inspections, and/or investigations.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

- Full name and aliases;
- Date of birth;
- Social Security number;
- Citizenship status;
- Driver's license, state ID, passport, or other government-issued credential information;
- Demographic information (*e.g.,* gender, race, ethnicity);
- Addresses;
- Contact information (*e.g.,* phone numbers, email addresses);
- Employment information (*e.g.,* duty station, grade, job series, entrance on duty date);
- Relevant information from background investigations;
- Education/training history;
- Medical history;
- Criminal history;
- Travel history, including passport information;
- Financial history;
- Relevant information from inspections, reviews, and inquiries, including records collected in response to an allegation, such as;
  - Government emails;
  - Time and attendance records;
  - Government credit card bills;
  - Building access logs;
  - Government phone bills/records;
  - Government property records;
  - Government travel records;
  - Computer forensic files;
  - Open source or publicly available information, such as social media postings;
  - Police reports; and
  - Any other information gathered in the course of or relating to an integrity or disciplinary inquiry, review, inspection, or investigation of a criminal, civil, or administrative nature;
- Investigative records of a criminal, civil, or administrative nature;
- Biometrics;
- Letters, emails, memoranda, video, photograph and digital images, and reports;
- Exhibits, evidence, statements, and affidavits;
- Relatives and associates;
- Allegations received and method received;
- Incident location/date;
- Case reference numbers;
- Case status;
- Case agent/officer or supervisor;
- Any other personal information relevant to the subject matter of an OIG investigation; and

• Investigative case files containing allegations and complaints; witness statements; transcripts of electronic monitoring; subpoenas and legal opinions and advice; reports of investigations (ROI); and reports of criminal, civil, and administrative actions taken as a result of the investigation.

RECORD SOURCE CATEGORIES:

Records are obtained from individuals who are the subject of the investigation or inquiry, employers, law enforcement organizations, detention facilities, members of the public, witnesses, educational institutions, government agencies, nongovernmental organizations, credit bureaus, references, neighborhood checks, confidential sources, medical service providers, personal interviews, photographic images, military records, financial institutions, free and for-purchase commercial records, open source or publicly available information, citizenship records, and the personnel history and application forms of agency applicants, employees, or contractors. Records are also collected from other DHS Components.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including the U.S. Attorneys Offices, or other federal agencies conducting litigation or proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any Component thereof;
2. Any employee or former employee of DHS in his/her official capacity;
3. Any employee or former employee of DHS in his/her individual capacity, when DOJ or DHS has agreed to represent the employee; or
4. The United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or General Services Administration pursuant to records management inspections being conducted under the authority of 44 U.S.C. secs. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when (1) DHS suspects or has confirmed that there has been a breach of the system of records; (2) DHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DHS (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

F. To another federal agency or federal entity, when DHS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

G. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

I. To a federal, state, or local agency, or other appropriate entity or individual, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, Executive Order, or other applicable national security directive when the security of the borders which DHS is tasked with maintaining are at risk of being compromised.

J. To international and foreign governmental authorities in accordance with law and formal or informal international agreements.

K. To an appropriate federal, state, local, tribal, foreign, or international agency, pursuant to a request, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual or issues of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request.

L. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

M. To the Council of the Inspectors General on Integrity and Efficiency (CIGIE) and other federal agencies, as necessary, if the records respond to an audit, investigation, or review conducted pursuant to an authorizing law, rule, or regulation, and in particular those conducted at the request of the CIGIE's Integrity Committee pursuant to statute.

N. To complainants and victims to the extent necessary to provide such persons with information and explanations concerning the progress or results of the investigation arising from the matters of which they complained or of which they were a victim.

O. To appropriate federal, state, local, tribal, or foreign governmental agencies or multilateral governmental organizations, with the approval of the Chief Privacy Officer, when DHS is aware of a need to use relevant data, that relate to the purpose(s) stated in this SORN, for purposes of testing new technology.

P. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of DHS, or when disclosure is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent the Chief Privacy Officer determines that release of the specific information in the context of a particular case would constitute a clearly unwarranted invasion of personal privacy.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

DHS OIG stores records in this system electronically or on paper in secure facilities in a locked drawer behind a locked door. The records may be stored on magnetic disc, tape, and digital media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

DHS OIG may retrieve records by the individual's name, date of birth, Social Security number, or any other unique identifier listed above.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records will be retained pursuant to DHS OIG National Archives and Records Administration (NARA) retention schedule N1–563–07–5 (October 11, 2007). Complaint and investigative record files that involve substantive information relating to national security or allegations against senior DHS officials, that attract national media or congressional attention, or that result in substantive changes in DHS policies or procedures are permanent and are transferred to the NARA 20 years after completion of the investigation and all actions based thereon. All other complaint and investigative record files are destroyed 20 years after completion of the investigation and all actions based thereon. Government issued investigative property records and management reports are destroyed when no longer needed for business purposes.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

DHS OIG safeguards records in this system according to applicable rules and policies, including all applicable DHS automated systems security and access policies. DHS OIG has imposed strict controls to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RECORD ACCESS PROCEDURES:

The Secretary of Homeland Security has exempted this system from certain notification, access, and amendment procedures of the Privacy Act, and the Judicial Redress Act, if applicable. However, DHS will consider individual requests to determine whether or not information may be released. Thus, individuals seeking access to and notification of any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the OIG Privacy Officer and OIG Freedom of Information Act Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''Contact Information.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, U.S. Department of Homeland Security, Washington, DC 20528–0655. Even if neither the Privacy Act nor the Judicial Redress Act provide a right of access, certain records about you may be available under the Freedom of Information Act.

When an individual is seeking records about himself or herself from this system of records or any other Departmental system of records, the individual's request must conform with the Privacy Act regulations set forth in 6 CFR part 5. The individual must first verify his/her identity, meaning that the individual must provide his/her full name, current address, and date and place of birth. The individual must sign the request, and the individual's signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, an individual may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov/foia* or 1–866–431–0486. In addition, the individual should:

- Explain why he or she believes the Department would have information being requested;
- Identify which component(s) of the Department he or she believes may have the information;
- Specify when the individual believes the records would have been created; and
- Provide any other information that will help the staff determine which DHS component agency may have responsive records;

If the request is seeking records pertaining to another living individual, the request must include an authorization from the individual whose record is being requested, authorizing the release to the requester.

Without the above information, the component(s) may not be able to conduct an effective search, and the individual's request may be denied due to lack of specificity or lack of compliance with applicable regulations.

CONTESTING RECORD PROCEDURES:

For records covered by the Privacy Act or covered JRA records, individuals may make a request for amendment or correction of a record of the Department about the individual by writing directly to the Department component that maintains the record, unless the record is not subject to amendment or correction. The request should identify each particular record in question, state the amendment or correction desired, and state why the individual believes that the record is not accurate, relevant, timely, or complete. The individual may submit any documentation that would be helpful. If the individual believes that the same record is in more than one system of records, the request should state that and be addressed to each component that maintains a system of records containing the record.

NOTIFICATION PROCEDURES:

See ''Record Access Procedures'' above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3), (c)(4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), e)(4)(I), (e)(5), (e)(8), (f); and (g)(1). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5), has exempted this system from the following provisions of the Privacy Act, 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

HISTORY:

80 FR 44372 (July 27, 2015).

Lynn Parker Dupree,

Chief Privacy Officer, U.S. Department of Homeland Security.

[FR Doc. 2021–22836 Filed 10–20–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2701–21; DHS Docket No. USCIS–2021–0020]

RIN 1615–ZB90

Implementation of Employment Authorization for Individuals Covered by Deferred Enforced Departure for Hong Kong

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security.

ACTION: Notice.

SUMMARY: On August 5, 2021, President Joseph Biden issued a memorandum to the Secretary of State and the Secretary of Homeland Security (Secretary) directing the Secretary to take appropriate measures to defer for 18 months, through February 5, 2023, the removal of certain Hong Kong residents present in the United States. This Notice provides information about Deferred Enforced Departure (DED) for certain eligible Hong Kong residents and provides information on how eligible individuals may apply for DED-related Employment Authorization Documents (EADs) with USCIS. For the purposes of this Notice, a Hong Kong resident is defined as an individual of any nationality, or without nationality, who has met the requirements for, and been granted, a Hong Kong Special Administrative Region Passport, a British National Overseas Passport, a British Overseas Citizen Passport, a Hong Kong Permanent Identity card, or a Hong Kong Special Administrative Region (HKSAR) Document of Identity for Visa Purposes.

DATES: DED and employment authorization for noncitizens covered under DED for Hong Kong is effective from August 5, 2021 through February 5, 2023. The procedures for employment authorization in this Notice apply only to noncitizens who are Hong Kong residents, who are present in the United States as of August 5, 2021, and who meet other eligibility criteria for DED described below.

FOR FURTHER INFORMATION CONTACT: You may contact Andria Strano, Acting Division Chief, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital Gateway Drive, Camp Springs, MD 20746, or by phone at 800–375–5283.

ADDRESSES:

- For further information on DED, including additional information on eligibility, please visit the USCIS DED web page at *uscis.gov/humanitarian/deferred-enforced-departure.* You can find specific information about DED for Hong Kong by selecting ''DED Granted Region: Hong Kong'' from the menu on the left of the DED web page.
- If you have additional questions about DED, please visit *uscis.gov/tools.* Our online virtual assistant, Emma, can answer many of your questions and point you to additional information on our website. If you are unable to find your answers there, you may also call our USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).
- Applicants seeking information about the status of their individual cases may check Case Status Online, available on the USCIS website at *uscis.gov*, or visit the USCIS Contact Center at *uscis.gov/contactcenter.*
- Further information will also be available at local USCIS offices upon publication of this Notice.

SUPPLEMENTARY INFORMATION:

Table of Abbreviations

CFR—Code of Federal Regulations
DED—Deferred Enforced Departure
DHS—U.S. Department of Homeland Security
EAD—Employment Authorization Document
FNC—Final Non-confirmation
Form I–765—Application for Employment Authorization
Form I–9—Employment Eligibility Verification
Form I–912—Request for Fee Waiver
FR—Federal Register
Government—U.S. Government
IER—U.S. Department of Justice Civil Rights Division, Immigrant and Employee Rights Section
SAVE—USCIS Systematic Alien Verification for Entitlements Program
Secretary—Secretary of Homeland Security
TNC—Tentative Non-confirmation
TPS—Temporary Protected Status
TTY—Text Telephone
USCIS—U.S. Citizenship and Immigration Services
U.S.C.—United States Code

Purpose of This Action

Pursuant to the President's constitutional authority to conduct the foreign relations of the United States, President Biden has concluded that foreign policy considerations warrant implementing DED for Hong Kong through February 5, 2023.[1] Through this Notice, as directed by the President, DHS is establishing procedures for individuals covered by DED for Hong Kong to apply for employment authorization through February 5, 2023.

What is Deferred Enforced Departure (DED)?

- DED is an administrative stay of removal ordered by the President. The authority to grant DED arises from the President's constitutional authority to conduct the foreign relations of the United States. The President can authorize DED for any reason related to this authority. DED has been authorized in situations where foreign nationals or other groups of noncitizens may face danger if required to return to countries or any part of such foreign countries experiencing political instability, conflict, or other unsafe conditions, or when there are other foreign policy reasons for allowing a designated group of noncitizens to remain in the United States.
- Although DED is not a specific immigration status, individuals covered by DED are not subject to removal from the United States, usually for a designated period of time. Furthermore, the President may direct that certain benefits, such as employment authorization or travel authorization, be available to the noncitizens covered by the DED directive.
- If the President provides for employment or travel authorization, USCIS administers those benefits. USCIS publishes a **Federal Register** notice to instruct the covered population on how to apply for any benefits provided.
- The President issues directives regarding DED and who is covered via presidential memorandum. The qualification requirements for individuals who are covered under DED are based on the terms of the President's directive regarding DED and any relevant implementing requirements established by DHS. Since DED is a directive not to remove particular individuals, rather than a specific immigration status like Temporary Protected Status (TPS), there is no DED application form required to obtain DED coverage.

[1] *See* Presidential Memorandum for the Secretary of State and the Secretary of Homeland Security on the Deferred Enforced Departure for Certain Hong Kong Residents August 5, 2021, *available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/05/memorandum-on-the-deferred-enforced-departure-for-certain-hong-kong-residents/.*

The Presidential Memorandum ordering DED for Hong Kong can be found at: *https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/05/memorandum-on-the-deferred-enforced-departure-for-certain-hong-kong-residents/.*

Ur M. Jaddou,

Director, U.S. Citizenship and Immigration Services.

Eligibility and Employment Authorization for DED

How will I know if I am eligible for employment authorization under the DED Presidential Memorandum for Hong Kong?

The procedures for employment authorization in this Notice apply only to non-U.S. citizens who are Hong Kong residents (regardless of their country of birth), who are present in the United States as of August 5, 2021, except for noncitizens:

- Who have voluntarily returned to Hong Kong or the People's Republic of China (PRC) after August 5, 2021;
- who have not continuously resided in the United States since August 5, 2021;
- who are inadmissible under section 212(a)(3) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(3)) or deportable under section 237(a)(4) of the INA (8 U.S.C. 1227(a)(4));
- who have been convicted of any felony or two or more misdemeanors committed in the United States, or who meet the criteria set forth in section 208(b)(2)(A) of the INA (8 U.S.C. 1158(b)(2)(A));
- who are subject to extradition;
- whose presence in the United States the Secretary has determined is not in the interest of the United States or presents a danger to public safety; or
- whose presence in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States.

What will I need to file if I am covered by DED and would like to obtain employment authorization?

If you are covered under DED for Hong Kong and would like to work on a DED-related EAD, you must apply for an EAD by filing an Application for Employment Authorization (Form I–765). Please carefully follow the Form I–765 instructions when completing the application for an EAD. When filing the Form I–765, you must:

- Indicate that you are eligible for DED by entering ''(a)(11)'' in response to Question 27 on the Form I–765; and
- Submit the fee for the Form I–765 (or request a fee waiver).

The regulations require individuals covered under DED who request an EAD to pay the fee prescribed in 8 CFR 103.7 for the Form I–765. *See also* 8 CFR 274a.12(a)(11) (employment authorization for DED-covered individuals); and 8 CFR 274a.13(a) (requirement to file EAD application if EAD desired). If you are unable to pay the fee, you may request a fee waiver by completing a Request for Fee Waiver (Form I–912).

Supporting Documentation

The filing instructions on Form I–765 list all the documents needed. You may also find information on the initial required documents on the USCIS website at *https://www.uscis.gov/i-765.* If USCIS determines after reviewing your submission that it needs additional information, it will issue you a Request for Evidence (RFE).

How will I know if USCIS will need to obtain biometrics?

If biometrics are required to produce your EAD, you will be notified by USCIS and scheduled for an appointment at a USCIS Application Support Center.

Where do I submit my completed DED-based application for employment authorization (Form I–765)?

For DED, mail your completed Form I–765 and supporting documentation to the proper address in Table 1 below.

TABLE 1—MAILING ADDRESSES

If . . .	Mail to . . .
You are applying through the U.S. Postal Service.	USCIS, Attn: DED Hong Kong, P.O. Box 805283, Chicago, IL 60680–5283.
You are using FedEx, UPS, or DHL.	USCIS, Attn: DED Hong Kong, (Box 805283), 131 South Dearborn—3rd Floor, Chicago, IL 60603–5517.

Can I file my DED-based Form I–765 electronically?

No. Electronic filing is not available when filing Form I–765 based on DED.

What happens after February 5, 2023, for purposes of DED-based employment authorization?

This DED authorization is set to end on February 5, 2023. After that date, employers can no longer accept EADs with a category code of A11 and a February 5, 2023, expiration date, and employees will need to present other evidence of continued work authorization.

Travel

In its discretion, DHS may provide travel authorization as a benefit of DED for eligible Hong Kong residents. You must file for advance parole if you wish to travel outside the United States. Advance parole gives you permission to leave the United States and return during a specified period. To request advance parole, you must file Form I–131, Application for Travel Document, available at *www.uscis.gov/i-131.* You may file Form I–131 with Form I–765 or separately. When filing the Form I–131, you must:

- Select Item Number 1.d. in Part 2 on the Form I–131; and
- Submit the fee for the Form I–131.

If you leave the United States without first receiving advance parole, you may no longer be eligible for DED and may not be permitted to reenter the United States. Please also be advised that if you return to Hong Kong or the PRC, you may not be permitted to resume DED in the United States since the presidential memorandum providing for DED for certain Hong Kong residents excludes individuals who have voluntarily returned to Hong Kong or the PRC after August 5, 2021.[2]

Mailing Information

Mail your application for Form I–131 to the proper address in Table 1.

Supporting Documentation

The filing instructions on Form I–131 list all the documents needed. You may also find information on the acceptable documentation and DED eligibility on the USCIS website at *www.uscis.gov/humanitarian/deferred-enforced-departure.* If USCIS needs additional evidence, it will issue you an RFE.

General Employment-Related Information for Individuals With DED-Based Employment Authorization and Their Employers

How can I obtain information on the status of my EAD request?

To get case status information about your DED-based EAD request, you can check Case Status Online at *uscis.gov*, or visit the USCIS Contact Center at *uscis.gov/contactcenter.* If your Form I–765 has been pending for more than 90 days, and you still need assistance, you may ask a question about your case online at *egov.uscis.gov/e-request/*

[2] Ibid.

Intro.do or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

When hired, what documentation may I show to my employer as evidence of identity and employment authorization when completing Form I–9?

You can find the Lists of Acceptable Documents on the third page of Form I–9, Employment Eligibility Verification, as well as the Acceptable Documents web page at *uscis.gov/i-9-central/acceptable-documents.* Employers must complete Form I–9 to verify the identity and employment authorization of all new employees hired after November 6, 1986. Within three business days of hire, employees must present acceptable document(s) to their employers as evidence of identity and employment authorization to satisfy Form I–9 requirements and employers must complete Section 2 of the Form I–9. For employment that will last less than three days, Section 2 of the Form I–9 must be completed no later than the first day of work for pay.

You may present any documentation from List A (which provides evidence of both identity and employment authorization) or documentation from List B (which provides evidence of your identity) together with documentation from List C (which provides evidence of employment authorization), or where applicable you may present an acceptable receipt. Receipts may not be accepted if employment will last less than three days. Additional information on receipts is available at *www.uscis.gov/i-9-central/form-i-9-acceptable-documents/receipts.* Employers may not reject a document based on a future expiration date. You can find additional information about Form I–9 on the I–9 Central web page at *uscis.gov/I-9Central.* An EAD is an acceptable document under List A.

If I have an EAD based on another immigration status, can I obtain a new DED-based EAD?

Yes, if you are eligible for DED, you can obtain a new EAD, regardless of whether you have an EAD based on another immigration status. If you want to obtain a DED-based EAD valid through February 5, 2023, then you must file Form I–765 and pay the associated fee.

Can my employer require that I provide any other documentation to prove my status, such as proof of my Hong Kong residency?

No. When completing Form I–9, employers must accept any documentation that appears on the Form I–9 Lists of Acceptable Documents that reasonably appears to be genuine and that relates to you, or an acceptable List A, List B, or List C receipt. Employers need not reverify List B identity documents. Therefore, employers may not request proof of Hong Kong residency when completing Form I–9 for new hires or reverifying the employment authorization of current employees. Refer to the ''Note to Employees'' section of this **Federal Register** notice for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin.

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This **Federal Register** notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call USCIS at 888–464–4218 (TTY 877–875–6028) or email USCIS at *I-9Central@dhs.gov.* USCIS accepts calls and emails in English and many other languages. For questions about avoiding discrimination during the employment eligibility verification process (Form I–9 and E-Verify), employers may call the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER) Employer Hotline at 800–255–8155 (TTY 800–237–2515). IER offers language interpretation in numerous languages. Employers may also email IER at *IER@usdoj.gov.*

Note to Employees

For general questions about the employment eligibility verification process, employees may call USCIS at 888–897–7781 (TTY 877–875–6028) or email USCIS at *I-9Central@dhs.gov.* USCIS accepts calls in English, Spanish and many other languages. Employees or applicants may also call the IER Worker Hotline at 800–255–7688 (TTY 800–237–2515) for information regarding employment discrimination based upon citizenship, immigration status, or national origin, including discrimination related to Form I–9 and E-Verify. The IER Worker Hotline provides language interpretation in numerous languages.

To comply with the law, employers must accept any document or combination of documents from the Lists of Acceptable Documents if the documentation reasonably appears to be genuine and to relate to the employee, or an acceptable List A, List B, or List C receipt. Employers may not require extra or additional documentation beyond what is required for Form I–9 completion. Further, employers participating in E-Verify who receive an E-Verify case result of Tentative Non-confirmation (TNC) must promptly inform employees of the TNC and give such employees an opportunity to contest the TNC. A TNC case result means that the information entered into E-Verify from Form I–9 differs from records available to DHS.

Employers may not terminate, suspend, delay training, withhold or lower pay, or take any adverse action against an employee because of the TNC while the case is still pending with E-Verify. A Final Non-confirmation (FNC) case result is received when E-Verify cannot confirm an employee's employment eligibility. An employer may terminate employment based on a case result of FNC. Work-authorized employees who receive an FNC may call USCIS for assistance at 888–897–7781 (TTY 877–875–6028). For more information about E-Verify-related discrimination or to report an employer for discrimination in the E-Verify process based on citizenship, immigration status, or national origin, contact IER's Worker Hotline at 800–255–7688 (TTY 800–237–2515). Additional information about proper nondiscriminatory Form I–9 and E-Verify procedures is available on the IER website at *justice.gov/ier* and the USCIS and E-Verify websites at *uscis.gov/i-9-central* and *e-verify.gov*.

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

For Federal purposes, individuals may present their A11 EAD to show they are covered by DED. However, while Federal Government agencies must follow the guidelines laid out by the Federal Government, state and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, state, or local government benefit, you may need to provide the government agency your A11 EAD or other DHS-issued documentation showing you are covered

under DED and/or showing you are authorized to work based on DED. Check with the government agency regarding which documentation the agency will accept.

Some benefit-granting agencies use the Systematic Alien Verification for Entitlements (SAVE) program to confirm the current immigration status of applicants for public benefits. SAVE can verify when an individual has DED based on the documentation above. In most cases, SAVE provides an automated electronic response to benefit-granting agencies within seconds, but occasionally verification can be delayed. You can check the status of your SAVE verification by using CaseCheck at *uscis.gov/save/save-casecheck,* then by clicking the ''Check Your Case'' button. CaseCheck is a free service that lets you follow the progress of your SAVE verification using your date of birth and SAVE verification case number or an immigration identifier number that you provided to the benefit-granting agency. If an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted on or will act on a SAVE verification and you do not believe the response is correct, find detailed information on how to make corrections or update your immigration record, make an appointment, or submit a written request to correct records on the SAVE website at *www.uscis.gov/save.*

[FR Doc. 2021–23012 Filed 10–20–21; 8:45 am]

BILLING CODE 9111–97–P

INTER-AMERICAN FOUNDATION

30-Day Notice for IAF Solicitation Related to Consultation With IAF Indigenous Grantees and Tribal Nations in the United States (PRA)

AGENCY: Inter-American Foundation.

ACTION: Notice and request for comment.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Inter-American Foundation (IAF), will submit to the Office of Management and Budget (OMB) a solicitation to conduct automated outreach to IAF Indigenous grantees and Tribal Nations in the United States. The solicitation explains the IAF's reasoning for this request and describes the type of information the agency seeks, along with calculations of possible related costs and burdens to potential participants.

FOR FURTHER INFORMATION CONTACT: Natalia Mandrus Associate General Counsel, (202) 688–3054 or via email to *nmandrus@iaf.gov* and Edward Gracia, Congressional Specialist, (202) 803–6109 or via email to *egracia@iaf.gov.*

DATES: Written comments must be submitted to the office listed in the address section below within 30 days from the date of this publication in the **Federal Register**.

SUPPLEMENTARY INFORMATION:

Title of Collection: IAF Solicitation Related to Consultation with Indigenous Grantees and Tribal Nations in the United States.

OMB Control Number: Will be assigned upon OMB approval.

Type of Review: New Collection (Request for a new OMB control number).

Affected Public: IAF Indigenous grantees and Tribal Nations in the United States.

Estimated Number of Respondents per year: 30.

Estimated Total Annual Burden Hours: 15 hours.

Abstract: In accordance with President Biden's January 26, 2021 memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, and Executive Order 13175, Consultation and Coordination with Tribal Governments (November 6, 2000), the IAF is committed to engaging in meaningful dialogue with Tribal Nations. The information collection would give Indigenous-led or Indigenous-serving organizations in Latin America, the Caribbean, and Tribal Nations in the United States an opportunity to participate in the design and fulfillment of U.S. policies and actions that may impact their interests. Also, the IAF would like to better understand interest on grantee exchanges between Tribal Nations in the United States and IAF Indigenous grantees and Indigenous-serving groups in order to share best practices.

Request for Comments: The IAF issued a 60-day **Federal Register** notice on June 3, 2021 (86 FR 31523). Comments were solicited and continue to be invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) 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; (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 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. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Aswathi Zachariah,

General Counsel.

[FR Doc. 2021–22945 Filed 10–20–21; 8:45 am]

BILLING CODE 7025–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLES960000.L14400000.ET0000.223; MNES–059784]

Notice of Application for Withdrawal and Segregation of Federal Lands; Cook, Lake, and Saint Louis Counties, Minnesota

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of application.

SUMMARY: The United States Department of Agriculture, Forest Service (USFS) has filed an application with the Bureau of Land Management (BLM) requesting the Secretary of the Interior to withdraw, for a 20-year term, approximately 225,378 acres of National Forest System lands in the Rainy River Watershed on the Superior National Forest in northeastern Minnesota, from disposition under the United States mineral and geothermal leasing laws, subject to valid existing rights. This notice segregates the lands for up to two years from operation of the United States mineral and geothermal leasing laws, subject to valid existing rights; provides an opportunity for the public to submit written comments on the withdrawal application; and notifies the public that one or more public meetings will be held regarding the application.

DATES: Comments regarding this withdrawal application must be received by January 19, 2022. A notice for public meeting(s) regarding the withdrawal application will be announced separately in the **Federal Register**, in at least one local newspaper, and on agency websites at least 30 days before meeting(s) are held during this 90-day comment period.

ADDRESSES: Comments regarding this withdrawal proposal should be sent to

F. David Radford, Deputy State Director of Geospatial Services, BLM Eastern States Office, RE: Superior National Forest Withdrawal Application, 5275 Leesburg Pike, Falls Church, Virginia 22041; or by email to *BLM_ES_Lands@blm.gov* (please include Superior National Forest Withdrawal Application in the subject line).

FOR FURTHER INFORMATION CONTACT: F. David Radford, BLM Eastern States Office, telephone: 703–558–7759, email: *fradford@blm.gov* during regular business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact the above individual. The Service is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

A map and other information related to the withdrawal application are available at the USFS Superior National Forest, 8901 Grand Avenue Place, Duluth, Minnesota 55808.

SUPPLEMENTARY INFORMATION: The USFS has filed an application with the BLM requesting the Secretary of the Interior to withdraw all federal lands and interests in lands (excluding lands with federally owned fractional mineral interests) situated within the exterior boundaries of the area depicted on the map submitted with the application, entitled Appendix B: Superior National Forest, dated September 20, 2021, from disposition under the United States mineral and geothermal leasing laws for a period of 20 years, subject to valid existing rights. The above-referenced map is available from BLM or USFS by sending a request to the physical address in the **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** sections above, as well as online via *https://www.blm.gov/sites/blm.gov/files/docs/2021-10/AppendixB_WithdrawalMap_20210916.pdf.* The purpose of the proposed withdrawal is to advance a comprehensive approach to protect and preserve the fragile and vital social and natural resources, ecological integrity, and wilderness values in the Rainy River Watershed, the Boundary Waters Canoe Area Wilderness (BWCAW) and the Boundary Waters Canoe Area Wilderness Mining Protection Area (MPA) in northeastern Minnesota, which are threatened by potential future sulfide mining. Development of sulfide-bearing mineral resources present in the withdrawal area could lead to permanently stored waste materials and other conditions upstream of the BWCAW and the MPA with the potential to generate and release effluent with elevated levels of acidity, metals, and other potential contaminants. Failure of required mitigation measures, containment facilities, or remediation efforts at mine sites and their related facilities could lead to irreversible degradation of this key water-based wilderness resource. The purpose of the proposed withdrawal is also to prevent the effects of climate change on precipitation regimes and protect the health, traditional cultural values, and subsistence-based lifestyle of the Tribes, which rely on resources in the region such as wild rice that are particularly susceptible to adverse impacts associated with mining. The lands will remain open to other forms of use and disposition as may be allowed by law on National Forest System lands, including the sale of mineral materials.

All the National Forest System lands identified in the townships below and any lands acquired by the Federal government within the exterior boundaries shown on the above referenced map are included in the withdrawal application. This area excludes the BWCAW and the MPA, as depicted on the above referenced map.

National Forest System Lands

Superior National Forest

4th Principal Meridian, Minnesota

Tps. 61 and 62 N., Rs. 5 W.
Tps. 60 to 62 N., Rs. 6 W.
Tps. 59 and 61 N., Rs. 7 W.
Tps. 59 to 61 N., Rs. 8 W.,
Tps. 58 to 61 N., Rs. 9 W.
Tps. 57 to 62 N., Rs. 10 W.
Tps. 57 to 63 N., Rs. 11 W.1Tp. 59 N., R. 12 W.
Tps. 61 to 63 N., Rs. 12 W.
Tps. 61 to 63 N., Rs. 13 W.

The areas described contain approximately 225,378 acres of National Forest System lands in Cook, Lake, and Saint Louis Counties.

Non-Federal lands within the area proposed for withdrawal total approximately 223,000 acres in Cook, Lake, and Saint Louis Counties. As non-Federal lands, these parcels would not be affected by the temporary segregation or proposed withdrawal, unless they are subsequently acquired by the Federal government.

Congress designated the BWCAW and established the MPA to protect and preserve the ecological richness of the lakes, waterways, and forested wilderness along the Canadian border. The protection of the Rainy River Watershed would help the preservation of the BWCAW and MPA, as well as Canada's Quetico Provincial Park, which are all interconnected through the unique hydrology in the region.

The use of a right-of-way, interagency agreement, or cooperative agreement would not meet the purpose of this proposed withdrawal because such an action would not adequately constrain mineral and geothermal leasing to provide adequate protection throughout this pristine natural area.

No alternative sites are feasible as the lands subject to the withdrawal application are the lands for which protection is sought from the impacts of potential future exploration and development under the United States mineral and geothermal leasing laws. No water will be needed to fulfill the purpose of the requested withdrawal.

The USFS will serve as the lead agency for analyzing the impacts of the proposed withdrawal under the National Environmental Policy Act. The USFS will designate the BLM as a cooperating agency. The BLM will independently evaluate and review the draft and final analysis and any other documents needed for the Secretary of the Interior to make a decision on the proposed withdrawal.

Records related to the withdrawal application may be examined by contacting the individual listed in the **FOR FURTHER INFORMATION CONTACT** section above.

For a period until January 19, 2022, all persons who wish to submit comments, suggestions, or objections related to the withdrawal application may present their views in writing to the BLM Deputy State Director of Geospatial Services at the BLM Eastern States Office address or the email listed in the **ADDRESSES** section above. Comments, including the names and street addresses of respondents, will be available for public review by appointment at the BLM Eastern States Office during regular business hours.

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 to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Notice is hereby given that a public meeting in connection with the application for withdrawal will be scheduled within the 90-day comment period. The BLM will publish a notice of the time and place in the **Federal Register**, at least one local newspaper, and on agency websites at least 30-days before the scheduled date of the

meeting. During this 90-day comment period, if determined to be needed, the BLM will hold additional meetings in other areas of the State.

For a period until October 23, 2023, subject to valid existing rights, the National Forest System lands described in this notice will be temporarily segregated from operation of the United States mineral and geothermal leasing laws, unless the application is denied or canceled, or the withdrawal is approved prior to that date. All other activities currently consistent with the Superior National Forest Land and Resource Management Plan are not restricted by this segregation, including public recreation, mineral materials sales, and other activities compatible with preservation of the character of the area, subject to USFS discretionary approval.

The application will be processed in accordance with the regulations set forth in 43 CFR part 2300.

Mitchell Leverette,

BLM Eastern States State Director.

[FR Doc. 2021–22958 Filed 10–20–21; 11:15 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVS00000.L51010000.FX0000.21X; N–89655; MO# 4500153967]

Notice of Segregation of Public Land for the Copper Rays Solar Project, Nye County, Nevada

AGENCY: Bureau of Land Management, Department of Interior.

ACTION: Notice of segregation.

SUMMARY: Through this notice the Bureau of Land Management (BLM) is segregating public lands included in the right-of-way application for the Copper Rays Solar Project, from appropriation under the public land laws, including the Mining Law, but not the Mineral Leasing or Material Sales Acts, for a period of 2 years from the date of publication of this notice, subject to valid existing rights. This segregation is to allow for the orderly administration of the public lands to facilitate consideration of development of renewable energy resources. The public lands segregated by this notice total 5,518.18 acres.

DATES: This segregation for the lands identified in this notice is effective on October 21, 2021.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to the mailing list, send requests to: Beth Ransel, Southern Nevada District Energy & Infrastructure Team, at telephone (702) 515–5284; address 4701 North Torrey Pines Drive, Las Vegas, NV 89130–2301; or email *BLM_NV_SND_EnergyProjects@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: Regulations found at 43 CFR 2091.3–1(e) and 2804.25(f) allow the BLM to temporarily segregate public lands within a right-of-way application area for solar energy development from the operation of the public land laws, including the Mining Law, by publication of a **Federal Register** notice. The BLM uses this temporary segregation authority to preserve its ability to approve, approve with modifications, or deny proposed rights-of-way, and to facilitate the orderly administration of the public lands. This temporary segregation is subject to valid existing rights, including existing mining claims located before this segregation notice. Licenses, permits, cooperative agreements, or discretionary land use authorizations of a temporary nature which would not impact lands identified in this notice may be allowed with the approval of an authorized officer of the BLM during the segregation period. The lands segregated under this notice are legally described as follows:

Mount Diablo Meridian, Nevada

T. 20 S., R. 54 E.,
  Sec. 35, S½SW¼SW¼.
T. 21 S., R. 54 E.,
  Sec. 1, SW¼NW¼ and W½SW¼;
  Sec. 2, lot 8;
  Sec. 12, W½NW¼ and W½SW¼;
  Sec. 13, W½NW¼, S½SW¼, S½NW¼SW¼, S½NE¼SW¼, S½SE¼, NW¼NW¼SW¼, S½NW¼SE¼, and S½NE¼SE¼;
  Sec. 14, S½NE¼SE¼, SE¼SE¼, E½SW¼SE¼, and SE¼NW¼SE¼;
  Sec. 23, E½;
  Sec. 24;
  Sec. 25;
  Sec. 26, E½NW¼NE¼, E½NE¼, SW¼NE¼, and S½;
  Sec. 35;
  Sec. 36.
T. 22 S., R. 54 E.,
  Sec. 1;
  Sec. 2.
T. 21 S., R. 55 E.,
  Sec. 18, lot 3.

The area described contains 5,518.18 acres, according to the official plats of the surveys of the lands on file with the BLM.

As provided in the regulations, the segregation of lands in this notice will not exceed 2 years from the date of publication unless extended for an additional 2 years through publication of a new notice in the **Federal Register**. The segregation period will terminate and the land will automatically reopen to appropriation under the public land laws, including the mining laws, at the earliest of the following dates: Upon issuance of a decision by the authorized officer granting, granting with modifications, or denying the application for a right-of-way; without further administrative action at the end of the segregation provided for in the **Federal Register** notice initiating the segregation; or upon publication of a **Federal Register** notice terminating the segregation.

Upon termination of the segregation of these lands, all lands subject to this segregation would automatically reopen to appropriation under the public land laws, including the mining laws.

(Authority: 43 CFR 2091.3–1(e) and 43 CFR 2804.25(f))

Nicholas Pay,

Field Manager—Pahrump Field Office.

[FR Doc. 2021–22886 Filed 10–20–21; 8:45 am]

BILLING CODE 4310–HC–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–462 and 731–TA–1156–1158 (Second Review) and 731–TA–1043–1045 (Third Review)]

Polyethylene Retail Carrier Bags From China, Indonesia, Malaysia, Taiwan, Thailand, and Vietnam

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping duty orders on polyethylene retail carrier bags from China, Indonesia, Malaysia, Taiwan, Thailand, and Vietnam and the countervailing duty order on polyethylene retail carrier bags from Vietnam would be likely to lead to continuation or recurrence of material injury to an industry in the United

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

States within a reasonably foreseeable time.

Background

The Commission instituted the reviews on April 1, 2021 (86 FR 17200) and determined on July 7, 2021 that it would conduct expedited reviews (86 FR 51377, September 15, 2021).

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in the reviews on October 18, 2021. The views of the Commission are contained in USITC Publication 5233 (October 2021), entitled *Polyethylene Retail Carrier Bags from China, Indonesia, Malaysia, Taiwan, Thailand, and Vietnam: Investigation Nos. 701–TA–462 and 731–TA–1156–1158 (Second Review) and 731–TA–1043–1045 (Third Review).*

By order of the Commission.

Issued: October 18, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–23004 Filed 10–20–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0036]

Agency Information Collection Activities; Proposed eCollection of eComments Requested; Revision of a Currently Approved Collection; Federal Firearms Licensees (FFL) Out of Business Records Request—ATF Form 5300.3A

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ) will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for an additional 30 days until November 22, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether, and if so, how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *The Title of the Form/Collection:* FFL Out of Business Records Request.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: ATF Form 5300.3A.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: The FFL Out of Business Records Request—ATF Form 5300.3A is used to notify Federal firearms licensees (FFLs) who go out of business to submit their firearms records to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) if the business discontinuance is absolute. FFLs can also use the form to notify ATF of a successor business that will maintain control of the firearms records.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* A combined 4,297 respondents will use the form and then package and ship/deliver business records to ATF following business discontinuance. It will take a combined total of 5 minutes for respondents to prepare the form and an additional 11 hours to package and then ship/deliver business records to ATF.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The combined estimated annual public burden associated with this collection is 47,523 hours, which is equal to 3,066 (# of respondents who completed the form) * 0.0833333 (5 minutes or the total time to complete each form) + 4,297 (# of respondents who ship/deliver records) * 11 hours (time taken to package ship/deliver records to ATF).

(7) *An Explanation of the Change in Estimates:* Since the last renewal in 2018, the total responses and mailing costs decreased from 4,607 to 4,297 and from $2,243,013 to $2,098,869 respectively, due to fewer FFLs going out of business. However, the total burden increased to 47,523 hours because it took each FFL more time to prepare an average 7 boxes of business records in 2020, compared to an estimated 4 boxes of records in 2018.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, Mail Stop 3E.405A, Washington, DC 20530.

Dated: October 15, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–22920 Filed 10–20–21; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Trade Adjustment Assistance

In accordance with the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) (''Act''), as amended, the Department of Labor herein presents notice of investigations regarding eligibility to apply for trade adjustment assistance under Chapter 2 of the Act (''TAA'') for workers by (TA–W) started during the period of *September 1, 2021 through September 30, 2021.*

This notice includes instituted initial investigations following the receipt of validly filed petitions. Furthermore, if applicable, this notice includes investigations to reconsider negative initial determinations or terminated initial investigations following the receipt of a valid application for reconsideration.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. Any persons showing a substantial interest in the subject matter of the investigations may request a public hearing provided such request is filed in writing with the Administrator, Office of Trade Adjustment Assistance, at the address shown below, no later than ten days after publication in **Federal Register**.

Initial Investigations

The following are initial investigations commenced following the receipt of a properly filed petition.

TA–W No.	Subject firm	Location	Inv start date
98,047	American Axle & Manufacturing (AAM)	Emporium, PA	9/1/2021
98,048	Computer Task Group, Inc	Boulder, CO	9/1/2021
98,049	Mondelez Global LLC	Aurora, CO	9/1/2021
98,050	Arcosa Wind Towers, Inc	Clinton, IL	9/3/2021
98,051	Computer Task Group, Inc	Buffalo, NY	9/3/2021
98,052	Grass Valley USA LLC	Hillsboro, OR	9/3/2021
98,053	Amphenol Corporation Spectra Strip	Hamden, CT	9/7/2021
98,054	Elsevier	Maryland Heights, MO	9/7/2021
98,055	Woodhead Industries, LLC	El Paso, TX	9/7/2021
98,056	Prototron Circuits Inc	Redmond, WA	9/7/2021
98,057	Tails To The Trails Dog Services	Caddo Mills, TX	9/10/2021
98,058	Arcosa Wind Towers, Inc	Newton, IA	9/13/2021
98,059	Ascension Health	Indianapolis, IN	9/13/2021
98,060	Northwest Hardwoods, Inc	Coos Bay, OR	9/14/2021
98,061	Trinseo LLC	Midland, MI	9/15/2021
98,062	Carlisle Interconnect Technologies	Kent, WA	9/16/2021
98,063	Mondelez Global, LLC	Aurora, CO	9/16/2021
98,064	Columbia Sportswear Company	Portland, OR	9/17/2021
98,065	Mondelez International	Fair Lawn, NJ	9/17/2021
98,066	US Well Services	San Angelo, TX	9/20/2021
98,067	DivaHairDeals	Columbia, MD	9/22/2021
98,068	Poly	Austin, TX	9/23/2021
98,069	CCC Intelligent Solutions Inc	Chicago, IL	9/24/2021
98,070	eSchoolData	Bohemia, NY	9/24/2021
98,071	The Green Valley Pecan Company	Sahuarita, AZ	9/29/2021
98,072	Malteurop North American Inc	Milwaukee, WI	9/29/2021
98,073	Liberty Mutual Insurance	Portland, OR	9/30/2021
98,074	Mass General Brigham	Somerville, MA	9/30/2021

A record of these investigations and petitions filed are available, subject to redaction, on the Department's website *https://www.dol.gov/agencies/eta/tradeact* under the searchable listing or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 12th day of October 2021.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2021–22991 Filed 10–20–21; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Determinations Regarding Eligiblity To Apply for Trade Adjustment Assistance

In accordance with Sections 223 and 284 (19 U.S.C. 2273 and 2395) of the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) (''Act''), as amended, the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance under Chapter 2 of the Act (''TAA'') for workers by (TA–W) issued during the period of September 1, 2021 through September 30, 2021.

This notice includes summaries of initial determinations such as Affirmative Determinations of Eligibility, Negative Determinations of Eligibility, and Determinations Terminating Investigations of Eligibility within the period. If issued in the period, this notice also includes summaries of post-initial determinations that modify or amend initial determinations such as Affirmative Determinations Regarding Applications for Reconsideration, Negative Determinations Regarding Applications for Reconsideration, Revised Certifications of Eligibility, Revised Determinations on Reconsideration, Negative Determinations on Reconsideration, Revised Determinations on remand from the Court of International Trade, and Negative Determinations on remand from the Court of International Trade.

Affirmative Determinations for Trade Adjustment Assistance

The following certifications have been issued.

TA–W No.	Subject firm	Location	Reason(s)
95,840	Northwest Hardwoods, Inc	Garibaldi, OR	Company Imports of Articles.

TA–W No.	Subject firm	Location	Reason(s)
96,661	Aptiv	Kokomo, IN	Shift in Services to a Foreign Country.
96,851	CF&I Steel LP d/b/a Evraz Rocky Mountain Steel	Pueblo, CO	Customer Imports of Articles.
96,869	Pitney Bowes Inc	Shelton, CT	Shift in Services to a Foreign Country.
96,869A	Pitney Bowes Inc	Tampa, FL	Shift in Services to a Foreign Country.
96,869B	Pitney Bowes Inc	Omaha, NE	Shift in Services to a Foreign Country.
96,869C	Pitney Bowes Inc	Troy, NY	Shift in Services to a Foreign Country.
96,869D	Pitney Bowes Inc	Guaynabo, PR	Shift in Services to a Foreign Country.
96,916	DAK Americas LLC	Moncks Corner, SC	Company Imports of Articles.
96,927	Mitsubishi Aircraft Corporation America Inc	Renton, WA	Shift in Services to a Foreign Country.
96,927A	Mitsubishi Aircraft Corporation America Inc	Moses Lake, WA	Shift in Services to a Foreign Country.
96,953	SSB Manufacturing Company	Monroe, OH	ITC Determination.
96,978	Technicolor USA, Inc	Culver City, CA	Acquisition of Services from a Foreign Country.
96,986	SSB Manufacturing Company	Kapolei, HI	ITC Determination.
96,988	FXI, Inc	Portland, OR	ITC Determination.
96,996	Lear Corporation	Morristown, TN	Shift in Production to a Foreign Country.
96,998	Clearwater Paper Company	Neenah, WI	Customer Imports of Articles.
97,035	Solenis LLC	Wilmington, DE	Shift in Services to a Foreign Country.
97,038	Estee Bedding Company	Chicago, IL	ITC Determination.
97,056	Trizetto Provider Solutions, LLC	Earth City, MO	Shift in Services to a Foreign Country.
97,066	Allstate Insurance Company	Largo, FL	Shift in Services to a Foreign Country.
97,072	Cerner Corporation	Kansas City, MO	Shift in Services to a Foreign Country.
97,095	Alexian Brothers—AHS Midwest Region Health Co. d/b/a AMITA Health.	Lisle, IL	Acquisition of Services from a Foreign Country.
97,099	Alexian Brothers-AHS Midwest Region Health Co. d/b/a AMITH Health.	Chicago, IL	Acquisition of Services from a Foreign Country.
97,103	Serta Simmons Bedding Manufacturing Company	Shawnee, KS	ITC Determination.
97,107	Foot Locker Corporate Services, Inc	Milwaukee, WI	Acquisition of Services from a Foreign Country.
97,109	Global Plastics, Inc	Perris, CA	ITC Determination.
97,112	PolymerPak	Vernon, CA	ITC Determination.
98,001	Blue Cube Operations LLC	Freeport, TX	Actual/Likely Increase in Imports following a Shift Abroad.
98,007	Cubic ITS, Inc. (fka Trafficware)	Sugar Land, TX	Shift in Production to an FTA Country or Beneficiary.
98,009	Core Molding Technologies	Batavia, OH	Shift in Production to an FTA Country or Beneficiary.
98,010	Rawlings Sporting Goods Company Inc	Caledonia, MN	Actual/Likely Increase in Imports following a Shift Abroad.
98,017	FujiFilm Manufacturing USA Inc	Greenwood, SC	Shift in Production to an FTA Country or Beneficiary.
98,023	Honeywell Building Technologies—Fire & Security, Integrated Supply Chain.	Northford, CT	Increased Company Imports.
98,028	Interdyne, Inc	Jonesville, MI	Secondary Component Supplier.
98,030	The Coleman Company Inc	Sauk Rapids, MN	Actual/Likely Increase in Imports following a Shift Abroad.
98,032	Fall Creek Farm & Nursery, Inc	Lowell, OR	Shift in Production to an FTA Country or Beneficiary.
98,037	Truck Accessories Group, LLC	Long Beach, CA	Shift in Production to an FTA Country or Beneficiary.
98,040	Honeywell Aerospace	Phoenix, AZ	Shift in Production to an FTA Country or Beneficiary.

Negative Determinations for Trade Adjustment Assistance

The following investigations revealed that the eligibility criteria for TAA have not been met for the reason(s) specified.

TA–W No.	Subject firm	Location	Reason(s)
95,710	United Healthcare Clinical Review	Shelton, CT	No Shift in Services or Other Basis.
96,806	B & R Sheet Metal, Inc	Eugene, OR	No Shift in Production or Other Basis.
96,807	Transco Industries	Portland, OR	No Sales or Service Decline or Other Basis.
96,846	Patriot Converting LLC	Newton, IA	No Sales or Production Decline or Other Basis.
96,887	Landis+Gyr Technology, Inc	Saint Louis, MO	No Shift in Services or Other Basis.
96,921	Siemens Gamesa Renewable Energy	Hutchinson, KS	No Sales or Production Decline or Other Basis.
96,959	Highly Marelli USA, Inc	Madison, MS	No Shift in Production or Other Basis.
97,007	T-Mobile USA, Inc	Honolulu, HI	No Shift in Services or Other Basis.
97,013	Hilcorp Alaska LLC	Prudhoe Bay, AK	No Employment Decline or Threat of Separation or ITC.
97,040	Cummins, Inc	Memphis, TN	No Sales or Production Decline or Other Basis.
97,043	Love's Bakery, Inc	Honolulu, HI	No Shift in Production or Other Basis.

TA–W No.	Subject firm	Location	Reason(s)
97,053	Entergy Nuclear Operations, Inc	Covert, MI	No Shift in Production or Other Basis.
97,063	Graham Packaging Company	Kansas City, MO	No Shift in Production or Other Basis.
97,075	Swiss Re America Holding Corp.	Kansas City, MO	No Shift in Services or Other Basis.
97,075A	Swiss Re Management (US) Corp.	Armonk, NY	No Employment Decline or Threat of Separation or ITC.
97,075B	Westport Insurance Corp.	Kansas City, MO	No Employment Decline or Threat of Separation or ITC.
98,004	The Miller Company	Meriden, CT	No Sales or Production Decline/Shift in Production (Domestic Transfer).
98,006	AIG Technologies, Inc	Fort Worth, TX	Workers Do Not Produce an Article.
98,012	Western Union	Denver, CO	Workers Do Not Produce an Article.
98,013	Customer Engagement Services, LLC (CES)	Phoenix, AZ	Workers Do Not Produce an Article.
98,022	Symbol Mattress of Florida, Inc	Kissimmee, FL	No Sales or Production Decline/Shift in Production (Domestic Transfer).
98,024	NCR Corporation	Atlanta, GA	Workers Do Not Produce an Article.
98,025	Oceana Foods, Inc	Shelby, MI	No Sales or Production Decline/Shift in Production (Domestic Transfer).
98,026	Southern Graphics Systems, LLC	Minneapolis, MN	Workers Do Not Produce an Article.
98,027	Rackspace USA, Inc	Windcrest, TX	Workers Do Not Produce an Article.
98,033	LargeWords	Blue Springs, MO	Workers Do Not Produce an Article.
98,036	NTT DATA Services, LLC	Plano, TX	Workers Do Not Produce an Article.
98,038	Genpact LLC	Jacksonville, FL	Workers Do Not Produce an Article.
98,041	Greystar Management Services, LLP	Phoenix, AZ	Workers Do Not Produce an Article.
98,043	Rackspace USA, Inc	Elk Grove Village, IL	Workers Do Not Produce an Article.
98,046	Revel Apparel, LLC	Greensboro, NC	No Import Increase and/or Production Shift Abroad.
98,048	Computer Task Group, Inc	Boulder, CO	Workers Do Not Produce an Article.
98,048A	Computer Task Group, Inc	Buffalo, NY	Workers Do Not Produce an Article.

Determinations Terminating Investigations for Trade Adjustment Assistance

The following investigations were terminated for the reason(s) specified.

TA–W No.	Subject firm	Location	Reason(s)
97,050	Honeywell International Inc	Smithfield, RI	Existing Certification in Effect.
97,096	Frontier Communications	Deland, FL	Petitioner Requests Withdrawal.
97,106	The News Journal	New Castle, DE	Ongoing Investigation in Process.
98,019	Betsy & Adam/Xscape Evenings	New York, NY	Existing Certification in Effect.
98,021	Commemorative Brands Inc	Austin, TX	Petitioner Requests Withdrawal.
98,047	American Axle & Manufacturing (AAM)	Emporium, PA	Petitioner Requests Withdrawal.
98,051	Computer Task Group, Inc	Buffalo, NY	Ongoing Investigation in Process.
98,057	Tails To The Trails Dog Services	Caddo Mills, TX	Petitioner Requests Withdrawal.
98,060	Northwest Hardwoods, Inc	Coos Bay, OR	Existing Certification in Effect.
98,063	Mondelez Global, LLC.	Aurora, CO	Petitioner Requests Withdrawal.

Revised Certifications of Eligibility

The following revised certifications of eligibility to apply for TAA have been issued.

TA–W No.	Subject firm	Location	Reason(s)
95,840	Northwest Hardwoods, Inc	Garibaldi, OR	Worker Group Clarification.
95,840A	Northwest Hardwoods, Inc	Coos Bay, OR	Worker Group Clarification.

Revised Determinations on Reconsideration

The following revised determinations on reconsideration, certifying eligibility to apply for TAA, have been issued.

TA–W No.	Subject firm	Location	Reason(s)
95,726	IPSCO Koppel Tubulars, LLC	Ambridge, PA	Customer Imports of Articles.
95,726A	IPSCO Koppel Tubulars, LLC	Koppel, PA	Customer Imports of Articles.

Negative Determinations on Reconsideration

The following negative determinations on reconsideration have been issued because the eligibility criteria for TAA have not been met for the reason(s) specified.

TA–W No.	Subject firm	Location	Reason(s)
94,882	AT&T Business—Global Operations & Services	Bellaire, TX	No Shift in Services or Other Basis.

I hereby certify that the aforementioned determinations were issued during the period of *September 1, 2021 through September 30, 2021.* These determinations are available on the Department's website *https://www.dol.gov/agencies/eta/tradeact* under the searchable listing determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 12th day of October 2021.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2021–22989 Filed 10–20–21; 8:45 am]

BILLING CODE 4510–FN–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 21–12]

Notice of Open Meeting

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: In accordance with the requirements of the Federal Advisory Committee Act, the Millennium Challenge Corporation (MCC) Advisory Council was established as a discretionary advisory committee on July 14, 2016. Its charter was renewed for a second term on July 11, 2018 and third term on July 8, 2020. The MCC Advisory Council serves MCC solely in an advisory capacity and provides insight regarding innovations in infrastructure, technology, and sustainability; perceived risks and opportunities in MCC partner countries; new financing mechanisms for developing country contexts; and shared value approaches. The MCC Advisory Council provides a platform for systematic engagement with the private sector and other external stakeholders and contributes to MCC's mission—to reduce poverty through sustainable, economic growth.

DATES: Friday, November 5, 2021, from 9:30 a.m.–11:30 a.m. EDT.

ADDRESSES: The meeting will be held via conference call.

FOR FURTHER INFORMATION CONTACT: Beth Roberts, 202.521.2687, *MCCAdvisoryCouncil@mcc.gov* or visit *https://www.mcc.gov/about/org-unit/advisory-council.*

SUPPLEMENTARY INFORMATION:

Agenda. During the Fall 2021 meeting of the MCC Advisory Council, members will be provided an update from MCC leadership. MCC Advisory Council Co-Chairs will discuss inputs to a letter that will be provided to the incoming MCC CEO, and council members will provide advice on the compact program development process and MCC's investment strategy in Malawi and other MCC partner countries that are seeking to focus on agricultural development. Council members will also debrief on the blended finance and climate/energy subcommittee meetings held in July 2021.

Public Participation. The meeting will be open to the public. Members of the public may file written statement(s) before or after the meeting. If you plan to attend, please submit your name and affiliation no later than Tuesday, November 2 to *MCCAdvisoryCouncil@mcc.gov* to receive dial-in instructions and be placed on an attendee list.

(Authority: Federal Advisory Committee Act, 5 U.S.C. App.)

Dated: October 15, 2021.

Thomas G. Hohenthaner,

Acting VP/General Counsel and Corporate Secretary.

[FR Doc. 2021–22957 Filed 10–20–21; 8:45 am]

BILLING CODE 9211–03–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (21–066)]

Earth Science Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Earth Science Advisory Committee (ESAC). This Committee functions in an advisory capacity to the Director, Earth Science Division, in the NASA Science Mission Directorate. The meeting will be held for the purpose of soliciting, from the science community and other persons, scientific and technical information relevant to program planning.

DATES: Thursday, November 4, 2021, 1:00 p.m.–2:00 p.m., Eastern Time.

FOR FURTHER INFORMATION CONTACT: KarShelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355 or *karshelia.kinard@nasa.gov.*

SUPPLEMENTARY INFORMATION: This meeting will be open to the public telephonically and by WebEx. You must use a touch-tone phone to participate in this meeting. Any interested person may dial the USA US toll free number 1–888–989–3483 or toll number 1–517–308–9111, passcode: 9775739, to participate in this meeting by telephone. The WebEx link is *https://nasaenterprise.webex.com/;* the event number is 2762 286 7926 and the event password: 6bPikHCc*48 (case sensitive).

The agenda for the meeting includes the following topic:

—Earth Science Program Annual Performance Review According to the

Government Performance and Results Act Modernization Act.

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2021–22883 Filed 10–20–21; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (21–067)]

NASA Advisory Council; Science Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Science Committee of the NASA Advisory Council (NAC). This Committee reports to the NAC. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Tuesday, November 9, 2021, 1:00 p.m.–5:00 p.m.; and Wednesday, November 10, 2021, 1:00 p.m.–5:00 p.m., Eastern Time.

FOR FURTHER INFORMATION CONTACT: Ms. KarShelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355 or *kinard.karshelia@nasa.gov.*

SUPPLEMENTARY INFORMATION: This meeting will be open to the public via Webex and telephonically. Webex connectivity information for each day is provided below. For audio, when you join the Webex event, you may use your computer or provide your phone number to receive a call back, otherwise, call the U.S. toll conference number listed for each day.

On Tuesday, November 9, the event address for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=eb715a9199d752a0d8487e6365ee73cd0.* The event number is 2761 186 1343 and the event password is gNXHJ5P3q2@. If needed, the U.S. toll conference number is 1–415–527–5035 and access code is 2761 186 1343.

On Wednesday, November 10, the event address for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=e937e5ef302feb393e886cbd2c20dfc29.* The event number is 2764 249 6233 and the event password is 3AXxBxhY$42. If needed, the U.S. toll conference number is 1–415–527–5035 and access code is 2764 249 6233. The agenda for the meeting includes the following topics:

—Science Mission Directorate (SMD) Missions, Programs and Activities

It is imperative that the meeting be held on these dates due to the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2021–22882 Filed 10–20–21; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (21–068)]

Planetary Science Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Planetary Science Advisory Committee. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Monday, November 15, 2021, 10:00 a.m. to 6:00 p.m., Eastern Time; and Tuesday, November 16, 2021, 10:00 a.m. to 6:00 p.m., Eastern Time.

ADDRESSES: Virtual meeting via WebEx and dial-in teleconference only.

FOR FURTHER INFORMATION CONTACT: Ms. Karshelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355 or *karshelia.kinard@nasa.gov.*

SUPPLEMENTARY INFORMATION: As noted above, this meeting will be available to the public telephonically and by WebEx only. For Monday, November 15, 2021, the meeting event address for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=e3c5b67d79794f2efcc35cc94812500f8.* The event meeting number is: 199 427 6706 and the password is: sEwJ5wMM@28. For audio, you may provide your phone number when you join the event, or call US Toll: +1–415–527–5035 (Access code: 199 427 6706). For Tuesday, November 16, 2021, the meeting event address for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=ecfa6e20c22be22391df3038d08a8c781.* The event meeting number is: 2761 489 8042 and the password is: JJzwJ44Aq*2. For audio, you may provide your phone number when you join the event, or call US Toll: +1–415–527–5035 (Access code: 2761 489 8042).

The agenda for the meeting includes the following topics:

—Planetary Science Division Update

—Planetary Science Division Research and Analysis Program Update

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2021–22881 Filed 10–20–21; 8:45 am]

BILLING CODE P

NATIONAL LABOR RELATIONS BOARD

Sunshine Act Meetings

TIME AND DATE: Each Wednesday of every month through Fiscal Year 2022 at 2:00 p.m. Changes in date and time will be posted at *www.nlrb.gov.*

PLACE: During the pandemic, meetings will be held via video conferencing technology. If Board meetings resume in person, the Board will meet in the Board Agenda Room, No. 5065, 1015 Half St. SE, Washington, DC. Any in-person meetings will be noted at *www.nlrb.gov.*

STATUS: Closed.

MATTERS TO BE CONSIDERED: Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider ''the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition . . . of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto.'' See also 5 U.S.C. 552b(c)(10).

CONTACT PERSON FOR MORE INFORMATION: Roxanne L. Rothschild, Executive Secretary, 1015 Half Street SE, Washington, DC 20570. Telephone: (202) 273–1940.

Submitted by

Dated: October 19, 2021.

Roxanne L. Rothschild,

Executive Secretary, National Labor Relations Board.

[FR Doc. 2021–23058 Filed 10–19–21; 11:15 am]

BILLING CODE 7545–01–P

NATIONAL SCIENCE FOUNDATION

Committee Management; Renewal

The NSF management officials having responsibility for the advisory committee listed below have determined that renewing this committee for another two years is necessary and in the public interest in connection with the performance of duties imposed upon the Director, National Science Foundation (NSF), by 42 U.S.C. 1861 *et seq.* This determination follows consultation with the Committee Management Secretariat, General Services Administration.

Committee: STEM Education Advisory Panel, #2624.

Effective date for renewal is October 18, 2021. For more information, please contact Crystal Robinson, NSF, at (703) 292–8687.

Dated: October 18, 2021.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2021–22967 Filed 10–20–21; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–282 and 50–306; NRC–2021–0192]

Northern States Power Company; Prairie Island Nuclear Generating Plant, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; opportunity to comment, request a hearing, and petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of amendments to Facility Operating License Nos. DPR–42 and DPR–60, issued to Northern States Power Company, for operation of the Prairie Island Nuclear Generating Plant, Units 1 and 2. The proposed amendments would allow a one-time extension of the allowed outage time for the motor-driven cooling pump (MDCP) as a contingency for planned maintenance on the cooling water (CL) system.

DATES: Submit comments by November 22, 2021. Request for a hearing or petitions for leave to intervene must be filed by December 20, 2021.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0192. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Robert Kuntz, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3733, email: *Robert.Kuntz@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2021–0192 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0192.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The exigent license amendment request to revise technical specification (TS) 3.7.8 to allow a one-time extension of the completion time of required action B.1, dated October 7, 2021, is available in ADAMS under Accession No. ML21281A017.
- *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2021–0192 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Introduction

The NRC is considering issuance of amendments to Facility Operating License Nos. DPR–42 and DPR–60, issued to Northern States Power Company, for operation of the Prairie Island Nuclear Generating Plant, Units 1 and 2, located in Goodhue County, Minnesota.

The proposed amendments would allow a one-time extension of the allowed outage time for the MDCP as a contingency for planned maintenance on the CL system.

Before any issuance of the proposed license amendments, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and NRC's regulations.

The NRC has made a proposed determination that the license amendment requests involve no

significant hazards consideration (NSHC). Under the NRC's regulations in § 50.92 of title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The CL system is not an initiator of any accident previously evaluated. As a result, the probability of an accident previously evaluated is not increased by the allowance to extend the Completion Time of Required Action B.1 if needed for installation or removal of a blind flange. The consequences of an accident during the proposed extended Required Action B.1 Completion Time are no different than the consequences of an accident during the existing 4 hour Completion Time. The MDCLP provides a source of cooling water to the operable CL header. However, the operable header is also served by the associated diesel driven cooling water pump (DDCLP) and that CL header remains operable even if the MDCLP is inoperable, so the extended time will not significantly increase consequences of any of the accidents that CL mitigates.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will not permanently alter the design or function of the CL system. The proposed change provides an allowance for the MDCLP to be valved out of service and inoperable longer than the TS 3.7.8 Required Action B.1 Completion Time of four hours. Up to 36 hours will be required for the purpose of installing a blind flange if the leakage across the valve supporting the planned isolation is found to be too high. Similarly, up to 36 hours will be required for the purpose of removing the blind flange.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change extends the Completion Time of Required Action B.1 of TS 3.7.8. Required Action B.1 verifies operability of the MDCLP. The MDCLP provides a source of cooling water to the operable header. However, the operable header is also served by the associated DDCLP and that CL header remains operable even if the MDCLP is inoperable.

Therefore, the proposed change does not result in a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the license amendment requests involve NSHC.

The NRC is seeking public comments on this proposed determination that the license amendment requests involve NSHC. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendments until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendments before expiration of the 60-day notice period if the Commission concludes the amendments involve no significant hazards consideration. In addition, the Commission may issue the amendments prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult 10 CFR 2.309. If a petition is filed, the presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the ''Electronic Submissions (E-Filing'') section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

If a hearing is requested and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration, which will serve to establish when the hearing is held. If the final determination is that the amendment requests involve no significant hazards consideration, the Commission may issue the amendments and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendments. If the final determination is that the amendment requests involve a significant hazards consideration, then any hearing held would take place before the issuance of the amendments unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 and on the NRC website at *https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate*.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires

participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as discussed below, is granted. Detailed guidance on electronic submissions is located in the Guidance for Electronic Submissions to the NRC (ADAMS Accession No. ML13031A056) and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system timestamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)-(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

For further details with respect to this action, see the application for license amendments dated October 7, 2021 (ADAMS Accession No. ML21281A017).

Attorney for licensee: Peter M. Glass, Assistant General Counsel, Xcel Energy, 414 Nicollet Mall—401–8, Minneapolis, MN 55401.

NRC Branch Chief: Nancy L. Salgado.

Dated: October 15, 2021.

For the Nuclear Regulatory Commission.

Robert F. Kuntz,

Senior Project Manager, Plant Licensing Branch III, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2021–22912 Filed 10–20–21; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2022–10 and CP2022–11]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 25, 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:

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I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal

Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2022–10 and CP2022–11; *Filing Title:* USPS Request to Add Priority Mail Contract 725 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 15, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* October 25, 2021.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2021–22996 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 15, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 725 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–10, CP2022–11.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–22897 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 7, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 205 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–6, CP2022–7.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–22893 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 7, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 204 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–4, CP2022–5.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–22891 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 13, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 207 to Competitive Product List.* Documents are available at

www.prc.gov, Docket Nos. MC2022–9, CP2022–10.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–22896 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 13, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 206 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–8, CP2022–9.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–22895 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, & First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 7, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail, & First-Class Package Service Contract 77 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–5, CP2022–6.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–22892 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 6, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 724 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–3, CP2022–3.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–22890 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 5, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Parcel Select Contract 48 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–2, CP2022–2.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–22889 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 8, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express Contract 92 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–7, CP2022–8.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–22894 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service

Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 4, 2021, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 126 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2022–1, CP2022–1.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2021–22888 Filed 10–20–21; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission Asset Management Advisory Committee (''AMAC'') will hold a public meeting on Thursday, October 28, 2021 at 10:00 a.m.

PLACE: The meeting will be conducted by remote means. Members of the public may watch the webcast of the meeting on the Commission's website at *www.sec.gov.*

STATUS: The meeting will begin at 10:00 a.m. and will be open to the public by webcast on the Commission's website at *www.sec.gov.*

MATTERS TO BE CONSIDERED: On October 19, 2021, the Commission issued notice of the meeting (Release No. 34–93380), indicating that the meeting is open to the public and inviting the public to submit written comments to AMAC. This Sunshine Act notice is being issued because a majority of the Commission may attend the meeting.

The meeting will include a discussion of matters in the asset management industry relating to the Evolution of Advice and the Small Advisers and Small Funds Subcommittees, including panel discussions and potential recommendations.

CONTACT PERSON FOR MORE INFORMATION: For further information, please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Authority: 5 U.S.C. 552b.

Dated: October 19, 2021.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2021–23108 Filed 10–19–21; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93360; File No. SR–NYSECHX–2021–15]

Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to Rule 7.10

October 15, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 5, 2021, the NYSE Chicago, Inc. (''NYSE Chicago'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to Rule 7.10 (Clearly Erroneous Executions) to the close of business on April 20, 2022. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Rule 7.10 (Clearly Erroneous Executions) to the close of business on April 20, 2022. The pilot program is currently due to expire on October 20, 2021.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Article 20, Rule 10 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[4] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[5] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[6]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan''),[7] including any extensions to the pilot period for the

[4] *See* Securities Exchange Act Release No. 62886 (Sept. 10, 2010), 75 FR 56613 (Sept. 16, 2010) (SR–CHX–2010–13).

[5] *See* Securities Exchange Act Release No. 68802 (Feb. 1, 2013), 78 FR 9092 (Feb. 7, 2013) (SR–CHX–2013–04).

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–CHX–2014–06).

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

LULD Plan.[8] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[9] In light of that change, the Exchange amended Article 20, Rule 10 to untie the pilot program's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[10] After the Commission approved the Exchange's proposal to transition to trading on Pillar,[11] the Exchange amended the corresponding Pillar rule—Rule 7.10—to extend the pilot's effectiveness to the close of business on April 20, 2020,[12] October 20, 2020,[13] April 20, 2021,[14] and subsequently, October 20, 2021.[15]

The Exchange now proposes to amend Rule 7.10 to extend the pilot's effectiveness for a further six months until the close of business on April 20, 2022. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (c), (e)(2), (f), and (g) of Article 20, Rule 10 prior to being amended by SR–CHX–2010–13 shall be in effect, and the provisions of paragraphs (i) through (k) shall be null and void.[16] In such an event, the remaining sections of Article 20, Rule 10 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 7.10.

The Exchange does not propose any additional changes to Rule 7.10. Extending the effectiveness of these rules for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[17] in general, and Section 6(b)(5) of the Act,[18] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 7.10 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[19] and Rule 19b–4(f)(6) thereunder.[20]

A proposed rule change filed under Rule 19b–4(f)(6)[21] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[22] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a

[8] *See* Securities Exchange Act Release No. 71782 (March 24, 2014), 79 FR 17630 (March 28, 2014) (SR–CHX–2014–04).

[9] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[10] *See* Securities Exchange Act Release No. 85533 (April 5, 2019), 84 FR 14701 (April 11, 2019) (SR–NYSECHX–2019–04).

[11] *See* Securities Exchange Act Release No. 87264 (October 9, 2019), 84 FR 55345 (October 16, 2019) (SR–NYSECHX–2019–08). Article 20, Rule 10 is no longer applicable to any securities that trade on the Exchange.

[12] *See* Securities Exchange Act Release No. 87351 (October 18, 2019), 84 FR 57068 (October 24, 2019) (SR–NYSECHX–2019–13).

[13] *See* Securities Exchange Act Release No. 88591 (April 8, 2020), 85 FR 20771 (April 14, 2020) (SR–NYSECHX–2020–09).

[14] *See* Securities Exchange Act Release No. 90156 (October 13, 2020), 85 FR 66384 (October 19, 2020) (SR–NYSECHX–2020–29).

[15] *See* Securities Exchange Act Release No. 91550 (April 14, 2021), 86 FR 20560 (April 20, 2021) (SR–NYSECHX–2021–06).

[16] *See* supra notes 4–6. The prior versions of paragraphs (c), (e)(2), (f), and (g) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 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.

[21] 17 CFR 240.19b–4(f)(6).

[22] 17 CFR 240.19b–4(f)(6)(iii).

permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[23]

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 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–NYSECHX–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–NYSECHX–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–NYSECHX–2021–15 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22935 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[23] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93367; File No. SR–EMERALD–2021–33]

Self-Regulatory Organizations: MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adjust the Options Regulatory Fee

October 15, 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 October 7, 2021, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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 Exchange's Fee Schedule (''Fee Schedule'') to adjust the Options Regulatory Fee (''ORF'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX'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

Currently, the Exchange assesses ORF in the amount of $0.00060 per contract side. The Exchange proposes to increase the amount of ORF from $0.00060 per contract side to $0.0016 per contract side. The Exchange initially filed this proposal on July 30, 2021 (SR–EMERALD–2021–24) and withdrew such filing on August 12, 2021. The Exchange refiled this proposal on August 12, 2021 (SR–EMERALD–2021–27) and withdrew such filing on October 7, 2021. The Exchange proposes to implement this fee change effective October 7, 2021.

In light of historical and projected volume changes and shifts in the industry and on the Exchange, as well as changes to the Exchange's regulatory cost structure, the Exchange proposes to change the amount of ORF that will be collected by the Exchange. The Exchange's proposed change to the ORF should balance the Exchange's regulatory revenue against the anticipated regulatory costs. The Exchange will continue to monitor ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

The Exchange notes it originally adopted the current ORF amount at a significantly lower rate as the Exchange had just begun operations and that the amount of ORF it collects has remain unchanged since it was first adopted in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

2019.[3] When the Exchange set the amount of its current ORF (almost 2½ years ago), it was a brand new marketplace, and the amount was based on cost and revenue projections that were applicable to a new market. As such, the Exchange's cost structure, including regulatory costs and projections, were significantly lower. The Exchange's regulatory cost structure has since significantly increased since that time, as the Exchange has had to deploy significant resources and capital as the Exchange's membership base, volume, and market share have grown. The increase in cost structure has outgrown any revenue increase as a result of higher volumes. Therefore, the Exchange believes it is reasonable to increase the amount of ORF assessed to Members,[4] notwithstanding the fact that ORF revenues have also grown as a result of increased volumes. To illustrate, for the first six months of 2021, the Exchange had market share of 3.50% in multi-listed options.[5] The Exchange now proposes to adjust the amount of its ORF to be in line with those of more mature, established exchanges, as its regulatory cost structure has shifted from that of a nascent exchange to a more mature exchange.

Collection of ORF

Currently, the Exchange assesses the per-contract ORF to each Member for all options transactions, including Mini Options, cleared or ultimately cleared by the Member, which are cleared by the Options Clearing Corporation (''OCC'') in the ''customer'' range,[6] regardless of the exchange on which the transaction occurs. The ORF is collected by OCC on behalf of the Exchange from either: (1) A Member that was the ultimate clearing firm for the transaction; or (2) a non-Member that was the ultimate clearing firm where a Member was the executing clearing firm for the transaction. The Exchange uses reports from OCC to determine the identity of the executing clearing firm and ultimate clearing firm.

To illustrate how the Exchange assesses and collects ORF, the Exchange provides the following set of examples. For a transaction that is executed on the Exchange and the ORF is assessed, if there is no change to the clearing account of the original transaction, then the ORF is collected from the Member that is the executing clearing firm for the transaction (the Exchange notes that, for purposes of the Fee Schedule, when there is no change to the clearing account of the original transaction, the executing clearing firm is deemed to be the ultimate clearing firm). If there is a change to the clearing account of the original transaction (*i.e.,* the executing clearing firm ''gives-up'' or ''CMTAs'' [7] the transaction to another clearing firm), then the ORF is collected from the clearing firm that ultimately clears the transaction—the ''ultimate clearing firm.'' The ultimate clearing firm may be either a Member or non-Member of the Exchange. If the transaction is executed on an away exchange and the ORF is assessed, then the ORF is collected from the ultimate clearing firm for the transaction. Again, the ultimate clearing firm may be either a Member or non-Member of the Exchange. The Exchange notes, however, that when the transaction is executed on an away exchange, the Exchange does not assess the ORF when neither the executing clearing firm nor the ultimate clearing firm is a Member (even if a Member is ''given-up'' or ''CMTAed'' and then such Member subsequently ''gives-up'' or ''CMTAs'' the transaction to another non-Member via a CMTA reversal). Finally, the Exchange does not assess the ORF on outbound linkage trades, whether executed at the Exchange or an away exchange. ''Linkage trades'' are tagged in the Exchange's system, so the Exchange can readily tell them apart from other trades. A customer order routed to another exchange results in two customer trades, one from the originating exchange and one from the recipient exchange. Charging ORF on both trades could result in double-billing of ORF for a single customer order; thus, the Exchange does not assess ORF on outbound linkage trades in a linkage scenario. This assessment practice is identical to the assessment practice currently utilized by the Exchange's affiliates, MIAX PEARL, LLC (''MIAX Pearl'') and Miami International Securities Exchange, LLC (''MIAX'').[8]

As a practical matter, when a transaction that is subject to the ORF is not executed on the Exchange, the Exchange lacks the information necessary to identify the order-entering member for that transaction. There are a multitude of order-entering market participants throughout the industry, and such participants can make changes to the market centers to which they connect, including dropping their connection to one market center and establishing themselves as participants on another. For these reasons, it is not possible for the Exchange to identify, and thus assess fees such as ORF, on order-entering participants on away markets on a given trading day. Clearing members, however, are distinguished from order-entering participants because they remain identified to the Exchange on information the Exchange receives from OCC regardless of the identity of the order-entering participant, their location, and the market center on which they execute transactions. Therefore, the Exchange believes it is more efficient for the operation of the Exchange and for the marketplace as a whole to collect the ORF from clearing members.

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

As discussed below, the Exchange believes it is appropriate to charge the ORF only to transactions that clear as customer at the OCC. The Exchange believes that its broad regulatory responsibilities with respect to a Member's activities supports applying the ORF to transactions cleared but not executed by a Member. The Exchange's regulatory responsibilities are the same regardless of whether a Member enters a transaction or clears a transaction executed on its behalf. The Exchange regularly reviews all such activities, including performing surveillance for position limit violations, manipulation,

[3] *See* Securities Exchange Act Release No. 85251 (March 6, 2019), 84 FR 8931 (March 12, 2019) (SR–EMERALD–2019–01).

[4] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. See Exchange Rule 100. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[5] *See https://www.miaxoptions.com/sites/default/files/press_release-files/MIAX_Press_Release_07132021.pdf.*

[6] Exchange participants must record the appropriate account origin code on all orders at the time of entry in order. The Exchange represents that it has surveillances in place to verify that Members mark orders with the correct account origin code.

[7] ''CMTA'' or Clearing Member Trade Assignment is a form of ''give-up'' whereby the position will be assigned to a specific clearing firm at OCC.

[8] *See* Securities Exchange Act Release Nos. 85163 (February 15, 2019), 84 FR 5798 (February 22, 2019) (SR–PEARL–2019–01); 85162 (February 15, 2019), 84 FR 5783 (February 22, 2019) (SR–MIAX–2019–01).

front-running, contrary exercise advice violations and insider trading. These activities span across multiple exchanges.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of Members' customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as the Office of the General Counsel, technology, and internal audit. Indirect expenses are estimated to be approximately 53% of the total regulatory costs for 2021. Thus, direct expenses are estimated to be approximately 47% of total regulatory costs for 2021. The Exchange notes that its estimated direct and indirect expense percentages are in the range and similar to those at other options exchanges.[9]

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange proposes to increase the amount of ORF that will be collected by the Exchange from $0.00060 per contract side to $0.0016 per contract side. The Exchange issued an Options Regulatory Fee Announcement on July 2, 2021, indicating the proposed rate change for August 1, 2021.[10] As described above, when the Exchange set the amount of its current ORF (almost 2½ years ago), it was a brand new marketplace, and the amount was based on cost and revenue projections that were applicable to a new market. At that time, the Exchange's cost structure, including regulatory costs and projections, were significantly lower. The Exchange's regulatory cost structure has since significantly increased since that time, as the Exchange has had to deploy significant resources and capital as the Exchange's membership base, volume, and market share have grown. The increase in cost structure has outgrown any revenue increase as a result of higher volumes. The Exchange believes the proposed adjustment will permit the Exchange to cover a material portion of its regulatory costs, while not exceeding regulatory costs; notwithstanding the fact that ORF revenues have also grown as a result of increased volumes. As noted above, the Exchange regularly reviews its ORF to ensure that the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

There can be no assurance that the Exchange's final costs for 2021 will not differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue being generated utilizing the current ORF rate results in revenue that is running below the Exchange's estimated regulatory costs for the year. Particularly, as noted above, the Exchange initially set its ORF at a substantially lower rate when the Exchange first launched operations.[11] The Exchange now believes that it is appropriate to increase the amount of the ORF so that it is in line with the Exchange's cost structure for operating a more established exchange, so that when combined with all of the Exchange's other regulatory fees and fines, it would allow the Exchange to recover a material portion of its regulatory costs, while continuing to not generate excess revenue.[12]

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange will continue to monitor MIAX Emerald regulatory costs and revenues at a minimum on a semi-annual basis. If the Exchange determines regulatory revenues exceed or are insufficient to cover a material portion of its regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission.

In connection with this filing, the Exchange notes that its affiliates, MIAX Pearl and MIAX, will also be adjusting the ORF fees that each of those exchanges charge.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[13] in general, and furthers the objectives of Section 6(b)(4) of the Act[14] in particular, in that it is an equitable allocation of reasonable dues, 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[15] 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 increasing the ORF from $0.00060 to $0.0016 per contract side is equitable and not unfairly discriminatory because it is objectively allocated to Members in that it is charged to all Members on all their transactions that clear as customer at the OCC, with an exception.[16] Moreover, the Exchange believes the ORF ensures fairness by assessing fees to Members such that the ORF assessment is directly based on the amount of customer options business each Member conducts. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. As a result, the costs associated with

[9] *See* Securities Exchange Act Release Nos. 91418 (March 26, 2021), 86 FR 17254 (April 1, 2021) (SR–Phlx–2021–16) (reducing the Nasdaq PHLX LLC ORF and estimating direct expenses at 58% and indirect expenses at 42%); 91420 (March 26, 2021), 86 FR 17223 (April 1, 2021) (SR–ISE–2021–04) (reducing the Nasdaq ISE, LLC ORF and estimating direct expenses at 58% and indirect expenses at 42%).

[10] *See https://www.miaxoptions.com/sites/default/files/circular-files/MIAX_Emerald_RC_2021_33.pdf.*

[11] *See supra* note 3.

[12] The Exchange notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have been allocated to the Financial Industry Regulatory Authority (''FINRA'') under a 17d–2 Agreement. The ORF is not designed to cover the cost of options sales practice regulation.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4).

[15] 15 U.S.C. 78f(b)(5).

[16] When a transaction is executed on an away exchange, the Exchange does not assess the ORF when neither the executing clearing firm nor the ultimate clearing firm is a Member (even if a Member is ''given-up'' or ''CMTAed'' and then such Member subsequently ''gives-up'' or ''CMTAs'' the transaction to another non-Member via a CMTA reversal).

administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (*e.g.,* Member proprietary transactions) of its regulatory program.

The Exchange notes it originally adopted the current ORF amount at a significantly lower rate as the Exchange had just begun operations and that the amount of ORF it collects has remain unchanged since it was first adopted in 2019.[17] When the Exchange set the amount of its current ORF (almost 2½ years ago), it was a brand new marketplace, and the amount was based on cost and revenue projections that were applicable to a new market. As such, the Exchange's cost structure, including regulatory costs and projections, were significantly lower. The Exchange's regulatory cost structure has since significantly increased since that time, as the Exchange has had to deploy significant resources and capital as the Exchange's membership base, volume, and market share have grown. The increase in cost structure has outgrown any revenue increase as a result of higher volumes. Therefore, the Exchange believes it is reasonable, equitable and not unfairly discriminatory to increase the amount of ORF assessed to Members, notwithstanding the fact that ORF revenues have also grown as a result of increased volumes.

The ORF is designed to recover a material portion of the costs of supervising and regulating Members' customer options business including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange will monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be less than or equal to the Exchange's regulatory costs, which is consistent with the Commission's view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side. In this regard, the Exchange believes that the proposed increase to the fee is reasonable.

The Exchange believes that continuing to limit changes to the ORF to twice a year on specific dates with advance notice is reasonable because it gives participants certainty on the timing of changes, if any, and better enables them to properly account for ORF charges among their customers. The Exchange believes that continuing to limit changes to the ORF to twice a year on specific dates is equitable and not unfairly discriminatory because it will apply in the same manner to all Members that are subject to the ORF and provide them with additional advance notice of changes to that fee.

The Exchange believes that collecting the ORF from non-Members when such non-Members ultimately clear the transaction (that is, when the non-Member is the ''ultimate clearing firm'' for a transaction in which a Member was assessed the ORF) is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange notes that there is a material distinction between ''assessing'' the ORF and ''collecting'' the ORF. The ORF is only assessed to a Member with respect to a particular transaction in which it is either the executing clearing firm or ultimate clearing firm. The Exchange does not assess the ORF to non-Members. Once, however, the ORF is assessed to a Member for a particular transaction, the ORF may be collected from the Member or a non-Member, depending on how the transaction is cleared at OCC. If there was no change to the clearing account of the original transaction, the ORF would be collected from the Member. If there was a change to the clearing account of the original transaction and a non-Member becomes the ultimate clearing firm for that transaction, then the ORF will be collected from that non-Member. The Exchange believes that this collection practice continues to be reasonable and appropriate, and was originally instituted for the benefit of clearing firms that desired to have the ORF be collected from the clearing firm that ultimately clears the transaction.

The Exchange designed the ORF so that revenue generated from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all Members on all their transactions that clear in the customer range at the OCC, with an exception.[18] The Exchange believes the ORF ensures fairness by assessing higher fees to those members that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (*e.g.,* staff expenses), as well as investigations into customer complaints and the terminations of registered persons. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (*e.g.,* member proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group (''ISG'')[19] the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its Members.

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

[17] *See supra* note 3.

[18] *See supra* note 16.

[19] ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

necessary or appropriate in furtherance of the purposes of the Act. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

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 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 No. SR–EMERALD–2021–33 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 No. SR–EMERALD–2021–33. 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 No. SR–EMERALD–2021–33, and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22940 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[20] 15 U.S.C. 78s(b)(3)(A)(ii).

[21] 17 CFR 240.19b–4(f)(2).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93358; File No. SR–MEMX–2021–13]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Related to Clearly Erroneous Transactions Until April 20, 2022

October 15, 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 October 14, 2021, MEMX LLC (''MEMX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] 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 with the Commission a proposed rule change to extend the current pilot program related to MEMX Rule 11.15, ''Clearly Erroneous Executions,'' to the close of business on April 20, 2022. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions to the close of business on April 20, 2022. Portions of Rule 11.15, explained in further detail below, are currently operating as a pilot program which is set to expire on October 20, 2021.[5]

On May 4, 2020, the Commission approved MEMX's Form 1 Application to register as a national securities exchange with rules including, on a pilot basis, MEMX Rule 11.15.[6] Rule 11.15, among other things (i) provides for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduces the ability of the Exchange to deviate from objective standards set forth in the rule. The rule further provides that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of the Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer of the Exchange or senior level employee designee, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security, and before such a trading halt has officially ended according to the primary listing market.[7]

Previously, the clearly erroneous pilot programs adopted by the national securities exchanges and the current Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''LULD Plan'') were a single pilot program. On April 17, 2019, the Commission approved the Eighteenth Amendment to the LULD Plan, allowing the LULD Plan to operate on a permanent, rather than pilot, basis.[8] Accordingly, national securities exchanges filed with the Commission amendments to exchange rules to untie the pilot program's effectiveness from that of the LULD Plan in order to provide such exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules in light of the proposed Eighteenth Amendment to the LULD Plan.[9]

More recently, national securities exchanges filed with the Commission amendments to exchange rules to extend the pilot's effectiveness to the close of business on October 20, 2021.[10] Similarly, the Exchange amended MEMX Rule 11.15 to extend the pilot's effectiveness to the close of business on October 20, 2021.[11]

The Exchange now proposes to amend MEMX Rule 11.15 to extend the pilot's effectiveness to the close of business on April 20, 2022. MEMX understands that certain other national securities exchanges and the Financial Industry Regulatory Authority (''FINRA'') also intend to file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to MEMX Rule 11.15.

The Exchange does not propose any additional changes to MEMX Rule 11.15. By proposing to extend the pilot, the Exchange will avoid any discrepancy between its clearly erroneous pilot program and the pilot programs of other exchanges and FINRA, as the language of such rules are identical to MEMX Rule 11.15 and, as noted above, other exchanges and FINRA also intend to file proposals to extend their respective clearly erroneous execution pilot programs. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis. As the LULD Plan was approved by the Commission to operate on a permanent, rather than pilot, basis the Exchange intends to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of MEMX Rule 11.15 for an additional six months should provide the Exchange and other national securities exchanges additional time to consider future amendments, if any, to the clearly erroneous execution rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5) of the Act,[13] in particular, in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that extending the clearly erroneous execution pilot under MEMX Rule 11.15 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed extension would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other national securities exchanges consider and develop a permanent proposal for clearly erroneous executions reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes its proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange understands that FINRA and certain other national securities exchanges will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule

[5] *See* MEMX Rule 11.15.

[6] *See* Securities Exchange Release No. 88806 (May 4, 2020), 85 FR 27451 (May 8, 2020).

[7] *See* MEMX Rule 11.15.

[8] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (File No. 4–631).

[9] *See, e.g.,* Securities Exchange Act Release No. 85542 (April 8, 2019), 84 FR 15009 (April 12, 2019) (SR–CboeBYX–2019–003).

[10] *See, e.g.,* Securities Exchange Act Release No. 91558 (April 14, 2021), 86 FR 20580 (April 20, 2021) (SR–CboeBZX–2021–027).

[11] *See* Securities Exchange Act Release No. 91457 (April 1, 2021), 86 FR 18082 (April 7, 2021) (SR–MEMX–2021–05).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

change will help to ensure consistency across market centers without implicating any competitive issues.

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

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 [14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6) [16] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [17] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[18]

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 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–MEMX–2021–13 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–MEMX–2021–13. 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–MEMX–2021–13 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22933 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 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.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–349, OMB Control No. 3235–0395]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Extension:
Rule 15g–6

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 15g–6—Account Statements for Penny Stock Customers—(17 CFR 240.15g–6) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 15g–6 requires brokers and dealers that sell penny stocks to provide their customers monthly account statements containing information with regard to the penny stocks held in customer accounts. The purpose of the rule is to increase the level of disclosure to investors concerning penny stocks generally and specific penny stock transactions.

The Commission estimates that approximately 178 broker-dealers will spend an average of approximately 78 hours annually to comply with this rule. Thus, the total compliance burden is approximately 13,884 burden-hours per year.

An agency may not conduct or sponsor, and a person is not required to

respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22905 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93359; File No. SR–NYSENAT–2021–20]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to Rule 7.10

October 15, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 5, 2021, NYSE National, Inc. (''NYSE National'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to Rule 7.10 (Clearly Erroneous Executions) to the close of business on April 20, 2022. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Rule 7.10 (Clearly Erroneous Executions) to the close of business on April 20, 2022. The pilot program is currently due to expire on October 20, 2021.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Rule 11.19 (Clearly Erroneous Executions) that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[4] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[5] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[6] Rule 11.19 is no longer applicable to any securities that trade on the Exchange and has been replaced with Rule 7.10, which is substantively identical to Rule 11.19.[7]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan''),[8] including any extensions to the pilot period for the LULD Plan.[9] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[10] In light of that change, the Exchange amended Rule 7.10 to untie the pilot program's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[11] The Exchange later amended Rule 7.10 to extend the pilot's effectiveness to the close of business on April 20, 2020,[12] October 20, 2020,[13] April 20, 2021,[14] and subsequently, October 20, 2021.[15]

The Exchange now proposes to amend Rule 7.10 to extend the pilot's effectiveness for a further six months to the close of business on April 20, 2022. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (c), (e)(2), (f), and (g) as described in former Rule 11.19 will be in effect, and the

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 62886 (Sept. 10, 2010), 75 FR 56613 (Sept. 16, 2010) (SR–NSX–2010–07).

[5] *See* Securities Exchange Act Release No. 68803 (Feb. 1, 2013), 78 FR 9078 (Feb. 7, 2013) (SR–NSX–2013–06).

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–NSX–2014–08).

[7] *See* Securities Exchange Act Release No. 83289 (May 17, 2018), 83 FR 23968 (May 23, 2018) (SR–NYSENAT–2018–02).

[8] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[9] *See* Securities Exchange Act Release No. 71797 (March 25, 2014), 79 FR 18108 (March 31, 2014) (SR–NSX–2014–07).

[10] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[11] *See* Securities Exchange Act Release No. 85522 (April 5, 2019), 84 FR 14704 (April 11, 2019) (SR–NYSENAT–2019–07).

[12] *See* Securities Exchange Act Release No. 87352 (October 18, 2019), 84 FR 57063 (October 24, 2019) (SR–NYSENAT–2019–24).

[13] *See* Securities Exchange Act Release No. 88593 (April 8, 2020), 85 FR 20728 (April 14, 2020) (SR–NYSENAT–2020–13).

[14] *See* Securities Exchange Act Release No. 90157 (October 13, 2020), 85 FR 66393 (October 19, 2020) (SR–NYSENAT–2020–32).

[15] *See* Securities Exchange Act Release No. 91549 (April 14, 2021), 86 FR 20548 (April 20, 2021) (SR–NYSENAT–2021–08).

provisions of paragraphs (i) through (k) shall be null and void.[16] In such an event, the remaining sections of Rule 7.10 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 7.10.

The Exchange does not propose any additional changes to Rule 7.10. Extending the effectiveness of Rule 7.10 for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[17] in general, and Section 6(b)(5) of the Act,[18] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 7.10 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[19] and Rule 19b–4(f)(6) thereunder.[20]

A proposed rule change filed under Rule 19b–4(f)(6)[21] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[22] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[23]

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 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–NYSENAT–2021–20 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSENAT–2021–20. 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

[16] *See supra* notes 4–6. The prior versions of paragraphs (c), (e)(2), (f), and (g) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 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.

[21] 17 CFR 240.19b–4(f)(6).

[22] 17 CFR 240.19b–4(f)(6)(iii).

[23] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–NYSENAT–2021–20 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22934 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93364; File No. SR–CboeBYX–2021–026]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Related to the Market-Wide Circuit Breaker in Rule 11.18

October 15, 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 October 14, 2021, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (''BYX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposal to extend the pilot related to the market-wide circuit breaker in Rule 11.18. 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/equities/regulation/rule_filings/byx/*), 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

BYX Rules 11.18(a) through (d), (f) and (g) describe the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, *i.e.,* market-wide circuit breakers. The market-wide circuit breaker (''MWCB'') mechanism was approved by the Commission to operate on a pilot basis, the term of which was to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS (the ''LULD Plan''),[5] including any extensions to the pilot period for the LULD Plan. In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[6] In light of the proposal to make the LULD Plan permanent, the Exchange amended Rule 11.18 to untie the pilot's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[7] The Exchange subsequently amended Rule 11.18 to extend the pilot's effectiveness for an additional year to the close of business on October 18, 2020,[8] and again to the close of business on October 18, 2021.[9] Now, the Exchange proposes to extend the pilot for an additional five months to March 18, 2022. This filing does not propose any substantive or additional changes to Rule 11.18.

The market-wide circuit breaker under Rule 11.18 provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA adopted uniform rules on a pilot basis relating to market-wide circuit breakers in 2012 (''MWCB Rules''), which are designed to slow the effects of extreme price movement through coordinated trading halts across securities markets when severe price declines reach levels that may exhaust market liquidity.[10] Market-wide circuit breakers provide for trading halts in all equities and options markets during a severe market decline as measured by a single-day decline in the S&P 500 Index.

Pursuant to Rule 11.18, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day's closing price of that index. Currently, the

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012). The LULD Plan provides a mechanism to address extraordinary market volatility in individual securities.

[6] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019).

[7] *See* Securities Exchange Act Release No. 85665 (April 16, 2019), 84 FR 16749 (April 22, 2019) (SR–CboeBYX–2019–004).

[8] *See* Securities Exchange Act Release No. 87343 (October 18, 2019), 84 FR 57104 (October 24, 2019) (SR–CboeBYX–2019–017).

[9] *See* Securities Exchange Act Release No. 90121 (October 8, 2020), 85 FR 65103 (October 14, 2020) (SR–CboeBYX–2020–028).

[10] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BATS–2011–038; SR–BYX–2011–025; SR–BX–2011–068; SR–CBOE–2011–087; SR–C2–2011–024; SR–CHX–2011–30; SR–EDGA–2011–31; SR–EDGX–2011–30; SR–FINRA–2011–054; SR–ISE–2011–61; SR–NASDAQ–2011–131; SR–NSX–2011–11; SR–NYSE–2011–48; SR–NYSEAmex–2011–73; SR–NYSEArca–2011–68; SR–Phlx–2011–129) (''MWCB Approval Order'').

triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. A market decline that triggers a Level 3 halt, at any time during the trading day, would halt market-wide trading for the remainder of the trading day.

In the Spring of 2020, at the outset of the worldwide COVID–19 pandemic, U.S. equities markets experienced four MWCB Level 1 halts, on March 9, 12, 16, and 18, 2020. In each instance, the markets halted as intended upon a 7% drop in the S&P 500 Index, and resumed as intended 15 minutes later.

In response to these events, the previously-convened MWCB Taskforce (''Taskforce'') reviewed the March 2020 halts and considered whether any immediate changes to the MWCB mechanism should be made. The Taskforce, consisting of representatives from equities exchanges, futures exchanges, FINRA, broker-dealers, and other market participants, had been assembled in early 2020 to consider more generally potential changes to the MWCB mechanism. The Taskforce held ten meetings in the Spring and Summer of 2020 that were attended by Commission staff to consider, among other things: (1) Whether to retain the S&P 500 Index as the standard for measuring market declines; (2) whether halts that occur shortly after the 9:30 a.m. market open cause more harm than good; and (3) what additional testing of the MWCB mechanism should be done.

After considering data and anecdotal reports of market participants' experiences during the March 2020 MWCB events, the Taskforce did not recommend immediate changes be made to the use of the S&P 500 Index as the reference price against which market declines are measured, or to the current MWCB mechanism which permits halts even shortly after the 9:30 a.m. market open. The Taskforce recommended creating a process for a backup reference price in the event that the S&P 500 Index becomes unavailable, and enhancing functional MWCB testing. The Taskforce also asked CME to consider modifying its rules to enter into a limit-down state in the futures pre-market after a 7% decline instead of 5%.

On September 17, 2020, the Director of the Division of Trading and Markets requested that the equities exchanges and FINRA prepare a more complete study of the design and operation of the MWCB mechanism and the LULD Plan during the period of volatility in the Spring of 2020. In response to the request, the SROs created a MWCB ''Working Group'' composed of SRO representatives and industry advisers that included members of the advisory committees to both the LULD Plan and the NMS Plans governing the collection, consolidation, and dissemination of last-sale transaction reports and quotations in NMS Stocks. The Working Group met regularly from September 2020 through March 2021 to consider the Commission's request, review data, and compile its study. The Working Group's efforts in this respect incorporated and built on the work of an MWCB Task Force. The Working Group submitted its study to the Commission on March 31, 2021 (the ''Study'').[11] In addition to a timeline of the MWCB events in March 2020, the Study includes a summary of the analysis and recommendations of the MWCB Task Force; an evaluation of the operation of the Pilot Rules during the March 2020 events; an evaluation of the design of the current MWCB system; and the Working Group's conclusions and recommendations. In the Study, the Working Group concluded: (1) The MWCB mechanism set out in the Pilot Rules worked as intended during the March 2020 events; (2) the MWCB halts triggered in March 2020 appear to have had the intended effect of calming volatility in the market, without causing harm; (3) the design of the MWCB mechanism with respect to reference value (SPX), trigger levels (7%/13%/20%), and halt times (15 minutes) is appropriate; (4) the change implemented in Amendment 10 to the Plan to Address Extraordinary Market Volatility (the ''Limit Up/Limit Down Plan'' or ''LULD Plan'') did not likely have any negative impact on MWCB functionality; and (5) no changes should be made to the mechanism to prevent the market from halting shortly after the opening of regular trading hours at 9:30 a.m. In light of the foregoing conclusions, the Working Group also made several recommendations, including that the Pilot Rules should be permanent without any changes.[12]

The SROs have since worked on a proposed a rule change to make the Pilot Rules permanent, consistent with the Working Group's recommendations. New York Stock Exchange (''NYSE'') filed such proposed rule change on July 16, 2021.[13] On August 27, 2021, the Commission extended its time to consider the proposed rule change to October 20, 2021.[14] The Exchange now proposes to extend the expiration date of the Pilot Rules to the end of business on March 18, 2022.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Section 6(b)(5) of the Act,[16] 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 market-wide circuit breaker mechanism under Rule 11.18 is an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. Extending the market-wide circuit breaker pilot for an additional five months would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Exchange and the other SROs work to make the Pilot Rules permanent.

The Exchange also believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Based on the foregoing, the Exchange believes the benefits to market participants from the MWCB under Rule 11.18 should continue on a pilot basis because the MWCB will promote fair and orderly markets, and protect investors and the public interest.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent

[11] *See* Report of the Market-Wide Circuit Breaker (''MWCB'') Working Group Regarding the March 2020 MWCB Events, submitted March 31, 2021 (the ''Study''), available at *https://www.nyse.com/publicdocs/nyse/markets/nyse/Report__of__the__MarketWide__Circuit__Breaker__Working__Group.pdf*.

[12] *See id.* at 46.

[13] *See* Securities Exchange Act Release No. 92428 (July 16, 2021), 86 FR 38776 (July 22, 2021) (SR–NYSE–2021–40).

[14] *See* Securities Exchange Act Release No. 92785A (August 27, 2021), 86 FR 50202 (September 7, 2021) (SR–NYSE–2021–40).

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

mechanism to halt trading across the U.S. markets while the Exchange and the other SROs finalize their proposals to make the Pilot Rules permanent. Further, the Exchange understands that FINRA and other national securities exchanges will file proposals to extend their rules regarding the market-wide circuit breaker pilot following Commission approval of the NYSE proposal. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

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 on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the 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 [17] and Rule 19b–4(f)(6) [18] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange asked that the Commission waive the 30 day operative delay so that the proposal may become operative immediately upon filing. Extending the Pilot Rules' effectiveness to the close of business on March 18, 2022 will extend the protections provided by the Pilot Rules, which would otherwise expire in less than 30 days. Waiver of the operative delay would therefore permit uninterrupted continuation of the MWCB pilot while the Commission reviews the NYSE's proposed rule change to make the Pilot Rules permanent. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[21]

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) [22] 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–CboeBYX–2021–026 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–CboeBYX–2021–026. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBYX–2021–026 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22941 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 15 U.S.C. 78s(b)(2)(B).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93357; File No. SR–NYSEArca–2021–87]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to Rule 7.10–E

October 15, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 6, 2021, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to Rule 7.10–E (Clearly Erroneous Executions) to the close of business on April 20, 2022. The proposed rule change is

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Rule 7.10–E (Clearly Erroneous Executions) to the close of business on April 20, 2022. The pilot program is currently due to expire on October 20, 2021.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Rule 7.10–E that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[4] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[5] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[6]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan''),[7] including any extensions to the pilot period for the LULD Plan.[8] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[9] In light of that change, the Exchange amended Rule 7.10–E to untie the pilot program's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[10] The Exchange later amended Rule 7.10–E to extend the pilot's effectiveness to the close of business on April 20, 2020,[11] October 20, 2020,[12] April 20, 2021,[13] and subsequently, October 20, 2021.[14]

The Exchange now proposes to amend Rule 7.10–E to extend the pilot's effectiveness for a further six months until the close of business on April 20, 2022. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (c), (e)(2), (f), and (g) shall be in effect, and the provisions of paragraphs (i) through (k) shall be null and void.[15] In such an event, the remaining sections of Rule 7.10–E would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 7.10–E.

The Exchange does not propose any additional changes to Rule 7.10–E. Extending the effectiveness of Rule 7.10–E for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[16] in general, and Section 6(b)(5) of the Act,[17] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 7.10–E for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

[4] *See* Securities Exchange Act Release No. 62886 (Sept. 10, 2010), 75 FR 56613 (Sept. 16, 2010) (SR–NYSEArca–2010–58).

[5] *See* Securities Exchange Act Release No. 68809 (Feb. 1, 2013), 78 FR 9081 (Feb. 7, 2013) (SR–NYSEArca–2013–12).

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–NYSEArca–2014–48).

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[8] *See* Securities Exchange Act Release No. 71807 (March 26, 2014), 79 FR 18087 (March 31, 2014) (SR–NYSEArca–2014–32).

[9] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[10] *See* Securities Exchange Act Release No. 85532 (April 5, 2019), 84 FR 14708 (April 11, 2019) (SR–NYSEArca–2019–21).

[11] *See* Securities Exchange Act Release No. 87355 (October 18, 2019), 84 FR 57094 (October 24, 2019) (SR–NYSEArca–2019–75).

[12] *See* Securities Exchange Act Release No. 88590 (April 8, 2020), 85 FR 20791 (April 14, 2020) (SR–NYSEArca–2020–25).

[13] *See* Securities Exchange Act Release No. 90155 (October 13, 2020), 85 FR 66386 (October 19, 2020) (SR–NYSEArca–2020–88).

[14] *See* Securities Exchange Act Release No. 91551 (April 14, 2021), 86 FR 20562 (April 20, 2021) (SR–NYSEArca–2021–22).

[15] *See supra* notes 4–6. The prior versions of paragraphs (c), (e)(2), (f), and (g) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [18] and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) [20] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [21] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as 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 change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2021–87 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2021–87. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2021–87 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22932 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6)(iii).

[22] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–098, OMB Control No. 3235–0081]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 12d2–1

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 12d2–1 (17 CFR 240.12d2–1),

under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Act'').

On February 12, 1935, the Commission adopted Rule 12d2–1 [1] (''Suspension of Trading'') which sets forth the conditions and procedures under which a security may be suspended from trading under Section 12(d) of the Act. [2] Rule 12d2–1 provides the procedures by which a national securities exchange may suspend from trading a security that is listed and registered on the exchange. Under Rule 12d2–1, an exchange is permitted to suspend from trading a listed security in accordance with its rules, and must promptly notify the Commission of any such suspension, along with the effective date and the reasons for the suspension.

Any such suspension may be continued until such time as the Commission may determine that the suspension is designed to evade the provisions of Section 12(d) of the Act and Rule 12d2–2 thereunder.[3] During the continuance of such suspension under Rule 12d2–1, the exchange is required to notify the Commission promptly of any change in the reasons for the suspension. Upon the restoration to trading of any security suspended under Rule 12d2–1, the exchange must notify the Commission promptly of the effective date of such restoration.

The trading suspension notices serve a number of purposes. First, they inform the Commission that an exchange has suspended from trading a listed security or reintroduced trading in a previously suspended security. They also provide the Commission with information necessary for it to determine that the suspension has been accomplished in accordance with the rules of the exchange, and to verify that the exchange has not evaded the requirements of Section 12(d) of the Act and Rule 12d2–2 thereunder by improperly employing a trading suspension. Without Rule 12d2–1, the Commission would be unable to fully implement these statutory responsibilities.

There are 24 national securities exchanges [4] that are subject to Rule 12d2–1. The burden of complying with Rule 12d2–1 is not evenly distributed among the exchanges, however, since there are many more securities listed on the New York Stock Exchange, Inc., the NASDAQ Stock Exchange, and the NYSE American LLC than on the other exchanges.[5] There are approximately 878 responses [6] under Rule 12d2–1 for the purpose of suspension of trading from the national securities exchanges each year, and the resultant aggregate annual reporting hour burden would be, assuming on average one-half reporting hour per response, 439 annual burden hours for all exchanges. The related internal compliance costs associated with these burden hours are $98,354 per year.

The collection of information obligations imposed by Rule 12d2–1 is mandatory. The response will be available to the public and will not be kept confidential.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22906 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[1] *See* Securities Exchange Act Release No. 98 (February 12, 1935).

[2] *See* Securities Exchange Act Release No. 7011 (February 5, 1963), 28 FR 1506 (February 16, 1963).

[3] Rule 12d2–2 prescribes the circumstances under which a security may be delisted from an exchange and withdrawn from registration under Section 12(b) of the Act, and provides the procedures for taking such action.

[4] The Exchanges are BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Investors Exchange LLC, Long Term Stock Exchange, Inc., MEMX, LLC, Miami International Securities Exchange, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The Nasdaq Stock Market, New York Stock Exchange LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE American LLC, NYSE National, Inc.

[5] In fact, some exchanges do not file any trading suspension reports in a given year.

[6] The 878 figure was calculated by averaging the numbers for compliance in 2019 and 2020, which are 822 and 933, respectively.

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–451, OMB Control No. 3235–0763]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 304 of Regulation ATS and Form ATS

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 304 of Regulation ATS (17 CFR 242.304) and Form ATS–N under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Regulation ATS provides a regulatory structure for alternative trading systems. Rule 304 of Regulation ATS provides conditions for NMS Stock ATSs seeking to rely on the exemption from the definition of ''exchange'' provided by Rule 3a1–1(a) of the Exchange Act, including to file a Form ATS–N, and for that Form ATS–N to become effective. Form ATS–N requires NMS Stock ATSs to provide information about their manner of operations, the broker-dealer operator, and the ATS-related activities of the broker-dealer operator and its affiliates to comply with the conditions provided under Rule 304. Form ATS–N promotes more efficient and effective market operations by providing more transparency to market participants about the operations of NMS Stock ATSs and the potential conflicts of interest of the controlling broker-dealer operator and its affiliates, and helps brokers meet their best execution obligations to their customers. Operational transparency rules, including Form ATS–N, are designed to increase competition among trading centers in regard to order routing and execution quality.

The Commission staff estimates that entities subject to the requirements of Rule 304 and Form ATS–N will spend a total of approximately 2,042 hours a year to comply with the Rule.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the

Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: October 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22904 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93366; File No. SR–CboeEDGA–2021–023]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Related to the Market-Wide Circuit Breaker in Rule 11.16

October 15, 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 October 15, 2021, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 EDGA Exchange, Inc. (''EDGA'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposal to extend the pilot related to the market-wide circuit breaker in Rule 11.16. 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/equities/regulation/rule_filings/edga/*), 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

EDGA Rules 11.16(a) through (d), (f) and (g) describe the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, *i.e.,* market-wide circuit breakers. The market-wide circuit breaker (''MWCB'') mechanism was approved by the Commission to operate on a pilot basis, the term of which was to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS (the ''LULD Plan''),[5] including any extensions to the pilot period for the LULD Plan. In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[6] In light of the proposal to make the LULD Plan permanent, the Exchange amended Rule 11.16 to untie the pilot's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[7] The Exchange subsequently amended Rule 11.16 to extend the pilot's effectiveness for an additional year to the close of business on October 18, 2020,[8] and again to the close of business on October 18, 2021.[9] The Exchange now proposes to amend Rule 11.16 to extend the pilot to the close of business on March 18, 2022. This filing does not propose any substantive or additional changes to Rule 11.16.

The market-wide circuit breaker under Rule 11.16 provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA adopted uniform rules on a pilot basis relating to market-wide circuit breakers in 2012 (''MWCB Rules''), which are designed to slow the effects of extreme price movement through coordinated trading halts across securities markets when severe price declines reach levels that may exhaust market liquidity.[10] Market-wide circuit breakers provide for trading halts in all equities and options markets during a severe market decline as measured by a single-day decline in the S&P 500 Index.

Pursuant to Rule 11.16, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day's closing price of that index. Currently, the triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012). The LULD Plan provides a mechanism to address extraordinary market volatility in individual securities.

[6] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019).

[7] *See* Securities Exchange Act Release No. 85668 (April 16, 2019), 84 FR 16743 (April 22, 2019) (SR–CboeEDGA–2019–006).

[8] *See* Securities Exchange Act Release No. 87335 (October 17, 2019), 84 FR 56858 (October 23, 2019) (SR-CboeEDGA–2019–016)

[9] *See* Securities Exchange Act Release No. 90127 (October 8, 2020), 85 FR 65085 (October 14, 2020) (SR-CboeEDGA–2020–026).

[10] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BATS–2011–038; SR–BYX–2011–025; SR–BX–2011–068; SR–CBOE–2011–087; SR–C2–2011–024; SR–CHX–2011–30; SR–EDGA–2011–31; SR–EDGX–2011–30; SR–FINRA–2011–054; SR–ISE–2011–61; SR–NASDAQ–2011–131; SR–NSX–2011–11; SR–NYSE–2011–48; SR–NYSEAmex–2011–73; SR–NYSEArca–2011–68; SR–Phlx–2011–129) (''MWCB Approval Order'').

15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. A market decline that triggers a Level 3 halt, at any time during the trading day, would halt market-wide trading for the remainder of the trading day.

In the Spring of 2020, at the outset of the worldwide COVID–19 pandemic, U.S. equities markets experienced four MWCB Level 1 halts, on March 9, 12, 16, and 18, 2020. In each instance, the markets halted as intended upon a 7% drop in the S&P 500 Index, and resumed as intended 15 minutes later.

In response to these events, the previously-convened MWCB Taskforce (''Taskforce'') reviewed the March 2020 halts and considered whether any immediate changes to the MWCB mechanism should be made. The Taskforce, consisting of representatives from equities exchanges, futures exchanges, FINRA, broker-dealers, and other market participants, had been assembled in early 2020 to consider more generally potential changes to the MWCB mechanism. The Taskforce held ten meetings in the Spring and Summer of 2020 that were attended by Commission staff to consider, among other things: (1) Whether to retain the S&P 500 Index as the standard for measuring market declines; (2) whether halts that occur shortly after the 9:30 a.m. market open cause more harm than good; and (3) what additional testing of the MWCB mechanism should be done.

After considering data and anecdotal reports of market participants' experiences during the March 2020 MWCB events, the Taskforce did not recommend immediate changes be made to the use of the S&P 500 Index as the reference price against which market declines are measured, or to the current MWCB mechanism which permits halts even shortly after the 9:30 a.m. market open. The Taskforce recommended creating a process for a backup reference price in the event that the S&P 500 Index becomes unavailable, and enhancing functional MWCB testing. The Taskforce also asked CME to consider modifying its rules to enter into a limit-down state in the futures pre-market after a 7% decline instead of 5%.

On September 17, 2020, the Director of the Division of Trading and Markets requested that the equities exchanges and FINRA prepare a more complete study of the design and operation of the MWCB mechanism and the LULD Plan during the period of volatility in the Spring of 2020. In response to the request, the SROs created a MWCB ''Working Group'' composed of SRO representatives and industry advisers that included members of the advisory committees to both the LULD Plan and the NMS Plans governing the collection, consolidation, and dissemination of last-sale transaction reports and quotations in NMS Stocks. The Working Group met regularly from September 2020 through March 2021 to consider the Commission's request, review data, and compile its study. The Working Group's efforts in this respect incorporated and built on the work of an MWCB Task Force. The Working Group submitted its study to the Commission on March 31, 2021 (the ''Study'').[11] In addition to a timeline of the MWCB events in March 2020, the Study includes a summary of the analysis and recommendations of the MWCB Task Force; an evaluation of the operation of the Pilot Rules during the March 2020 events; an evaluation of the design of the current MWCB system; and the Working Group's conclusions and recommendations. In the Study, the Working Group concluded: (1) The MWCB mechanism set out in the Pilot Rules worked as intended during the March 2020 events; (2) the MWCB halts triggered in March 2020 appear to have had the intended effect of calming volatility in the market, without causing harm; (3) the design of the MWCB mechanism with respect to reference value (SPX), trigger levels (7%/13%/20%), and halt times (15 minutes) is appropriate; (4) the change implemented in Amendment 10 to the Plan to Address Extraordinary Market Volatility (the ''Limit Up/Limit Down Plan'' or ''LULD Plan'') did not likely have any negative impact on MWCB functionality; and (5) no changes should be made to the mechanism to prevent the market from halting shortly after the opening of regular trading hours at 9:30 a.m. In light of the foregoing conclusions, the Working Group also made several recommendations, including that the Pilot Rules should be permanent without any changes.[12]

The SROs have since worked on a proposed a rule change to make the Pilot Rules permanent, consistent with the Working Group's recommendations. New York Stock Exchange (''NYSE'') filed such proposed rule change on July 16, 2021.[13] On August 27, 2021, the Commission extended its time to consider the proposed rule change to October 20, 2021.[14] The Exchange now proposes to extend the expiration date of the Pilot Rules to the end of business on March 18, 2022.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Section 6(b)(5) of the Act,[16] 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 market-wide circuit breaker mechanism under Rule 11.16 is an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. Extending the market-wide circuit breaker pilot for an additional five months would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Exchange and the other SROs work to make the Pilot Rules permanent.

The Exchange also believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Based on the foregoing, the Exchange believes the benefits to market participants from the MWCB under Rule 11.16 should continue on a pilot basis because the MWCB will promote fair and orderly markets, and protect investors and the public interest.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Exchange and the other SROs finalize their proposals to make the Pilot Rules permanent. Further, the Exchange understands that FINRA and other national securities exchanges will file proposals to extend

[11] *See* Report of the Market-Wide Circuit Breaker (''MWCB'') Working Group Regarding the March 2020 MWCB Events, submitted March 31, 2021 (the ''Study''), available at *https://www.nyse.com/publicdocs/nyse/markets/nyse/Report_of_the_MarketWide_Circuit_Breaker_Working_Group.pdf.*

[12] *See id.* at 46.

[13] *See* Securities Exchange Act Release No. 92428 (July 16, 2021), 86 FR 38776 (July 22, 2021) (SR–NYSE–2021–40).

[14] *See* Securities Exchange Act Release No. 92785A (August 27, 2021), 86 FR 50202 (September 7, 2021) (SR–NYSE–2021–40).

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

their rules regarding the market-wide circuit breaker pilot following Commission approval of the NYSE proposal. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

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 on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [17] and Rule 19b–4(f)(6) [18] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange asked that the Commission waive the 30 day operative delay so that the proposal may become operative immediately upon filing. Extending the Pilot Rules' effectiveness to the close of business on March 18, 2022 will extend the protections provided by the Pilot Rules, which would otherwise expire in less than 30 days. Waiver of the operative delay would therefore permit uninterrupted continuation of the MWCB pilot while the Commission reviews the NYSE's proposed rule change to make the Pilot Rules permanent. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[21]

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

[18] 17 CFR 240.19b–4.

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 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–CboeEDGA–2021–023 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–CboeEDGA–2021–023. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGA–2021–023 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22939 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93342; File No. SR–CboeBZX–2021–070]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Current Pilot Program Related to Clearly Erroneous Executions, to the Close of Business on April 20, 2022

October 15, 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 October 14, 2021, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] 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 BZX Exchange, Inc. (''BZX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to extend the current pilot

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

program related to BZX Rule 11.17, Clearly Erroneous Executions, to the close of business on April 20, 2022. 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/equities/regulation/rule_filings/bzx/*), 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 purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions to the close of business on April 20, 2022. Portions of Rule 11.17, explained in further detail below, are currently operating as a pilot program set to expire on October 20, 2021.[5]

On September 10, 2010, the Commission approved, on a pilot basis, changes to BZX Rule 11.17 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[6] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[7] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[8]

On December 26, 2018, the Commission published the proposed Eighteenth Amendment[9] to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'')[10] to allow the Plan to operate on a permanent, rather than pilot, basis. On April 8, 2019, the Exchange amended BZX Rule 11.17 to untie the pilot program's effectiveness from that of the Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019 in order allow the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules in light of the proposed Eighteenth Amendment to the Plan.[11] On April 17, 2019, the Commission published an approval of the Eighteenth Amendment to allow the Plan to operate on a permanent, rather than pilot, basis.[12] On October 21, 2019, the Exchange amended BZX Rule 11.17 to extend the pilot's effectiveness to the close of business on April 20, 2020.[13] On March 18, 2020, the Exchange amended BZX Rule 11.17 to extend the pilot's effectiveness to the close of business on October 20, 2020.[14] On October 20, 2020, the Exchange amended BZX Rule 11.17 to extend the pilot's effectiveness to the close of business on April 20, 2021.[15] Finally, on April 14, the Exchange amended BYX Rule 11.17 to extend the pilot's effectiveness to the close of business on October 20, 2021.[16]

The Exchange now proposes to amend BZX Rule 11.17 to extend the pilot's effectiveness to the close of business on April 20, 2022. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') have filed or plan to file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to BZX Rule 11.17.

The Exchange does not propose any additional changes to BZX Rule 11.17. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis. As the Plan was approved by the Commission to operate on a permanent, rather than pilot, basis the Exchange intends to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of BZX Rule 11.17 for an additional six months should provide the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[17] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[18] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to

[5] *See* Securities Exchange Act Release No. 20583 (April 14, 2021), 86 FR 20580 (April 20, 2021) (SR–CboeBZX–2021–027).

[6] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–BATS–2010–016).

[7] *See* Securities Exchange Act Release No. 68797 (January 31, 2013), 78 FR 8635 (February 6, 2013) (SR–BATS–2013–008).

[8] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–BATS–2014–014).

[9] *See* Securities Exchange Act Release No. 84843 (December 18, 2018), 83 FR 66464 (December 26, 2018) (File No. 4–631) (''Eighteenth Amendment'').

[10] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[11] *See* Securities Exchange Act Release No. 85543 (April 8, 2019), 84 FR 15018 (April 12, 2019) (SR–CboeBZX–2019–022).

[12] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (File No. 4–631).

[13] *See* Securities Exchange Act Release No. 87365 (October 21, 2019), 84 FR 57540 (October 25, 2019) (SR–CboeBZX–2019–089).

[14] *See* Securities Exchange Act Release No. 88497 (March 27, 2020), 85 FR 18602 (April 2, 2020) (SR–CboeBZX–2020–026).

[15] *See* Securities Exchange Act Release No. 90230 (October 20, 2020), 85 FR 67802 (Oct. 26, 2020) (SR–CboeBYX–2020–030).

[16] *See* supra note 5.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [19] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that extending the clearly erroneous execution pilot under BZX Rule 11.17 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and the other national securities exchanges consider and develop a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange understands that FINRA and other national securities exchanges have or will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [20] and Rule 19b–4(f)(6) thereunder.[21]

A proposed rule change filed under Rule 19b–4(f)(6) [22] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [23] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–CboeBZX–2021–070 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–CboeBZX–2021–070. 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–CboeBZX–2021–070 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22921 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[19] *Id.*

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 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.

[22] 17 CFR 240.19b–4(f)(6).

[23] 17 CFR 240.19b–4(f)(6)(iii).

[24] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93348; File No. SR–CBOE–2021–058]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule With Respect to Its Lead Market-Maker Incentive Programs

October 15, 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 October 7, 2021, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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 Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its Fees Schedule with respect to its Lead Market-Maker (''LMM'') Incentive Programs. 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://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), 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 Fees Schedule to amend the Global Trading Hours (''GTH'') Cboe Volatility Index (''VIX'') options and VIX Weekly (VIXW) options LMM Incentive Program and the GTH S&P 500 Index (''SPX'') options and SPX Weekly (''SPXW'') options LMM Incentive Program.[3]

Both LMM Incentive Programs provide a rebate to Trading Permit Holders (''TPHs'') with LMM appointments to the respective incentive program that meet certain quoting standards in the applicable series in a month. The Exchange notes that meeting or exceeding the quoting standards (both current and as proposed; described in further detail below) in each of the LMM Incentive Program products to receive the applicable rebate (both currently offered and as proposed; described in further detail below) is optional for an LMM appointed to a program. Rather, an LMM appointed to an incentive program is eligible to receive the corresponding rebate if it satisfies the applicable quoting standards, which the Exchange believes encourages the LMM to provide liquidity in the applicable class and trading session (*i.e.,* GTH). The Exchange may consider other exceptions to the programs' quoting standards based on demonstrated legal or regulatory requirements or other mitigating circumstances. In calculating whether an LMM appointed to an incentive program meets the applicable program's quoting standards each month, the Exchange excludes from the calculation in that month the business day in which the LMM missed meeting or exceeding the quoting standards in the highest number of the applicable series.

GTH VIX/VIXW LMM Program

The Exchange first proposes to amend its GTH VIX/VIXW LMM Incentive Program. Currently, the program provides that if an LMM in VIX/VIXW provides continuous electronic quotes during GTH that meet or exceed the heightened quoting standards (below) in at least 99% of each of the VIX and VIXW series, 90% of the time in a given month, the LMM will receive a rebate for that month in the amount of $15,000 for VIX and $5,000 for VIXW (or pro-rated amount if an appointment begins after the first trading day of the month or ends prior to the last trading day of the month) for that month. Additionally, if the appointed LMM provides continuous electronic quotes during GTH that meet or exceed the above VIX heightened quoting standards in at least 99% of the VIX series, 90% of the time in a given month, the LMM will receive a rebate for that month of $0.03 per VIX/VIXW contract executed in its Market-Maker capacity during RTH.

Premium level	Maximum allowable width
VIXW:	
$0.00–$100.00	$10.00
$100.01–$200.00	16.00
Greater than $200.000	24.00

Premium level	Expiring		Near term		Mid term		Long term	
	15 days or less		15 days to 60 days		61 days to 270 days		271 days or greater	
	Width	Size	Width	Size	Width	Size	Width	Size
VIX:								
$0.00–$1.00	$0.75	25	$0.50	50	$0.50	50	$1.00	10
$1.01–$3.00	1.00	15	0.75	25	0.75	25	1.00	10
$3.01–$5.00	1.00	15	0.75	25	0.75	25	1.20	7
$5.01–$10.00	1.50	10	1.00	10	1.00	10	2.00	5
$10.01–$30.00	2.50	5	1.50	5	2.50	5	4.00	3
Greater than $30.00	5.00	3	3.00	5	5.00	3	7.00	2

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on September 30, 2021 (SR–CBOE–2021–056). On October 7, 2021, the Exchange withdrew that filing and submitted this filing.

The Exchange proposes to restructure the GTH VIX/VIXW LMM Incentive Program by adopting a two sets of quoting standards for VIX options; a set of basic quoting standards and a set of heightened quoting standards. The Exchange notes that the current quoting standards for VIXW will remain the same but will be considered basic quoting standards for VIXW. As proposed, the program provides that, if the appointed LMM provides continuous electronic quotes during GTH that meet or exceed the basic quoting standards in the same percentage of series in the same percentage of time (*i.e.,* 99% of each VIX/VIXW series, 90% of the time per month), the LMM will receive the same rebate ($15,000 for VIX and $5,000 for VIXW) for that month. The new basic quoting standards proposed for VIX options are as follows in the table below:

Premium level	Expiring		Near term		Mid term		Long term	
	Less than 15 days		15 days to 60 days		61 days to 180 days		181 days or greater	
	Width	Size	Width	Size	Width	Size	Width	Size
VIX Value at Prior Close <18								
$0.00–$1.00	$0.35	50	$0.25	75	$0.35	50	$0.80	10
$1.01–$3.00	0.50	30	0.35	50	0.50	30	0.90	10
$3.01–$5.00	0.60	25	0.35	25	0.60	20	1.00	10
$5.01–$10.00	1.00	10	0.80	20	1.30	10	2.00	5
$10.01–$30.00	2.00	5	1.50	5	2.00	5	3.00	3
Greater than $30.00	5.00	3	3.00	3	5.00	3	5.00	3
VIX Value at Prior Close from 18–25								
$0.00–$1.00	$0.50	25	$0.35	50	$0.50	40	$1.00	10
$1.01–$3.00	0.50	20	0.50	30	0.70	20	1.00	10
$3.01–$5.00	0.80	20	0.50	20	0.80	10	1.30	5
$5.01–$10.00	1.50	10	1.00	10	2.00	5	2.20	5
$10.01–$30.00	3.00	1	2.50	1	3.00	1	5.00	1
Greater than $30.00	5.00	1	5.00	1	5.00	1	10.00	1
VIX Value at Prior Close from >25								
$0.00–$1.00	0.80	15	0.50	20	0.60	20	1.20	10
$1.01–$3.00	1.00	10	0.75	20	1.00	10	1.20	10
$3.01–$5.00	1.20	10	0.90	10	1.20	5	1.80	5
$5.01–$10.00	2.00	5	1.50	5	2.50	5	3.00	3
$10.01–$30.00	5.00	1	5.00	1	5.00	1	7.00	1
Greater than $30.00	10.00	1	10.00	1	10.00	1	10.00	1

Additionally, if the appointed LMM provides continuous electronic quotes during GTH that meet or exceed the new VIX heighted quoting standards (as proposed below) in the same percentage of VIX series (99%) for the same percentage of time (90%) of the time in a given month, the LMM will receive the same rebate currently offered ($0.03) for that month per VIX/VIXW contract executed in its Market-Maker capacity during Regular Trading Hours.

Premium level	Expiring		Near term	
	Less than 15 days		15 days to 60 days	
	Width	Size	Width	Size
VIX Value at Prior Close <18				
$0.00–$1.00	$0.20	100	$0.20	100
$1.01–$3.00			0.25	50
$3.01–$5.00			0.35	25
VIX Value at Prior Close from 18–25				
$0.00–$1.00	0.25	50	0.20	50
$1.01–$3.00			0.30	30
$3.01–$5.00			0.40	30
VIX Value at Prior Close from >25				
$0.00–$1.00	0.30	30	0.25	30
$1.01–$3.00			0.40	20
$3.01–$5.00			0.60	20

The Exchange believes the proposed basic and heightened quoting requirements for VIX options under the GTH VIX/VIXW LMM Incentive Program are designed to continue to encourage LMMs appointed to the program to provide significant liquidity in VIX options during GTH. Particularly, by adopting different sets of quoting standards that are applicable depending on the VIX Index value at the prior close (*i.e.,* at the close of the preceding RTH session) the proposed rule change will encourage LMMs appointed to the program to meet the quoting standards by making it easier for them to satisfy such standards. Spreads in VIX options generally widen when the VIX experiences higher volatility (*i.e.,* is higher in value). As a result, the Exchange understands that, when the VIX Index experiences higher volatility, LMMs appointed to the program find it increasingly challenging to meet the program's current quoting standards. Therefore, to better enable and encourage LMMs to meet the quoting standards, the proposed rule change adopts generally wider widths and smaller quote sizes where the VIX Index may be experiencing higher volatility (*i.e.,* as the value of the VIX in the proposed VIX value categories becomes relatively higher based on the closing index value from the preceding trading session). The proposed rule change also adopts generally tighter widths and larger quote sizes in the expiration categories that are nearer in term and gradually widens the widths and reduces the quote sizes as the expiration categories become longer in term. The Exchange believes the proposed rule change provides a balance between providing more challenging opportunities, thus greater quoting incentive, in the expiration categories that are nearer in term and easing the width and size requirements as the expiration categories become longer in term, wherein the Exchange understands that demand and participation becomes less significant and thus more difficult for LMMs to quote within tighter widths and larger sizes. Also, by providing a set of heightened quoting standards that provide for tighter width and large size standards than the set of basic quoting standards, the proposed rule change offers LMMs appointed to the program a more challenging opportunity, thus further incentive, to strive to meet the heightened quoting standards in order to receive the additional rebate on their VIX/VIXW orders in RTH.

In addition to this, the Exchange proposes to update the time to expiration in the mid-term expiration category for the VIX basic quoting standards (as proposed) from a range of 61 to 270 days to a range of 61 to 180 days, and in the long-term expiration category from 271 days or greater to 181 days or greater. The Exchange notes that it has recently begun listing more VIX options that expire more than 180 days out and that the Exchange understands that it is more difficult for LMMs to meet the narrower pricing standards current under the current mid-term expiration category for VIX options that expire in 181 days or more. As such, the Exchange wishes to align the long-term expiration category in a manner that makes it easier for LMMs to achieve the quoting standards thereunder, particularly as the Exchange has increased the number of VIX options listed that expire more than 180 days out.

GTH SPX/SPXW LMM Program

The Exchange proposes to amend the GTH SPX/SPXW LMM Incentive Program. Currently, under the GTH SPX/SPXW LMM Incentive Program, if an LMM in SPX/SPXW provides continuous electronic quotes during GTH that meet or exceed the heightened quoting standards (below) in at least 85% of each of the SPX and SPXW series, 90% of the time in a given month, the LMM will receive a rebate for that month in the amount of $20,000 for SPX and $30,000 for SPXW (or pro-rated amount if an appointment begins after the first trading day of the month or ends prior to the last trading day of the month) for that month.

Premium level	Expiring		Near term		Mid term		Long term	
	7 days or less		8 days to 60 days		61 days to 270 days		271 days or greater	
	Width	Size	Width	Size	Width	Size	Width	Size
$0.00–$5.00	$0.50	10	$0.40	25	$0.60	15	$1.00	10
$5.01–$15.00	2.00	7	1.60	18	2.40	11	4.00	7
$15.01–$50.00	5.00	5	4.00	13	6.00	8	10.00	5
$50.01–$100.00	10.00	3	8.00	8	12.00	5	20.00	3
$100.01–$200.00	20.00	2	16.00	5	24.00	3	40.00	2
Greater than $200.00	30.00	1	24.00	3	36.00	1	60.00	1

The Exchange proposes to adopt a new set of heightened quoting standards (below) under the GTH SPX/SPXW LMM Incentive Program, similar to the proposed new basic quoting standards under the GTH VIX/VIXW LMM Incentive Program, as described above.

Premium level	Expiring		Near term		Mid term		Long term	
	7 days or less		8 days to 60 days		61 days to 270 days		271 days to 500 days	
	Width	Size	Width	Size	Width	Size	Width	Size
VIX Value at Prior Close <20								
$0.00–$5.00	$0.35	25	$0.40	15	$0.60	5	$1.20	5
$5.01–$15.00	0.60	20	0.60	20	1.50	10	2.00	5
$15.01–$50.00	1.20	15	2.00	15	2.00	10	4.00	5
$50.01–$100.00	6.00	10	4.00	10	3.00	10	5.00	5
$100.01–$200.00	15.00	1	5.00	5	4.00	5	6.00	5
Greater than $200.00	20.00	1	8.00	1	12.00	1	50.00	1

Premium level	Expiring		Near term		Mid term		Long term	
	7 days or less		8 days to 60 days		61 days to 270 days		271 days to 500 days	
	Width	Size	Width	Size	Width	Size	Width	Size
VIX Value at Prior Close from 20–30								
$0.00–$5.00	0.60	15	0.80	10	0.75	5	2.00	5
$5.01–$15.00	1.00	15	1.00	15	2.20	5	3.00	5
$15.01–$50.00	2.50	10	3.50	10	3.0	5	5.00	5
$50.01–$100.00	10.00	10	7.00	10	3.50	5	7.00	5
$100.01–$200.00	18.00	1	8.00	5	6.00	5	10.00	5
Greater than $200.00	25.00	1	12.00	1	2.00 [sic]	1	60.00	1
VIX Value at Prior Close >30								
$0.00–$5.00	0.90	10	1.00	10	1.00	5	3.00	5
$5.01–$15.00	2.50	10	2.50	10	3.00	5	4.00	5
$15.01–$50.00	4.00	10	5.00	10	5.00	5	8.00	5
$50.01–$100.00	12.00	5	10.00	5	4.50	3	10.00	1
$100.01–$200.00	20.00	1	12.00	5	15.00	1	18.00	1
Greater than $200.00	30.00	1	25.00	1	30.00	1	70.00	1

For the same reasons described above regarding the new quoting standards for the GTH VIX/VIXW the LMM Incentive Program, the Exchange believes that, by adopting generally wider widths and smaller quote sizes as the value of the VIX in the proposed VIX value categories becomes relatively higher based on the closing VIX Index value from the preceding trading session, the proposed rule change is designed to better reflect market characteristics in SPX and SPXW options where the VIX Index may be experiencing higher volatility (*i.e.,* in the proposed categories in which the value of the VIX is relatively higher based on the closing VIX Index value from the preceding trading session), and thus encourage LMMs appointed to the program to meet the quoting standards by making it easier for them to satisfy such standards. The Exchange also believes that by adopting generally tighter widths and larger quote sizes in the expiration categories that are nearer in term and gradually widening the widths and reducing the quote sizes as the expiration categories become longer in term, the proposed rule change provides more challenging opportunities, thus greater quoting incentive, in the expiration categories that are nearer in term while easing the width and size requirements as the expiration categories become longer in term, wherein the Exchange understands that demand and participation becomes less significant and thus more difficult for LMMs to quote within tighter widths and larger sizes.

In addition to this, the Exchange proposes to update the time to expiration in the long-term expiration category from 271 days or greater to a range of 271 days to 500 days. The Exchange notes that it has recently begun listing more SPX/SPXW options with expirations greater than 271 days. The Exchange understands that it is difficult for LMMs to price options that generally expire more than 500 days out; therefore, the Exchange wishes to narrow the long-term expiration category in a manner that makes it easier for LMMs to achieve the quoting standards thereunder, particularly as the Exchange has increased the number of options listed within this expiry category.

The Exchange also proposes to update the rebate amount received for meeting the heightened quoting standards, as proposed, in a given month in SPX, by slightly decreasing the rebate amount from $20,000 to $15,000 and in SPXW, by slightly increasing the rebate amount from $30,000 to $35,000. The Exchange has observed a recent increase in demand in SPWX options and therefore wishes to further incentive LMM appointed to the program to provide significant liquidity in SPXW options by meeting the heightened quoting standards, while continuing to allocate the same total rebate amount ($50,000) across SPX and SPXW.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[5] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[6] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

Regarding both the GTH SPX/SPXW and VIX/VIXW LMM Incentive Programs generally, the Exchange believes it is reasonable, equitable and not unfairly discriminatory to continue to offer these financial incentives, including as amended, to LMMs appointed to the programs, because it benefits all market participants trading in the corresponding products during GTH. These incentive programs encourage the LMMs appointed to such programs to satisfy the heightened quoting standards, which may increase liquidity and provide more trading opportunities and tighter spreads. Indeed, the Exchange notes that these LMMs serve a crucial role in providing quotes and the opportunity for market participants to trade VIX/VIXW and SPX/SPXW options, as applicable, which can lead to increased volume, providing for robust markets. The

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f(b)(4).

Exchange ultimately offers the LMM Incentive Programs, as amended, to sufficiently incentivize LMMs appointed to each incentive program to provide key liquidity and active markets in the corresponding program products during the corresponding trading sessions, and believes that these incentive programs, as amended, will continue to encourage increased quoting to add liquidity in each of the corresponding program products, thereby protecting investors and the public interest. The Exchange also notes that an LMM appointed to an incentive program may undertake added costs each month to satisfy that heightened quoting standards (*e.g.,* having to purchase additional logical connectivity).

The Exchange believes that the proposed changes to the LMM Incentive Programs are reasonable. Particularly, the Exchange believes that it is reasonable to adopt new quoting requirements in the GTH VIX/VIXW and SPX/SPXW LMM Incentive Programs, as these proposed new quoting requirements are reasonably designed to continue to encourage LMMs appointed to the respective incentive programs to provide significant liquidity in VIX options and SPX/SPXW options during GTH. In particular, the Exchange believes that it is reasonable to adopt new widths and sizes in the quoting standards under the GTH VIX/VIXW and SPX/SPXW LMM Incentive Programs, as applicable, as the proposed rule change is generally designed to further align the quote widths and size standards for VIX options and SPX/SPXW options with the market characteristics in each applicable class. As such, the Exchange believes the new quote widths and size are reasonably designed to facilitate LMMs appointed to the GTH VIX/VIXW and SPX/SPXW LMM Incentive Programs in meeting the heightened quoting standards (in order to receive the rebate offered under the respective incentive program) by increasing their quoting activity and posting tighter spreads and more aggressive quotes in VIX options and SPX/SPXW options, as applicable. An increase in quoting activity and tighter quotes tends to signal additional corresponding increase in order flow from other market participants, which benefits all investors by deepening the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Exchange believes that by adopting different sets of quoting standards that are applicable depending on the VIX Index value at the prior close (*i.e.,* at the close of the preceding RTH session) the proposed rule change will encourage LMMs appointed to the program to meet the quoting standards by making it easier for them to satisfy such standards. In particular, the Exchange believes that the proposed rule change to adopt generally wider widths and smaller quote sizes as the value of the VIX in the proposed VIX value categories becomes relatively higher based on the closing VIX Index value from the preceding trading session is reasonably designed to better reflect market characteristics in VIX options and SPX/SPXW options where the VIX Index may be experiencing higher volatility (based on the closing VIX Index value from the preceding trading session), and thus encourage LMMs appointed to the programs to meet the quoting standards by making it easier for them to satisfy such standards.

Additionally, and as described above, the Exchange believes that the proposed rule change to adopt generally tighter widths and larger quote sizes for VIX options and SPX/SPXW options in the expiration categories that are nearer in term and widen the widths and reduce the quote sizes as the expiration categories become longer in term is reasonably designed to provide more challenging opportunities, thus greater quoting incentive, in the expiration categories that are nearer in term while easing the width and size requirements as the expiration categories become longer in term. In addition to this, the Exchange believes that by providing a set of heightened quoting standards for VIX options that provide for tighter width and large size standards than the proposed set of basic quoting standards for VIX options, the proposed rule change offers LMMs appointed to the GTH VIX/VIXW LMM Incentive Program a more challenging opportunity, thus further incentive, to strive to meet the heightened quoting standards in VIX options in order to receive the current additional rebate on their VIX/VIXW orders in RTH. The Exchange also notes that the proposed basic quoting standards for VIX options and proposed heightened quoting standards for VIX and for SPX/SPXW options do not represent a significant departure from each of the program's current quote width and size standards and remain generally aligned with the current range of widths and sizes; they are merely being tailored to better reflect market characteristics in VIX options and in SPX/SPX options as they each relate to volatility in the VIX Index. The Exchange further notes that quote widths and sizes typical in VIX options differ from that in SPX/SPXW options, therefore, the proposed heightened quoting requirements reflect quote widths and sizes that the Exchange believes aligns with the market characteristics specific to each.

In addition to this, the Exchange believes that it is reasonable to amend the number of days to expiration that comprise certain expiry categories in the GTH VIX/VIXW and SPX/SPXW LMM Incentive Programs as these updates are reasonably designed to make it easier for the LMMs appointed to the respective incentive programs to satisfy the heightened quoting standards for options expiring a certain number of days out, by better aligning the applicable category of heightened quoting standards with the market characteristics and level of demand for options that expire a certain number of days out.

The Exchange believes that it is reasonable to amend the monthly rebate amounts applicable to the GTH SPX/SPXW Incentive Program. The Exchange believes that the proposed increased rebate amount (from $30,000 to $35,000) for SPXW options is reasonably designed to continue to incentivize an appointed LMM to meet the applicable quoting standards for SPXW options, thereby providing liquid and active markets, which facilitates tighter spreads, increased trading opportunities, and overall enhanced market quality to the benefit of all market participants. The Exchange also believes that it is reasonable to shift the total rebate amount ($50,000) allocated across SPX and SPXW options under the program by offsetting the slightly increased rebate amount for SPXW ($35,000) options with a slightly decreased rebated amount for SPX options ($15,000) because the Exchange has observed a recent increase in demand in SPWX options and therefore wishes to further incentive LMM appointed to the program to provide significant liquidity in SPXW options by meeting the heightened quoting standards, while continuing to allocate the same total rebate amount across SPX and SPXW.

The Exchange believes that the proposed changes to the LMM Incentive Programs are equitable and not unfairly discriminatory. The Exchange believes that it is equitable and not unfairly discriminatory to adopt new quoting standards and to update the number of days to expiration for certain expiry

categories in the GTH VIX/VIXW and SPX/SPXW LMM Incentive Programs because such overall quoting standards and expiry categories will equally apply to any and all TPHs with LMM appointments to the GTH VIX/VIXW and SPX/SPXW LMM Incentive Programs, as applicable, that seek to meet the programs' heightened quoting standards in order to receive the rebate offered (both current and proposed, as applicable) under the respective programs. The Exchange believes the proposed rebates applicable to the GTH SPX/SPXW Incentive Program are equitable and not unfairly discriminatory because they, too, will equally apply to any TPH that is appointed as an LMM to the GTH SPX/SPXW LMM Incentive Program. Additionally, if an LMM appointed to either the GTH SPX/SPXW or the GTH VIX/VIXW LMM Incentive Programs does not satisfy the corresponding heightened quoting standard for any given month, then it simply will not receive the rebate offered by the respective program for that month.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes the proposed rule change does impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed changes to existing LMM Incentive Programs will apply to all LMMs appointed to the applicable program classes (*i.e.,* VIX/VIXW and SPX/SPXW) in a uniform manner. To the extent these LMMs appointed to an incentive program receive a benefit that other market participants do not, as stated, these LMMs in their role as Mark-Makers on the Exchange have different obligations and are held to different standards. For example, Market-Makers play a crucial role in providing active and liquid markets in their appointed products, thereby providing a robust market which benefits all market participants. Such Market-Makers also have obligations and regulatory requirements that other participants do not have. The Exchange also notes that an LMM appointed to an incentive program may undertake added costs each month that it needs to satisfy that heightened quoting standards (*e.g.,* having to purchase additional logical connectivity). The Exchange also notes that the incentive programs are designed to attract additional order flow to the Exchange, wherein greater liquidity benefits all market participants by providing more trading opportunities, tighter spreads, and added market transparency and price discovery, and signals to other market participants to direct their order flow to those markets, thereby contributing to robust levels of liquidity.

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 the LMM Incentive Programs apply only to transactions in products exclusively listed on Cboe Options. Additionally, as noted above, the incentive programs are designed to attract additional order flow to the Exchange, wherein greater liquidity benefits all market participants by providing more trading opportunities, tighter spreads, and added market transparency and price discovery, and signals to other market participants to direct their order flow to those markets, thereby contributing to robust levels of liquidity. The Exchange notes it operates in a highly competitive market. In addition to Cboe Options, TPHs have numerous alternative venues that they may participate on and director their order flow, including 15 other options exchanges, as well as off-exchange venues, where competitive products are available for trading. Based on publicly available information, no single options exchange has more than 16% of the market share of executed volume of options trades.[7] Therefore, no exchange possesses significant pricing power in the execution of option order flow. 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.'' [8] 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'. . . .''.[9] Accordingly, the Exchange does not believe its proposed changes to the incentive programs impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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 [10] and paragraph (f) of Rule 19b–4 [11] 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–CBOE–2021–058 on the subject line.

[7] See Cboe Global Markets, U.S. Options Market Volume Summary by Month (September 22, 2021), available at *http://markets.cboe.com/us/options/market_share/*.

[8] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[9] *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)).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f).

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2021–058. 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–CBOE–2021–058 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22927 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93347; File No. SR–PEARL–2021–33]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Withdrawal of a Proposed Rule Change To Amend the MIAX Pearl Options Fee Schedule To Increase the Monthly Fees for MIAX Express Network Full Service Ports

October 15, 2021.

On July 1, 2021, MIAX PEARL, LLC (''MIAX Pearl'' or the ''Exchange'') 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 amend the MIAX Pearl Options Fee Schedule to increase monthly fees for the Exchange's MIAX Express Network Full Service MEO Ports. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] On July 15, 2021, the proposed rule change was published for comment in the **Federal Register**.[4] On August 27, 2021, pursuant to Section 19(b)(3)(C) of the Act, the Commission: (1) Temporarily suspended the proposed rule change; and (2) instituted proceedings to determine whether to approve or disapprove the proposal.[5] The Commission received one comment letter on the proposal.[6] On October 12, 2021, the Exchange withdrew the proposed rule change (SR–PEARL–2021–33).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22926 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 92365 (July 9, 2021), 86 FR 37347.

[5] *See* Securities Exchange Act Release No. 92798, 86 FR 49360 (September 2, 2021).

[6] *See* Letter from Richard J. McDonald, Susquehanna International Group, LLP, to Vanessa Countryman, Secretary, Commission, dated September 7, 2021, available at: *https://www.sec.gov/comments/sr-pearl-2021-33/srpearl202133-9208443-250011.pdf.*

[7] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–438, OMB Control No. 3235–0495]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Extension:
Rule 154

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

The federal securities laws generally prohibit an issuer, underwriter, or dealer from delivering a security for sale unless a prospectus meeting certain requirements accompanies or precedes the security. Rule 154 (17 CFR 230.154) under the Securities Act of 1933 (15 U.S.C. 77a) (the ''Securities Act'') permits, under certain circumstances, delivery of a single prospectus to investors who purchase securities from the same issuer and share the same address (''householding'') to satisfy the applicable prospectus delivery requirements.[1] The purpose of rule 154 is to reduce the amount of duplicative prospectuses delivered to investors sharing the same address.

Under rule 154, a prospectus is considered delivered to all investors at a shared address, for purposes of the federal securities laws, if the person relying on the rule delivers the prospectus to the shared address, addresses the prospectus to the investors as a group or to each of the investors individually, and the investors consent to the delivery of a single prospectus. The rule applies to prospectuses and prospectus supplements. Currently, the rule

[1] The Securities Act requires the delivery of prospectuses to investors who buy securities from an issuer or from underwriters or dealers who participate in a registered distribution of securities. *See* Securities Act sections 2(a)(10), 4(1), 4(3), 5(b) [15 U.S.C. 77b(a)(10), 77d(1), 77d(3), 77e(b); *see also* rule 174 under the Securities Act (17 CFR 230.174) (regarding the prospectus delivery obligation of dealers); rule 15c2–8 under the Securities Exchange Act of 1934 (17 CFR 240.15c2–8) (prospectus delivery obligations of brokers and dealers).

permits householding of all prospectuses by an issuer, underwriter, or dealer relying on the rule if, in addition to the other conditions set forth in the rule, the issuer, underwriter, or dealer has obtained from each investor written or implied consent to householding.[2] The rule requires issuers, underwriters, or dealers that wish to household prospectuses with implied consent to send a notice to each investor stating that the investors in the household will receive one prospectus in the future unless the investors provide contrary instructions. In addition, at least once a year, issuers, underwriters, or dealers relying on rule 154 for the householding of prospectuses relating to open-end management investment companies that are registered under the Investment Company Act of 1940 (''mutual funds'') and each series thereof must explain to investors who have provided written or implied consent how they can revoke their consent.[3] Preparing and sending the notice and the annual explanation of the right to revoke are collections of information.

The rule allows issuers, underwriters, or dealers to household prospectuses if certain conditions are met. Among the conditions with which a person relying on the rule must comply are providing notice to each investor that only one prospectus will be sent to the household and, in the case of issuers that are mutual funds and any series thereof, providing to each investor who consents to householding an annual explanation of the right to revoke consent to the delivery of a single prospectus to multiple investors sharing an address. The purpose of the notice and annual explanation requirements of the rule is to ensure that investors who wish to receive individual copies of prospectuses are able to do so.

Although rule 154 is not limited to mutual funds, the Commission believes that it is used mainly by mutual funds and by broker-dealers that deliver prospectuses for mutual funds. The Commission is unable to estimate the number of issuers other than mutual funds that rely on the rule.

The Commission estimates that, as of June 30, 2021, there are approximately 13,182 mutual fund series registered on Form N–1A, approximately 1,279 of which are directly sold and therefore deliver their own prospectuses. Of these, the Commission estimates that approximately half (640 mutual fund series): (i) Do not send the implied consent notice requirement because they obtain affirmative written consent to household prospectuses in the fund's account opening documentation; or (ii) do not take advantage of the householding provision because of electronic delivery options which lessen the economic and operational benefits of rule 154 when compared with the costs of compliance. Therefore, the Commission estimates that each of the 640 directly sold mutual fund series will spend an average of 20 hours per year complying with the notice requirement of the rule, for a total of 12,800 burden hours. In addition, of the approximately 1,279 mutual fund series that are directly sold, the Commission estimates that approximately 75% (or 960) will each spend 1 hour complying with the annual explanation of the right to revoke requirement of the rule, for a total of 960 hours.

The Commission estimates that, as of December 31, 2020, there were approximately 462 broker-dealers that have customer accounts with mutual funds, and therefore may be required to deliver mutual fund prospectuses. The Commission estimates that each affected broker-dealer will spend, on average, 20 hours complying with the notice requirement of the rule, for a total of 9,240 hours. In addition, each broker-dealer will also spend one hour complying with the annual explanation of the right to revoke requirement, for a total of 462 hours. Therefore, the total number of respondents for rule 154 is 1,422 (960[4] mutual fund series plus 462 broker-dealers), and the estimated total hour burden is approximately 23,462 hours (13,760 hours for mutual fund series, plus 9,702 hours for broker-dealers).

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. 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.

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, C/O Cynthia Roscoe 100 F Street NE, Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: October 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22898 Filed 10–20–21; 8:45 am]

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[2] Rule 154 permits the householding of prospectuses that are delivered electronically to investors only if delivery is made to a shared electronic address and the investors give written consent to householding. Implied consent is not permitted in such a situation. *See* rule 154(b)(4).

[3] See Rule 154(c).

[4] The Commission estimates that 640 mutual funds prepare both the implied consent notice and the annual explanation of the right to revoke consent + 320 mutual funds that prepare only the annual explanation of the right to revoke.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93365; File No. SR–CboeBZX–2021–071]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Related to the Market-Wide Circuit Breaker in Rule 11.18

October 15, 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 October 14, 2021, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (''BZX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposal to extend the pilot related to the market-wide circuit breaker in Rule 11.18. 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/equities/regulation/rule_filings/bzx/*), 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

BZX Rules 11.18(a) through (d), (f) and (g) describe the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, *i.e.,* market-wide circuit breakers. The market-wide circuit breaker (''MWCB'') mechanism was approved by the Commission to operate on a pilot basis, the term of which was to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS (the ''LULD Plan''),[5] including any extensions to the pilot period for the LULD Plan. In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[6] In light of the proposal to make the LULD Plan permanent, the Exchange amended Rule 11.18 to untie the pilot's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[7] The Exchange subsequently amended Rule 11.18 to extend the pilot's effectiveness for an additional year to the close of business on October 18, 2020,[8] and again to the close of business on October 18, 2021.[9] The Exchange now proposes to amend Rule 11.18 to extend the pilot to the close of business on March 18, 2022. This filing does not propose any substantive or additional changes to Rule 11.18.

The market-wide circuit breaker under Rule 11.18 provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA adopted uniform rules on a pilot basis relating to market-wide circuit breakers in 2012 (''MWCB Rules''), which are designed to slow the effects of extreme price movement through coordinated trading halts across securities markets when severe price declines reach levels that may exhaust market liquidity.[10] Market-wide circuit breakers provide for trading halts in all equities and options markets during a severe market decline as measured by a single-day decline in the S&P 500 Index.

Pursuant to Rule 11.18, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day's closing price of that index. Currently, the triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. A market decline that triggers a Level 3 halt, at any time during the trading day, would halt market-wide trading for the remainder of the trading day.

In the Spring of 2020, at the outset of the worldwide COVID–19 pandemic, U.S. equities markets experienced four MWCB Level 1 halts, on March 9, 12, 16, and 18, 2020. In each instance, the markets halted as intended upon a 7% drop in the S&P 500 Index, and resumed as intended 15 minutes later.

In response to these events, the previously-convened MWCB Taskforce (''Taskforce'') reviewed the March 2020 halts and considered whether any immediate changes to the MWCB mechanism should be made. The Taskforce, consisting of representatives from equities exchanges, futures exchanges, FINRA, broker-dealers, and other market participants, had been assembled in early 2020 to consider more generally potential changes to the MWCB mechanism. The Taskforce held ten meetings in the Spring and Summer of 2020 that were attended by Commission staff to consider, among other things: (1) Whether to retain the S&P 500 Index as the standard for measuring market declines; (2) whether halts that occur shortly after the 9:30 a.m. market open cause more harm than good; and (3) what additional testing of the MWCB mechanism should be done.

After considering data and anecdotal reports of market participants' experiences during the March 2020 MWCB events, the Taskforce did not recommend immediate changes be made to the use of the S&P 500 Index as the reference price against which market declines are measured, or to the current MWCB mechanism which permits halts even shortly after the 9:30 a.m. market open. The Taskforce recommended creating a process for a backup reference price in the event that the S&P 500 Index becomes unavailable, and enhancing functional MWCB testing. The Taskforce also asked CME to consider modifying its rules to enter into a limit-down state in the futures pre-market after a 7% decline instead of 5%.

On September 17, 2020, the Director of the Division of Trading and Markets requested that the equities exchanges and FINRA prepare a more complete study of the design and operation of the MWCB mechanism and the LULD Plan during the period of volatility in the Spring of 2020. In response to the request, the SROs created a MWCB ''Working Group'' composed of SRO representatives and industry advisers that included members of the advisory committees to both the LULD Plan and the NMS Plans governing the collection, consolidation, and dissemination of

[5] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012). The LULD Plan provides a mechanism to address extraordinary market volatility in individual securities.

[6] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019).

[7] *See* Securities Exchange Act Release No. 85689 (April 18, 2019), 84 FR 17217 (April 24, 2019) (SR–CboeBZX–2019–028).

[8] *See* Securities Exchange Act Release No. 87336 (October 17, 2019), 84 FR 56868 (October 23, 2019) (SR–CboeBZX–2019–088).

[9] *See* Securities Exchange Act Release No. 90126 (October 8, 2020), 85 FR 65119 (October 14, 2020) (SR–CboeBZX–2020–074).

[10] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BATS–2011–038; SR–BYX–2011–025; SR–BX–2011–068; SR–CBOE–2011–087; SR–C2–2011–024; SR–CHX–2011–30; SR–EDGA–2011–31; SR–EDGX–2011–30; SR–FINRA–2011–054; SR–ISE–2011–61; SR–NASDAQ–2011–131; SR–NSX–2011–11; SR–NYSE–2011–48; SR–NYSEAmex–2011–73; SR–NYSEArca–2011–68; SR–Phlx-2011–129) (''MWCB Approval Order'').

last-sale transaction reports and quotations in NMS Stocks. The Working Group met regularly from September 2020 through March 2021 to consider the Commission's request, review data, and compile its study. The Working Group's efforts in this respect incorporated and built on the work of an MWCB Task Force. The Working Group submitted its study to the Commission on March 31, 2021 (the ''Study'').[11] In addition to a timeline of the MWCB events in March 2020, the Study includes a summary of the analysis and recommendations of the MWCB Task Force; an evaluation of the operation of the Pilot Rules during the March 2020 events; an evaluation of the design of the current MWCB system; and the Working Group's conclusions and recommendations. In the Study, the Working Group concluded: (1) The MWCB mechanism set out in the Pilot Rules worked as intended during the March 2020 events; (2) the MWCB halts triggered in March 2020 appear to have had the intended effect of calming volatility in the market, without causing harm; (3) the design of the MWCB mechanism with respect to reference value (SPX), trigger levels (7%/13%/20%), and halt times (15 minutes) is appropriate; (4) the change implemented in Amendment 10 to the Plan to Address Extraordinary Market Volatility (the ''Limit Up/Limit Down Plan'' or ''LULD Plan'') did not likely have any negative impact on MWCB functionality; and (5) no changes should be made to the mechanism to prevent the market from halting shortly after the opening of regular trading hours at 9:30 a.m. In light of the foregoing conclusions, the Working Group also made several recommendations, including that the Pilot Rules should be permanent without any changes.[12]

The SROs have since worked on a proposed a rule change to make the Pilot Rules permanent, consistent with the Working Group's recommendations. New York Stock Exchange (''NYSE'') filed such proposed rule change on July 16, 2021.[13] On August 27, 2021, the Commission extended its time to consider the proposed rule change to October 20, 2021.[14] The Exchange now proposes to extend the expiration date of the Pilot Rules to the end of business on March 18, 2022.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Section 6(b)(5) of the Act,[16] 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 market-wide circuit breaker mechanism under Rule 11.18 is an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. Extending the market-wide circuit breaker pilot for an additional five months would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Exchange and the other SROs work to make the Pilot Rules permanent.

The Exchange also believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Based on the foregoing, the Exchange believes the benefits to market participants from the MWCB under Rule 11.18 should continue on a pilot basis because the MWCB will promote fair and orderly markets, and protect investors and the public interest.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Exchange and the other SROs finalize their proposals to make the Pilot Rules permanent. Further, the Exchange understands that FINRA and other national securities exchanges will file proposals to extend their rules regarding the market-wide circuit breaker pilot following Commission approval of the NYSE proposal. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

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 on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the 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[17] and Rule 19b–4(f)(6)[18] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange asked that the Commission waive the 30 day operative delay so that the proposal may become operative immediately upon filing. Extending the Pilot Rules' effectiveness to the close of business on March 18, 2022 will extend the protections provided by the Pilot Rules, which would otherwise expire in less than 30 days. Waiver of the operative delay would therefore permit uninterrupted continuation of the MWCB pilot while the Commission reviews the NYSE's proposed rule change to make the Pilot Rules permanent. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[21]

At any time within 60 days of the filing of the proposed rule change, the

[11] *See* Report of the Market-Wide Circuit Breaker (''MWCB'') Working Group Regarding the March 2020 MWCB Events, submitted March 31, 2021 (the ''Study''), available at *https://www.nyse.com/publicdocs/nyse/markets/nyse/Report_of_the_MarketWide_Circuit_Breaker_Working_Group.pdf.*

[12] *See id.* at 46.

[13] *See* Securities Exchange Act Release No. 92428 (July 16, 2021), 86 FR 38776 (July 22, 2021) (SR–NYSE–2021–40).

[14] *See* Securities Exchange Act Release No. 92785A (August 27, 2021), 86 FR 50202 (September 7, 2021) (SR–NYSE–2021–40).

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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) [22] 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–CboeBZX–2021–071 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–CboeBZX–2021–071. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBZX–2021–071 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22938 Filed 10–20–21; 8:45 am]

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[22] 15 U.S.C. 78s(b)(2)(B).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93356; File No. SR–NYSEAMER–2021–41]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to Rule 7.10E

October 15, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 5, 2021, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to Rule 7.10E (Clearly Erroneous Executions) to the close of business on April 20, 2022. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Rule 7.10E (Clearly Erroneous Executions) to the close of business on April 20, 2022. The pilot program is currently due to expire on October 20, 2021.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Rule 7.10E that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[4] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[5] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and

[4] *See* Securities Exchange Act Release No. 62886 (Sept. 10, 2010), 75 FR 56613 (Sept. 16, 2010) (SR–NYSEAmer–2010–60).

[5] *See* Securities Exchange Act Release No. 68801 (Feb. 1, 2013), 78 FR 8630 (Feb. 6, 2013) (SR–NYSEMKT–2013–11).

before such trading halt has officially ended according to the primary listing market.[6]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan''),[7] including any extensions to the pilot period for the LULD Plan.[8] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[9] In light of that change, the Exchange amended Rule 7.10E to untie the pilot's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[10] The Exchange later amended Rule 7.10E to extend the pilot's effectiveness to the close of business on April 20, 2020,[11] October 20, 2020,[12] April 20, 2021,[13] and subsequently, October 20, 2021.[14]

The Exchange now proposes to amend Rule 7.10E to extend the pilot's effectiveness for a further six months until the close of business on April 20, 2022. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (c), (e)(2), (f), and (g) shall be in effect, and the provisions of paragraphs (i) through (k) shall be null and void.[15] In such an event, the remaining sections of Rule 7.10E would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 7.10E.

The Exchange does not propose any additional changes to Rule 7.10E. Extending the effectiveness of Rule 7.10E for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[16] in general, and Section 6(b)(5) of the Act,[17] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 7.10E for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[18] and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6)[20] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[21] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–NYSEMKT–2014–37).

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[8] *See* Securities Exchange Act Release No. 71820 (March 27, 2014), 79 FR 18595 (April 2, 2014) (SR–NYSEMKT–2014–28).

[9] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[10] *See* Securities Exchange Act Release No. 85563 (April 9, 2019), 84 FR 15241 (April 15, 2019) (SR–NYSEAMER–2019–11).

[11] *See* Securities Exchange Act Release No. 87354 (October 18, 2019), 84 FR 57139 (October 24, 2019) (SR–NYSEAMER–2019–44).

[12] *See* Securities Exchange Act Release No. 88589 (April 8, 2020), 85 FR 20769 (April 14, 2020) (SR–NYSEAMER–2020–22).

[13] *See* Securities Exchange Act Release No. 90154 (October 13, 2020), 85 FR 66376 (October 19, 2020) (SR–NYSEAMER–2020–73).

[14] *See* Securities Exchange Act Release No. 91552 (April 14, 2021), 86 FR 20583 (April 20, 2021) (SR–NYSEAMER–2021–19).

[15] *See* supra notes 4–6. The prior versions of paragraphs (c), (e)(2), (f), and (g) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6)(iii).

uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as 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 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–NYSEAMER–2021–41 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAMER–2021–41. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2021–41 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22931 Filed 10–20–21; 8:45 am]

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[22] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93343; File No. SR–CboeBYX–2021–025]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Extend the Current Pilot Program Related To Clearly Erroneous Executions, to the Close of Business on April 20, 2022

October 15, 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 October 14, 2021, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 BYX Exchange, Inc. (''BYX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to extend the current pilot program related to BYX Rule 11.17, Clearly Erroneous Executions, to the close of business on April 20, 2022. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/byx/*), 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 purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions to the close of business on April 20, 2022. Portions of Rule 11.17, explained in further detail below, are currently operating as a pilot program set to expire on October 20, 2021.[5]

On September 10, 2010, the Commission approved, on a pilot basis, changes to BYX Rule 11.17 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 20578 (April 14, 2021), 86 FR 20578 (April 20, 2021) (SR–CboeBYX–2021–008).

forth in the rule.[6] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[7] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[8]

On December 26, 2018, the Commission published the proposed Eighteenth Amendment[9] to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'')[10] to allow the Plan to operate on a permanent, rather than pilot, basis. On April 8, 2019, the Exchange amended BYX Rule 11.17 to untie the pilot program's effectiveness from that of the Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019 in order allow the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules in light of the proposed Eighteenth Amendment to the Plan.[11] On April 17, 2019, the Commission published an approval of the Eighteenth Amendment to allow the Plan to operate on a permanent, rather than pilot, basis.[12] On October 21, 2019, the Exchange amended BYX Rule 11.17 to extend the pilot's effectiveness to the close of business on April 20, 2020.[13] On March 18, 2020, the Exchange amended BYX Rule 11.17 to extend the pilot's effectiveness to the close of business on October 20, 2020.[14] On October 20, 2020, the Exchange amended BYX Rule 11.17 to extend the pilot's effectiveness to the close of business on April 20, 2021.[15] Finally, on April 14, the Exchange amended BYX Rule 11.17 to extend the pilot's effectiveness to the close of business on October 20, 2021.[16]

The Exchange now proposes to amend BYX Rule 11.17 to extend the pilot's effectiveness to the close of business on April 20, 2022. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') have filed or plan to file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to BYX Rule 11.17.

The Exchange does not propose any additional changes to BYX Rule 11.17. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis. As the Plan was approved by the Commission to operate on a permanent, rather than pilot, basis the Exchange intends to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of BYX Rule 11.17 for an additional six months should provide the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[17] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[18] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[19] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that extending the clearly erroneous execution pilot under BYX Rule 11.17 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and the other national securities exchanges consider and develop a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange understands that FINRA and other national securities exchanges have or will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

[6] *See* Securities Exchange Act Release No. 63097 (Oct. 13, 2010), 75 FR 64767 (Oct. 20, 2010) (SR–BYX–2010–002).

[7] *See* Securities Exchange Act Release No. 68798 (Jan. 31, 2013), 78 FR 8628 (Feb. 6, 2013) (SR–BYX–2013–005).

[8] *See* Securities Exchange Act Release No. 71796 (March 25, 2014), 79 FR 18099 (March 31, 2014) (SR–BYX–2014–003).

[9] *See* Securities Exchange Act Release No. 84843 (December 18, 2018), 83 FR 66464 (December 26, 2018) (File No. 4–631) (''Eighteenth Amendment'').

[10] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[11] *See* Securities Exchange Act Release No. 85542 (Apr. 8, 2019), 84 FR 15009 (Apr. 12, 2019) (SR–CboeBYX–2019–003).

[12] *See* Securities Exchange Act Release No. 85623 (Apr. 11, 2019), 84 FR 16086 (Apr. 17, 2019) (File No. 4–631).

[13] *See* Securities Exchange Act Release No. 87364 (Oct. 21, 2019), 84 FR 57528 (Oct. 25, 2019) (SR–CboeBYX–2019–018).

[14] *See* Securities Exchange Act Release No. 88496 (March 27, 2020), 85 FR 18600 (April 2, 2020) (SR–CboeBYX–2020–010).

[15] *See* Securities Exchange Act Release No. 90230 (October 20, 2020), 85 FR 67802 (Oct. 26, 2020) (SR–CboeBYX–2020–030).

[16] *See* supra note 5.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] *Id.*

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [20] and Rule 19b–4(f)(6) thereunder.[21]

A proposed rule change filed under Rule 19b–4(f)(6) [22] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [23] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–CboeBYX–2021–025 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–CboeBYX–2021–025. 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-CboeBYX–2021–025 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22922 Filed 10–20–21; 8:45 am]

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[20] 15 U.S.C. 78s(b)(3)(A).

[21] 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.

[22] 17 CFR 240.19b–4(f)(6).

[23] 17 CFR 240.19b–4(f)(6)(iii).

[24] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93353; File No. SR–CboeEDGX–2021–046]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Related to the Market-Wide Circuit Breaker in Rule 11.16

October 15, 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 October 14, 2021, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] 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. (''EDGX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposal to extend the pilot related to the market-wide circuit breaker in Rule 11.16. 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

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

EDGX Rules 11.16(a) through (d), (f) and (g) describe the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, *i.e.,* market-wide circuit breakers. The market-wide circuit breaker (''MWCB'') mechanism was approved by the Commission to operate on a pilot basis, the term of which was to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS (the ''LULD Plan''),[5] including any extensions to the pilot period for the LULD Plan. In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[6] In light of the proposal to make the LULD Plan permanent, the Exchange amended Rule 11.16 to untie the pilot's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[7] The Exchange subsequently amended Rule 11.16 to extend the pilot's effectiveness for an additional year to the close of business on October 18, 2020,[8] and again to the close of business on October 18, 2021.[9] The Exchange now proposes to amend Rule 11.16 to extend the pilot to the close of business on March 18, 2022. This filing does not propose any substantive or additional changes to Rule 11.16.

The market-wide circuit breaker under Rule 11.16 provides an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. All U.S. equity exchanges and FINRA adopted uniform rules on a pilot basis relating to market-wide circuit breakers in 2012 (''MWCB Rules''), which are designed to slow the effects of extreme price movement through coordinated trading halts across securities markets when severe price declines reach levels that may exhaust market liquidity.[10] Market-wide circuit breakers provide for trading halts in all equities and options markets during a severe market decline as measured by a single-day decline in the S&P 500 Index.

Pursuant to Rule 11.16, a market-wide trading halt will be triggered if the S&P 500 Index declines in price by specified percentages from the prior day's closing price of that index. Currently, the triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline that triggers a Level 1 or Level 2 halt after 9:30 a.m. ET and before 3:25 p.m. ET would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. ET would not halt market-wide trading. A market decline that triggers a Level 3 halt, at any time during the trading day, would halt market-wide trading for the remainder of the trading day.

In the Spring of 2020, at the outset of the worldwide COVID–19 pandemic, U.S. equities markets experienced four MWCB Level 1 halts, on March 9, 12, 16, and 18, 2020. In each instance, the markets halted as intended upon a 7% drop in the S&P 500 Index, and resumed as intended 15 minutes later.

In response to these events, the previously-convened MWCB Taskforce (''Taskforce'') reviewed the March 2020 halts and considered whether any immediate changes to the MWCB mechanism should be made. The Taskforce, consisting of representatives from equities exchanges, futures exchanges, FINRA, broker-dealers, and other market participants, had been assembled in early 2020 to consider more generally potential changes to the MWCB mechanism. The Taskforce held ten meetings in the Spring and Summer of 2020 that were attended by Commission staff to consider, among other things: (1) Whether to retain the S&P 500 Index as the standard for measuring market declines; (2) whether halts that occur shortly after the 9:30 a.m. market open cause more harm than good; and (3) what additional testing of the MWCB mechanism should be done.

After considering data and anecdotal reports of market participants' experiences during the March 2020 MWCB events, the Taskforce did not recommend immediate changes be made to the use of the S&P 500 Index as the reference price against which market declines are measured, or to the current MWCB mechanism which permits halts even shortly after the 9:30 a.m. market open. The Taskforce recommended creating a process for a backup reference price in the event that the S&P 500 Index becomes unavailable, and enhancing functional MWCB testing. The Taskforce also asked CME to consider modifying its rules to enter into a limit-down state in the futures pre-market after a 7% decline instead of 5%.

On September 17, 2020, the Director of the Division of Trading and Markets requested that the equities exchanges and FINRA prepare a more complete study of the design and operation of the MWCB mechanism and the LULD Plan during the period of volatility in the Spring of 2020. In response to the request, the SROs created a MWCB ''Working Group'' composed of SRO representatives and industry advisers that included members of the advisory committees to both the LULD Plan and the NMS Plans governing the collection, consolidation, and dissemination of last-sale transaction reports and quotations in NMS Stocks. The Working Group met regularly from September 2020 through March 2021 to consider the Commission's request, review data, and compile its study. The Working Group's efforts in this respect incorporated and built on the work of an MWCB Task Force. The Working Group submitted its study to the Commission on March 31, 2021 (the ''Study'').[11] In

[5] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012). The LULD Plan provides a mechanism to address extraordinary market volatility in individual securities.

[6] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019).

[7] *See* Securities Exchange Act Release No. 85667 (April 16, 2019), 84 FR 16736 (April 22, 2019) (SR–CboeEDGX–2019–023).

[8] *See* Securities Exchange Act Release No. 87339 (October 17, 2019), 84 FR 56882 (October 23, 2019) (SR–CboeEDGX–2019–061).

[9] *See* Securities Exchange Act Release No. 90147 (October 9, 2020), 85 FR 65453 (October 15, 2020) (SR–CboeEDGX–2020–047).

[10] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BATS–2011–038; SR–BYX–2011–025; SR–BX–2011–068; SR–CBOE–2011–087; SR–C2–2011–024; SR–CHX–2011–30; SR–EDGA–2011–31; SR–EDGX–2011–30; SR–FINRA–2011–054; SR–ISE–2011–61; SR–NASDAQ–2011–131; SR–NSX–2011–11; SR–NYSE–2011–48; SR–NYSEAmex–2011–73; SR–NYSEArca–2011–68; SR–Phlx–2011–129) (''MWCB Approval Order'').

[11] *See* Report of the Market-Wide Circuit Breaker (''MWCB'') Working Group Regarding the March

addition to a timeline of the MWCB events in March 2020, the Study includes a summary of the analysis and recommendations of the MWCB Task Force; an evaluation of the operation of the Pilot Rules during the March 2020 events; an evaluation of the design of the current MWCB system; and the Working Group's conclusions and recommendations. In the Study, the Working Group concluded: (1) The MWCB mechanism set out in the Pilot Rules worked as intended during the March 2020 events; (2) the MWCB halts triggered in March 2020 appear to have had the intended effect of calming volatility in the market, without causing harm; (3) the design of the MWCB mechanism with respect to reference value (SPX), trigger levels (7%/13%/20%), and halt times (15 minutes) is appropriate; (4) the change implemented in Amendment 10 to the Plan to Address Extraordinary Market Volatility (the ''Limit Up/Limit Down Plan'' or ''LULD Plan'') did not likely have any negative impact on MWCB functionality; and (5) no changes should be made to the mechanism to prevent the market from halting shortly after the opening of regular trading hours at 9:30 a.m. In light of the foregoing conclusions, the Working Group also made several recommendations, including that the Pilot Rules should be permanent without any changes.[12]

The SROs have since worked on a proposed a rule change to make the Pilot Rules permanent, consistent with the Working Group's recommendations. New York Stock Exchange (''NYSE'') filed such proposed rule change on July 16, 2021.[13] On August 27, 2021, the Commission extended its time to consider the proposed rule change to October 20, 2021.[14] The Exchange now proposes to extend the expiration date of the Pilot Rules to the end of business on March 18, 2022.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Section 6(b)(5) of the Act,[16] 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 market-wide circuit breaker mechanism under Rule 11.16 is an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. Extending the market-wide circuit breaker pilot for an additional five months would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Exchange and the other SROs work to make the Pilot Rules permanent.

The Exchange also believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Based on the foregoing, the Exchange believes the benefits to market participants from the MWCB under Rule 11.16 should continue on a pilot basis because the MWCB will promote fair and orderly markets, and protect investors and the public interest.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Exchange and the other SROs finalize their proposals to make the Pilot Rules permanent. Further, the Exchange understands that FINRA and other national securities exchanges will file proposals to extend their rules regarding the market-wide circuit breaker pilot following Commission approval of the NYSE proposal. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

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 on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[17] and Rule 19b–4(f)(6)[18] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange asked that the Commission waive the 30 day operative delay so that the proposal may become operative immediately upon filing. Extending the Pilot Rules' effectiveness to the close of business on March 18, 2022 will extend the protections provided by the Pilot Rules, which would otherwise expire in less than 30 days. Waiver of the operative delay would therefore permit uninterrupted continuation of the MWCB pilot while the Commission reviews the NYSE's proposed rule change to make the Pilot Rules permanent. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[21]

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

2020 MWCB Events, submitted March 31, 2021 (the ''Study''), available at *https://www.nyse.com/publicdocs/nyse/markets/nyse/Report_of_the_MarketWide_Circuit_Breaker_Working_Group.pdf.*

[12] *See id.* at 46.

[13] *See* Securities Exchange Act Release No. 92428 (July 16, 2021), 86 FR 38776 (July 22, 2021) (SR–NYSE–2021–40).

[14] *See* Securities Exchange Act Release No. 92785A (August 27, 2021), 86 FR 50202 (September 7, 2021) (SR–NYSE–2021–40).

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

[18] 17 CFR 240.19b–4.

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–2021–046 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–2021–046. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGX–2021–046 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93344; File No. SR–CboeEDGA–2021–022]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Current Pilot Program Related to Clearly Erroneous Executions, to the Close of Business on April 20, 2022

October 15, 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 October 14, 2021, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 EDGA Exchange, Inc. (''EDGA'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to extend the current pilot program related to EDGA Rule 11.15, Clearly Erroneous Executions, to the close of business on April 20, 2022. 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/equities/regulation/rule_filings/edga/*), 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 purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions to the close of business on October 20, 2021. Portions of Rule 11.15, explained in further detail below, are currently operating as a pilot program set to expire on October 20, 2021.[5]

On September 10, 2010, the Commission approved, on a pilot basis, changes to EDGA Rule 11.15 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[6] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[7] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in

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[22] 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. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 91556 (April 14, 2021), 86 FR 20550 (April 20, 2021) (SR–CboeEDGA–2021–008).

[6] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–EDGA–2010–03).

[7] *See* Securities Exchange Act Release No. 68806 (February 1, 2013), 78 FR 8670 (February 6, 2013) (SR–EDGA–2013–05).

connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[8]

On December 26, 2018, the Commission published the proposed Eighteenth Amendment[9] to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'')[10] to allow the Plan to operate on a permanent, rather than pilot, basis. On April 8, 2019, the Exchange amended EDGA Rule 11.15 to untie the pilot program's effectiveness from that of the Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019 in order allow the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules in light of the proposed Eighteenth Amendment to the Plan.[11] On April 17, 2019, the Commission published an approval of the Eighteenth Amendment to allow the Plan to operate on a permanent, rather than pilot, basis.[12] On October 21, 2019, the Exchange amended EDGA Rule 11.15 to extend the pilot's effectiveness to the close of business on April 20, 2020.[13] On March 18, 2020, the Exchange amended EDGA Rule 11.15 to extend the pilot's effectiveness to the close of business on October, 20, 2020.[14] On October 20, 2020, the Exchange amended EDGA Rule 11.15 to extend the pilot's effectiveness to the close of business on April 20, 2021.[15] Finally, on April 14, the Exchange amended BYX Rule 11.17 to extend the pilot's effectiveness to the close of business on October 20, 2021.[16]

The Exchange now proposes to amend EDGA Rule 11.15 to extend the pilot's effectiveness to the close of business April 20, 2022. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') have filed or plan to file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to EDGA Rule 11.15.

The Exchange does not propose any additional changes to EDGA Rule 11.15. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis. As the Plan was approved by the Commission to operate on a permanent, rather than pilot, basis the Exchange intends to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of EDGA Rule 11.15 for an additional six months should provide the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[17] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[18] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[19] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that extending the clearly erroneous execution pilot under EDGA Rule 11.15 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and the other national securities exchanges consider and develop a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange understands that FINRA and other national securities exchanges have or will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[20] and Rule 19b–4(f)(6) thereunder.[21]

[8] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–EDGA–2014–11).

[9] *See* Securities Exchange Act Release No. 84843 (December 18, 2018), 83 FR 66464 (December 26, 2018) (File No. 4–631) (''Eighteenth Amendment'').

[10] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[11] *See* Securities Exchange Act Release No. 85544 (April 8, 2019), 84 FR 15011 (April 12, 2019) (SR–CboeEDGA–2019–005).

[12] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (File No. 4–631).

[13] *See* Securities Exchange Act Release No. 87366 (October 21, 2019), 84 FR 57538 (October 25, 2019) (SR–CboeEDGA–2019–017).

[14] *See* Securities Exchange Act Release No. 88499 (March 27, 2020), 85 FR 18604 (April 2, 2020) (SR–CboeEDGA–2020–009).

[15] *See* Securities Exchange Act Release No. 90235 (October 21, 2021), 85 FR 68097 (October 27, 2020) (SR–CboeEDGA–2020–027).

[16] *See* supra note 5.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] *Id.*

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 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

Continued

A proposed rule change filed under Rule 19b–4(f)(6) [22] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [23] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–CboeEDGA–2021–022 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–CboeEDGA–2021–022. 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–CboeEDGA–2021–022 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

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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.

[22] 17 CFR 240.19b–4(f)(6).

[23] 17 CFR 240.19b–4(f)(6)(iii).

[24] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93354; File No. SR–NYSE–2021–59]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to Rule 7.10

October 15, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 5, 2021, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to Rule 7.10 (Clearly Erroneous Executions) to the close of business on April 20, 2022. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Rule 7.10 (Clearly Erroneous Executions) to the close of business on April 20, 2022. The pilot program is currently due to expire on October 20, 2021.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Rule 128 (Clearly Erroneous Executions) that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[4] In 2013, the Exchange adopted a provision to Rule 128 designed to address the operation of the Plan.[5] Finally, in 2014, the Exchange adopted two additional provisions to Rule 128 providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[6] Rule 128 is no longer applicable to any securities that trade on the Exchange and has been replaced with Rule 7.10, which is substantively identical to Rule 128.[7]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan''),[8] including any extensions to the pilot period for the LULD Plan.[9] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[10] In light of that change, the Exchange amended Rules 7.10 and 128 to untie the pilot program's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[11] The Exchange later amended Rule 7.10 to extend the pilot's effectiveness to the close of business on April 20, 2020,[12] October 20, 2020,[13] April 20, 2021,[14] and subsequently, October 20, 2021.[15]

The Exchange now proposes to amend Rule 7.10 to extend the pilot program's effectiveness for a further six months until the close of business on April 20, 2022. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (c), (e)(2), (f), and (g) shall be in effect, and the provisions of paragraphs (i) through (k) shall be null and void.[16] In such an event, the remaining sections of Rules 7.10 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 7.10.

The Exchange does not propose any additional changes to Rule 7.10. Extending the effectiveness of Rule 7.10 for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[17] in general, and Section 6(b)(5) of the Act,[18] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 7.10 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across

[4] *See* Securities Exchange Act Release No. 62886 (Sept. 10, 2010), 75 FR 56613 (Sept. 16, 2010) (SR–NYSE–2010–47).

[5] *See* Securities Exchange Act Release No. 68804 (Feb. 1, 2013), 78 FR 8677 (Feb. 6, 2013) (SR–NYSE–2013–11).

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–NYSE–2014–22).

[7] *See* Securities Exchange Act Release Nos. 82945 (March 26, 2019), 83 FR 13553, 13565 (March 29, 2019) (SR–NYSE–2017–36) (Approval Order) and 85962 (May 29, 2019), 84 FR 26188, 26189 n.13 (June 5, 2019) (SR–NYSE–2019–05) (Approval Order).

[8] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[9] *See* Securities Exchange Act Release No. 71821 (March 27, 2014), 79 FR 18592 (April 2, 2014) (SR–NYSE–2014–17).

[10] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[11] *See* Securities Exchange Act Release No. 85523 (April 5, 2019), 84 FR 14706 (April 11, 2019) (SR–NYSE–2019–17).

[12] *See* Securities Exchange Act Release No. 87353 (October 18, 2019), 84 FR 57087 (October 24, 2019) (SR–NYSE–2019–56).

[13] *See* Securities Exchange Act Release No. 88580 (April 7, 2020), 85 FR 20551 (April 13, 2020) (SR–NYSE–2020–24).

[14] *See* Securities Exchange Act Release No. 90151 (October 9, 2020), 85 FR 65458 (October 15, 2020) (SR–NYSE–2020–83).

[15] *See* Securities Exchange Act Release No. 91553 (April 14, 2021), 86 FR 20552 (April 20, 2021) (SR–NYSE–2021–24).

[16] *See supra* notes 4–6. The prior versions of paragraphs (c), (e)(2), (f), and (g) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [19] and Rule 19b–4(f)(6) thereunder.[20]

A proposed rule change filed under Rule 19b–4(f)(6) [21] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [22] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[23]

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 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–NYSE–2021–59 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–NYSE–2021–59. 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–NYSE–2021–59 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

J. Matthew DeLesDernier,

Assistant Secretary.

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[19] 15 U.S.C. 78s(b)(3)(A).

[20] 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.

[21] 17 CFR 240.19b–4(f)(6).

[22] 17 CFR 240.19b–4(f)(6)(iii).

[23] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93368; File No. SR–MIAX–2021–48]

Self-Regulatory Organizations: Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adjust the Options Regulatory Fee

October 15, 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 October 7, 2021, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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 adjust the Options Regulatory Fee (''ORF'').

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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.

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

Currently, the Exchange assesses ORF in the amount of $0.0029 per contract side. The Exchange proposes to reduce the amount of ORF from $0.0029 per contract side to $0.0019 per contract side in order to help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange's proposed change to the ORF should balance the Exchange's regulatory revenue against the anticipated regulatory costs. The Exchange initially filed this proposal on July 30, 2021 (SR–MIAX–2021–36) and withdrew such filing on August 12, 2021. The Exchange refiled this proposal on August 12, 2021 (SR–MIAX–2021–38) and withdrew such filing on October 7, 2021. The Exchange proposes to implement this fee change effective October 7, 2021.

Collection of ORF

Currently, the Exchange assesses the per-contract ORF to each Member [3] for all options transactions, including Mini Options, cleared or ultimately cleared by the Member, which are cleared by the Options Clearing Corporation (''OCC'') in the ''customer'' range,[4] regardless of the exchange on which the transaction occurs. The ORF is collected by OCC on behalf of the Exchange from either: (1) A Member that was the ultimate clearing firm for the transaction; or (2) a non-Member that was the ultimate clearing firm where a Member was the executing clearing firm for the transaction. The Exchange uses reports from OCC to determine the identity of the executing clearing firm and ultimate clearing firm.

To illustrate how the Exchange assesses and collects ORF, the Exchange provides the following set of examples. For a transaction that is executed on the Exchange and the ORF is assessed, if there is no change to the clearing account of the original transaction, then the ORF is collected from the Member that is the executing clearing firm for the transaction (the Exchange notes that, for purposes of the Fee Schedule, when there is no change to the clearing account of the original transaction, the executing clearing firm is deemed to be the ultimate clearing firm). If there is a change to the clearing account of the original transaction (*i.e.,* the executing clearing firm ''gives-up'' or ''CMTAs'' [5] the transaction to another clearing firm), then the ORF is collected from the clearing firm that ultimately clears the transaction—the ''ultimate clearing firm.'' The ultimate clearing firm may be either a Member or non-Member of the Exchange. If the transaction is executed on an away exchange and the ORF is assessed, then the ORF is collected from the ultimate clearing firm for the transaction. Again, the ultimate clearing firm may be either a Member or non-Member of the Exchange. The Exchange notes, however, that when the transaction is executed on an away exchange, the Exchange does not assess the ORF when neither the executing clearing firm nor the ultimate clearing firm is a Member (even if a Member is ''given-up'' or ''CMTAed'' and then such Member subsequently ''gives-up'' or ''CMTAs'' the transaction to another non-Member via a CMTA reversal). Finally, the Exchange does not assess the ORF on outbound linkage trades, whether executed at the Exchange or an away exchange. ''Linkage trades'' are tagged in the Exchange's system, so the Exchange can readily tell them apart from other trades. A customer order routed to another exchange results in two customer trades, one from the originating exchange and one from the recipient exchange. Charging ORF on both trades could result in double-billing of ORF for a single customer order; thus, the Exchange does not assess ORF on outbound linkage trades in a linkage scenario. This assessment practice is identical to the assessment practice currently utilized by the Exchange's affiliates, MIAX PEARL, LLC (''MIAX Pearl'') and MIAX Emerald, LLC (''MIAX Emerald'').[6]

As a practical matter, when a transaction that is subject to the ORF is not executed on the Exchange, the Exchange lacks the information necessary to identify the order-entering member for that transaction. There are a multitude of order-entering market participants throughout the industry, and such participants can make changes to the market centers to which they connect, including dropping their connection to one market center and establishing themselves as participants on another. For these reasons, it is not possible for the Exchange to identify, and thus assess fees such as ORF, on order-entering participants on away markets on a given trading day. Clearing members, however, are distinguished from order-entering participants because they remain identified to the Exchange on information the Exchange receives from OCC regardless of the identity of the order-entering participant, their location, and the market center on which they execute transactions. Therefore, the Exchange believes it is more efficient for the operation of the Exchange and for the marketplace as a whole to collect the ORF from clearing members.

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

As discussed below, the Exchange believes it is appropriate to charge the ORF only to transactions that clear as customer at the OCC. The Exchange believes that its broad regulatory responsibilities with respect to a Member's activities supports applying

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] Exchange participants must record the appropriate account origin code on all orders at the time of entry in order. The Exchange represents that it has surveillances in place to verify that Members mark orders with the correct account origin code.

[5] ''CMTA'' or Clearing Member Trade Assignment is a form of ''give-up'' whereby the position will be assigned to a specific clearing firm at OCC.

[6] *See* Securities Exchange Act Release Nos. 85163 (February 15, 2019), 84 FR 5798 (February 22, 2019) (SR–PEARL–2019–01); 85251 (March 6, 2019), 84 FR 8931 (March 12, 2019) (SR–EMERALD–2019–01).

the ORF to transactions cleared but not executed by a Member. The Exchange's regulatory responsibilities are the same regardless of whether a Member enters a transaction or clears a transaction executed on its behalf. The Exchange regularly reviews all such activities, including performing surveillance for position limit violations, manipulation, front-running, contrary exercise advice violations and insider trading. These activities span across multiple exchanges.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of Members' customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as the Office of the General Counsel, technology, and internal audit. Indirect expenses are estimated to be approximately 48% of the total regulatory costs for 2021. Thus, direct expenses are estimated to be approximately 52% of total regulatory costs for 2021. The Exchange notes that its estimated direct and indirect expense percentages are in the range and similar to those at other options exchanges.[7]

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange proposes to reduce the amount of ORF that will be collected by the Exchange from $0.0029 per contract side to $0.0019 per contract side. The Exchange issued an Options Regulatory Fee Announcement on July 2, 2021, indicating the proposed rate change for August 1, 2021.[8]

The proposed decrease is based on recent options volumes, which included an increase in retail investors. With respect to options volume, the Exchange, and the options industry as a whole, experienced a significant increase between 2020 and 2021. For example, total options contract volumes in April, May and June 2021 were 29.7%, 32.7% and 25.6% higher than the total options contract volumes in April, May and June 2020, respectively.[9]

There can be no assurance that the Exchange's final costs for 2021 will not differ materially from these expectations, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue being generated utilizing the current ORF rate may result in revenue that will run in excess of the Exchange's estimated regulatory costs for the year.[10] Particularly, as noted above, the options market has seen a substantial increase in volume throughout 2020 and 2021, due in large part to the extreme volatility in the marketplace as a result of the COVID–19 pandemic. This unprecedented spike in volatility resulted in significantly higher volume than was originally projected by the Exchange (thereby resulting in substantially higher ORF revenue than projected). The Exchange therefore proposes to decrease the ORF in order to ensure it does not exceed its regulatory costs for the year. Particularly, the Exchange believes that decreasing the ORF when combined with all of the Exchange's other regulatory fees and fines, would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the current rate.[11]

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange will continue to monitor MIAX regulatory costs and revenues at a minimum on a semi-annual basis. If the Exchange determines regulatory revenues exceed or are insufficient to cover a material portion of its regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission.

In connection with this filing, the Exchange notes that its affiliates, MIAX Pearl and MIAX Emerald, will also be adjusting the ORF fees that each of those exchanges charge.

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 dues, 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[14] 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 the proposed fee change is reasonable because customer transactions will be subject to a lower ORF fee than the current rate. Moreover, the proposed reduction is necessary in order for the Exchange to not collect revenue in excess of its anticipated regulatory costs, in combination with other regulatory fees and fines, which is consistent with the Exchange's practices.

The ORF is designed to recover a material portion of the costs of supervising and regulating Members' customer options business including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive and

[7] *See* Securities Exchange Act Release Nos. 91418 (March 26, 2021), 86 FR 17254 (April 1, 2021) (SR-Phlx-2021–16) (reducing the Nasdaq PHLX LLC ORF and estimating direct expenses at 58% and indirect expenses at 42%); 91420 (March 26, 2021), 86 FR 17223 (April 1, 2021) (SR–ISE–2021–04) (reducing the Nasdaq ISE, LLC ORF and estimating direct expenses at 58% and indirect expenses at 42%).

[8] *See https://www.miaxoptions.com/sites/default/files/circular-files/MIAX_Options_RC_2021_36.pdf.*

[9] *See* data from OCC at: *https://www.businesswire.com/news/home/20210504005178/en/OCC-April-2021-Total-Volume-Up-29.7-Percent-from-a-Year-Ago, https://www.businesswire.com/news/home/20210602005174/en/OCC-May-2021-Total-Volume-Up-32.7-Percent-from-a-Year-Ago, and https://apnews.com/press-release/business-wire/778385e696f4407590cc6ff9cb64db03.*

[10] The Exchange notes that notwithstanding the potential excess ORF revenue the Exchange anticipates it would collect utilizing the current rate, it would not use such revenue for non-regulatory purposes.

[11] The Exchange notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have been allocated to the Financial Industry Regulatory Authority (''FINRA'') under a 17d–2 Agreement. The ORF is not designed to cover the cost of options sales practice regulation.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

[14] 15 U.S.C. 78f(b)(5).

enforcement activities. The Exchange will monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be less than or equal to the Exchange's regulatory costs, which is consistent with the Commission's view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side. In this regard, the Exchange believes that the proposed decrease to the fee is reasonable.

The Exchange believes that continuing to limit changes to the ORF to twice a year on specific dates with advance notice is reasonable because it gives participants certainty on the timing of changes, if any, and better enables them to properly account for ORF charges among their customers. The Exchange believes that continuing to limit changes to the ORF to twice a year on specific dates is equitable and not unfairly discriminatory because it will apply in the same manner to all Members that are subject to the ORF and provide them with additional advance notice of changes to that fee.

The Exchange believes that collecting the ORF from non-Members when such non-Members ultimately clear the transaction (that is, when the non-Member is the ''ultimate clearing firm'' for a transaction in which a Member was assessed the ORF) is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange notes that there is a material distinction between ''assessing'' the ORF and ''collecting'' the ORF. The ORF is only assessed to a Member with respect to a particular transaction in which it is either the executing clearing firm or ultimate clearing firm. The Exchange does not assess the ORF to non-Members. Once, however, the ORF is assessed to a Member for a particular transaction, the ORF may be collected from the Member or a non-Member, depending on how the transaction is cleared at OCC. If there was no change to the clearing account of the original transaction, the ORF would be collected from the Member. If there was a change to the clearing account of the original transaction and a non-Member becomes the ultimate clearing firm for that transaction, then the ORF will be collected from that non-Member. The Exchange believes that this collection practice continues to be reasonable and appropriate, and was originally instituted for the benefit of clearing firms that desired to have the ORF be collected from the clearing firm that ultimately clears the transaction.

The Exchange designed the ORF so that revenue generated from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may be collecting revenue in excess of its regulatory costs. Indeed, the Exchange notes that when taking into account the recent options volume, which included an increase in customer options transactions, it estimates the ORF will generate revenues that may cover more than the approximated Exchange's projected regulatory costs. Moreover, when coupled with the Exchange's other regulatory fees and revenues, the Exchange estimates ORF to generate over 100% of the Exchange's projected regulatory costs. As such, the Exchange believes it is reasonable and appropriate to decrease the ORF amount from $0.0029 to $0.0019 per contract side.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all Members on all their transactions that clear in the customer range at the OCC, with an exception.[15] The Exchange believes the ORF ensures fairness by assessing higher fees to those members that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (*e.g.,* staff expenses), as well as investigations into customer complaints and the terminations of registered persons. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (*e.g.,* member proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group (''ISG'')[16] the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its Members.

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. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is

[15] When a transaction is executed on an away exchange, the Exchange does not assess the ORF when neither the executing clearing firm nor the ultimate clearing firm is a Member (even if a Member is ''given-up'' or ''CMTAed'' and then such Member subsequently ''gives-up'' or ''CMTAs'' the transaction to another non-Member via a CMTA reversal).

[16] ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

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,[17] and Rule 19b–4(f)(2) [18] 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 No. SR–MIAX–2021–48 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 No. SR–MIAX–2021–48. 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 No. SR–MIAX–2021–48, and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22942 Filed 10–20–21; 8:45 am]

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[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 240.19b–4(f)(2).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93369; File No. SR–PEARL–2021–48]

Self-Regulatory Organizations: MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Pearl Options Fee Schedule To Adjust the Options Regulatory Fee

October 15, 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 October 7, 2021, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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 Pearl Options Fee Schedule (the ''Fee Schedule'') to adjust the Options Regulatory Fee (''ORF'').

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

Currently, the Exchange assesses ORF in the amount of $0.0028 per contract side. The Exchange proposes to reduce the amount of ORF from $0.0028 per contract side to $0.0018 per contract side in order to help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange's proposed change to the ORF should balance the Exchange's regulatory revenue against the anticipated regulatory costs. The Exchange initially filed this proposal on July 30, 2021 (SR–PEARL–2021–37) and withdrew such filing on August 12, 2021. The Exchange refiled this proposal on August 12, 2021 (SR–PEARL–2021–38) and withdrew such filing on October 7, 2021. The Exchange proposes to implement this fee change effective October 7, 2021.

Collection of ORF

Currently, the Exchange assesses the per-contract ORF to each Member [3] for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for

all options transactions, including Mini Options, cleared or ultimately cleared by the Member, which are cleared by the Options Clearing Corporation (''OCC'') in the ''customer'' range,[4] regardless of the exchange on which the transaction occurs. The ORF is collected by OCC on behalf of the Exchange from either: (1) A Member that was the ultimate clearing firm for the transaction; or (2) a non-Member that was the ultimate clearing firm where a Member was the executing clearing firm for the transaction. The Exchange uses reports from OCC to determine the identity of the executing clearing firm and ultimate clearing firm.

To illustrate how the Exchange assesses and collects ORF, the Exchange provides the following set of examples. For a transaction that is executed on the Exchange and the ORF is assessed, if there is no change to the clearing account of the original transaction, then the ORF is collected from the Member that is the executing clearing firm for the transaction (the Exchange notes that, for purposes of the Fee Schedule, when there is no change to the clearing account of the original transaction, the executing clearing firm is deemed to be the ultimate clearing firm). If there is a change to the clearing account of the original transaction (*i.e.,* the executing clearing firm ''gives-up'' or ''CMTAs''[5] the transaction to another clearing firm), then the ORF is collected from the clearing firm that ultimately clears the transaction—the ''ultimate clearing firm.'' The ultimate clearing firm may be either a Member or non-Member of the Exchange. If the transaction is executed on an away exchange and the ORF is assessed, then the ORF is collected from the ultimate clearing firm for the transaction. Again, the ultimate clearing firm may be either a Member or non-Member of the Exchange. The Exchange notes, however, that when the transaction is executed on an away exchange, the Exchange does not assess the ORF when neither the executing clearing firm nor the ultimate clearing firm is a Member (even if a Member is ''given-up'' or ''CMTAed'' and then such Member subsequently ''gives-up'' or ''CMTAs'' the transaction to another non-Member via a CMTA reversal). Finally, the Exchange does not assess the ORF on outbound linkage trades, whether executed at the Exchange or an away exchange. ''Linkage trades'' are tagged in the Exchange's system, so the Exchange can readily tell them apart from other trades. A customer order routed to another exchange results in two customer trades, one from the originating exchange and one from the recipient exchange. Charging ORF on both trades could result in double-billing of ORF for a single customer order; thus, the Exchange does not assess ORF on outbound linkage trades in a linkage scenario. This assessment practice is identical to the assessment practice currently utilized by the Exchange's affiliates, Miami International Securities Exchange, LLC (''MIAX'') and MIAX Emerald, LLC (''MIAX Emerald'').[6]

As a practical matter, when a transaction that is subject to the ORF is not executed on the Exchange, the Exchange lacks the information necessary to identify the order-entering member for that transaction. There are a multitude of order-entering market participants throughout the industry, and such participants can make changes to the market centers to which they connect, including dropping their connection to one market center and establishing themselves as participants on another. For these reasons, it is not possible for the Exchange to identify, and thus assess fees such as ORF, on order-entering participants on away markets on a given trading day. Clearing members, however, are distinguished from order-entering participants because they remain identified to the Exchange on information the Exchange receives from OCC regardless of the identity of the order-entering participant, their location, and the market center on which they execute transactions. Therefore, the Exchange believes it is more efficient for the operation of the Exchange and for the marketplace as a whole to collect the ORF from clearing members.

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

As discussed below, the Exchange believes it is appropriate to charge the ORF only to transactions that clear as customer at the OCC. The Exchange believes that its broad regulatory responsibilities with respect to a Member's activities supports applying the ORF to transactions cleared but not executed by a Member. The Exchange's regulatory responsibilities are the same regardless of whether a Member enters a transaction or clears a transaction executed on its behalf. The Exchange regularly reviews all such activities, including performing surveillance for position limit violations, manipulation, front-running, contrary exercise advice violations and insider trading. These activities span across multiple exchanges.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of Members' customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as the Office of the General Counsel, technology, and internal audit. Indirect expenses are estimated to be approximately 50% of the total regulatory costs for 2021. Thus, direct expenses are estimated to be approximately 50% of total regulatory costs for 2021. The Exchange notes that its estimated direct and indirect expense percentages are in the range and similar to those at other options exchanges.[7]

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and

purposes of trading on the Exchange as an ''Electronic Exchange Member'' or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[4] Exchange participants must record the appropriate account origin code on all orders at the time of entry in order. The Exchange represents that it has surveillances in place to verify that Members mark orders with the correct account origin code.

[5] ''CMTA'' or Clearing Member Trade Assignment is a form of ''give-up'' whereby the position will be assigned to a specific clearing firm at OCC.

[6] *See* Securities Exchange Act Release Nos. 85162 (February 15, 2019), 84 FR 5783 (February 22, 2019) (SR–MIAX–2019–01); 85251 (March 6, 2019), 84 FR 8931 (March 12, 2019) (SR–EMERALD–2019–01).

[7] *See* Securities Exchange Act Release Nos. 91418 (March 26, 2021), 86 FR 17254 (April 1, 2021) (SR–Phlx–2021–16) (reducing the Nasdaq PHLX LLC ORF and estimating direct expenses at 58% and indirect expenses at 42%); 91420 (March 26, 2021), 86 FR 17223 (April 1, 2021) (SR–ISE–2021–04) (reducing the Nasdaq ISE, LLC ORF and estimating direct expenses at 58% and indirect expenses at 42%).

regulation of its members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange proposes to reduce the amount of ORF that will be collected by the Exchange from $0.0028 per contract side to $0.0018 per contract side. The Exchange issued an Options Regulatory Fee Announcement on July 2, 2021, indicating the proposed rate change for August 1, 2021.[8]

The proposed decrease is based on recent options volumes, which included an increase in retail investors. With respect to options volume, the Exchange, and the options industry as a whole, experienced a significant increase between 2020 and 2021. For example, total options contract volumes in April, May and June 2021 were 29.7%, 32.7% and 25.6% higher than the total options contract volumes in April, May and June 2020, respectively.[9]

There can be no assurance that the Exchange's final costs for 2021 will not differ materially from these expectations, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue being generated utilizing the current ORF rate may result in revenue that will run in excess of the Exchange's estimated regulatory costs for the year.[10] Particularly, as noted above, the options market has seen a substantial increase in volume throughout 2020 and 2021, due in large part to the extreme volatility in the marketplace as a result of the COVID–19 pandemic. This unprecedented spike in volatility resulted in significantly higher volume than was originally projected by the Exchange (thereby resulting in substantially higher ORF revenue than projected). The Exchange therefore proposes to decrease the ORF in order to ensure it does not exceed its regulatory costs for the year. Particularly, the Exchange believes that decreasing the ORF when combined with all of the Exchange's other regulatory fees and fines, would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the current rate.[11]

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange will continue to monitor MIAX Pearl regulatory costs and revenues at a minimum on a semi-annual basis. If the Exchange determines regulatory revenues exceed or are insufficient to cover a material portion of its regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission.

In connection with this filing, the Exchange notes that its affiliates, MIAX and MIAX Emerald, will also be adjusting the ORF fees that each of those exchanges charge.

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 dues, 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[14] 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 the proposed fee change is reasonable because customer transactions will be subject to a lower ORF fee than the current rate. Moreover, the proposed reduction is necessary in order for the Exchange to not collect revenue in excess of its anticipated regulatory costs, in combination with other regulatory fees and fines, which is consistent with the Exchange's practices.

The ORF is designed to recover a material portion of the costs of supervising and regulating Members' customer options business including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange will monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be less than or equal to the Exchange's regulatory costs, which is consistent with the Commission's view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side. In this regard, the Exchange believes that the proposed decrease to the fee is reasonable.

The Exchange believes that continuing to limit changes to the ORF to twice a year on specific dates with advance notice is reasonable because it gives participants certainty on the timing of changes, if any, and better enables them to properly account for ORF charges among their customers. The Exchange believes that continuing to limit changes to the ORF to twice a year on specific dates is equitable and not unfairly discriminatory because it will apply in the same manner to all Members that are subject to the ORF and provide them with additional advance notice of changes to that fee.

The Exchange believes that collecting the ORF from non-Members when such non-Members ultimately clear the transaction (that is, when the non-Member is the ''ultimate clearing firm'' for a transaction in which a Member was assessed the ORF) is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange notes that there is a material distinction between ''assessing'' the ORF and ''collecting'' the ORF. The ORF is only assessed to a Member with respect to a particular transaction in which it is either the executing clearing firm or ultimate clearing firm. The Exchange does not assess the ORF to non-Members. Once, however, the ORF is assessed to a Member for a particular transaction, the

[8] *See https://www.miaxoptions.com/sites/default/files/circular-files/MIAX_Pearl_Options_RC_2021_29.pdf.*

[9] *See* data from OCC at: *https://www.businesswire.com/news/home/20210504005178/en/OCC-April-2021-Total-Volume-Up-29.7-Percent-from-a-Year-Ago, https://www.businesswire.com/news/home/20210602005174/en/OCC-May-2021-Total-Volume-Up-32.7-Percent-from-a-Year-Ago, and https://apnews.com/press-release/business-wire/778385e696f4407590cc6ff9cb64db03.*

[10] The Exchange notes that notwithstanding the potential excess ORF revenue the Exchange anticipates it would collect utilizing the current rate, it would not use such revenue for non-regulatory purposes.

[11] The Exchange notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have been allocated to the Financial Industry Regulatory Authority (''FINRA'') under a 17d–2 Agreement. The ORF is not designed to cover the cost of options sales practice regulation.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

[14] 15 U.S.C. 78f(b)(5).

ORF may be collected from the Member or a non-Member, depending on how the transaction is cleared at OCC. If there was no change to the clearing account of the original transaction, the ORF would be collected from the Member. If there was a change to the clearing account of the original transaction and a non-Member becomes the ultimate clearing firm for that transaction, then the ORF will be collected from that non-Member. The Exchange believes that this collection practice continues to be reasonable and appropriate, and was originally instituted for the benefit of clearing firms that desired to have the ORF be collected from the clearing firm that ultimately clears the transaction.

The Exchange designed the ORF so that revenue generated from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may be collecting revenue in excess of its regulatory costs. Indeed, the Exchange notes that when taking into account the recent options volume, which included an increase in customer options transactions, it estimates the ORF will generate revenues that may cover more than the approximated Exchange's projected regulatory costs. Moreover, when coupled with the Exchange's other regulatory fees and revenues, the Exchange estimates ORF to generate over 100% of the Exchange's projected regulatory costs. As such, the Exchange believes it is reasonable and appropriate to decrease the ORF amount from $0.0028 to $0.0018 per contract side.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all Members on all their transactions that clear in the customer range at the OCC, with an exception.[15] The Exchange believes the ORF ensures fairness by assessing higher fees to those members that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (*e.g.,* staff expenses), as well as investigations into customer complaints and the terminations of registered persons. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (*e.g.,* member proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group (''ISG'')[16] the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its Members.

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. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

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,[17] and Rule 19b–4(f)(2)[18] 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 No. SR–PEARL–2021–48 on the subject line.

[15] When a transaction is executed on an away exchange, the Exchange does not assess the ORF when neither the executing clearing firm nor the ultimate clearing firm is a Member (even if a Member is ''given-up'' or ''CMTAed'' and then such Member subsequently ''gives-up'' or ''CMTAs'' the transaction to another non-Member via a CMTA reversal).

[16] ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 240.19b–4(f)(2).

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 No. SR–PEARL–2021–48. 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 No. SR–PEARL–2021–48, and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22943 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93362; File No. SR–MEMX–2021–14]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Related to the Market Wide Circuit Breaker Until March 18, 2022

October 15, 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 October 14, 2021, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 with the Commission a proposed rule change to extend the pilot related to the market-wide circuit breaker in Rule 11.16 to the close of business on March 18, 2022. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the pilot related to the market-wide circuit breaker in Rule 11.16 to the close of business on March 18, 2022.

Background

The Market-Wide Circuit Breaker (''MWCB'') rules, which for the Exchange are contained in Exchange Rule 11.16, provide an important, automatic mechanism that is invoked to promote stability and investor confidence during periods of significant stress when cash equities securities experience extreme market-wide declines. The MWCB rules are designed to slow the effects of extreme price declines through coordinated trading halts across both cash equity and equity options securities markets.

The cash equities rules governing MWCBs were first adopted in 1988 and, in 2012, all U.S. cash equity exchanges and FINRA amended their cash equities uniform rules on a pilot basis (the ''Pilot Rules,'' *i.e.,* Rule 11.16 (a)–(d)).[5] The Pilot Rules currently provide for trading halts in all cash equity securities during a severe market decline as measured by a single-day decline in the S&P 500 Index (''SPX'').[6] Under the Pilot Rules, a market-wide trading halt will be triggered if SPX declines in price by specified percentages from the prior day's closing price of that index. The triggers are set at three circuit breaker thresholds: 7% (Level 1), 13% (Level 2), and 20% (Level 3). A market decline that triggers a Level 1 or Level 2 halt after 9:30 a.m. and before 3:25 p.m. would halt market-wide trading for 15 minutes, while a similar market decline at or after 3:25 p.m. would not halt market-wide trading. (Level 1 and Level 2 halts may occur only once a day.) A market decline that triggers a Level 3 halt at any time during the trading day would halt market-wide trading for the remainder of the trading day.

The Commission approved the Pilot Rules, the term of which was to

[5] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BATS–2011–038; SR–BYX–2011–025; SR–BX–2011–068; SR–CBOE–2011–087; SR–C2–2011–024; SR–CHX–2011–30; SR–EDGA–2011–31; SR–EDGX–2011–30; SR–FINRA–2011–054; SR–ISE–2011–61; SR–NASDAQ–2011–131; SR–NSX–2011–11; SR–NYSE–2011–48; SR–NYSEAmex–2011–73; SR–NYSEArca–2011–68; SR–Phlx–2011–129) (''Pilot Rules Approval Order'').

[6] The rules of the equity options exchanges similarly provide for a halt in trading if the cash equity exchanges invoke a MWCB Halt. *See, e.g.,* NYSE Arca Rule 6.65–O(d)(4).

coincide with the pilot period for the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS (the ''LULD Plan''),[7] including any extensions to the pilot period for the LULD Plan.[8] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[9] In conjunction with the proposal to make the LULD Plan permanent, all U.S. cash equity exchanges and FINRA filed to to untie the Pilot Rules' effectiveness from that of the LULD Plan and to extend the Pilot Rules' effectiveness to the close of business on October 18, 2019.[10] On May 4, 2020, the Commission approved MEMX's Form 1 Application to register as a national securities exchange with rules including, on a pilot basis expiring on October 18, 2020, the Pilot Rules.[11] The Exchange subsequently amended Rule 11.16 to extend the Pilot Rules' effectiveness for an additional year to the close of business on October 18, 2021.[12]

The Exchange now proposes to amend Rule 11.16 to extend the pilot to the close of business on March 18, 2022. This filing does not propose any substantive or additional changes to Rule 11.16.

The MWCB Task Force and the March 2020 MWCB Events

In late 2019, Commission staff requested the formation of a MWCB Task Force (''Task Force'') to evaluate the operation and design of the MWCB mechanism. The Task Force included representatives from the SROs, the Commission, CME, the Commodity Futures Trading Commission (''CFTC''), and the securities industry and conducted several organizational meetings in December 2019 and January 2020.

In Spring 2020, the MWCB mechanism proved itself to be an effective tool for protecting markets through turbulent times. In March 2020, at the outset of the worldwide COVID–19 pandemic, U.S. equities markets experienced four MWCB Level 1 halts, on March 9, 12, 16, and 18, 2020. In each instance, the markets halted as intended upon a 7% drop in the S&P 500 Index, and resumed as intended 15 minutes later.

In response to these events, in the Spring and Summer of 2020, the Task Force held ten meetings that were attended by Commission staff, with the goal of performing an expedited review of the March 2020 halts and identifying any areas where the MWCB mechanism had not worked properly. Given the risk of unintended consequences, the Task Force did not recommend changes that were not rooted in a noted deficiency. The Task Force recommended creating a process for a backup reference price in the event that SPX were to become unavailable, and enhancing functional MWCB testing. The Task Force also asked CME to consider modifying its rules to enter into a limit-down state in the futures pre-market after a 7% decline instead of 5%. CME made the requested change, which became effective on October 12, 2020.[13]

The MWCB Working Group's Study

On September 17, 2020, the Director of the Commission's Division of Trading and Markets asked the SROs to conduct a more complete study of the design and operation of the Pilot Rules and the LULD Plan during the period of volatility in the Spring of 2020.

In response to the request, the SROs created a MWCB ''Working Group'' composed of SRO representatives and industry advisers that included members of the advisory committees to both the LULD Plan and the NMS Plans governing the collection, consolidation, and dissemination of last-sale transaction reports and quotations in NMS Stocks. The Working Group met regularly from September 2020 through March 2021 to consider the Commission's request, review data, and compile its study. The Working Group's efforts in this respect incorporated and built on the work of an MWCB Task Force.

The Working Group submitted its study to the Commission on March 31, 2021 (the ''Study'').[14] In addition to a timeline of the MWCB events in March 2020, the Study includes a summary of the analysis and recommendations of the MWCB Task Force; an evaluation of the operation of the Pilot Rules during the March 2020 events; an evaluation of the design of the current MWCB system; and the Working Group's conclusions and recommendations.

In the Study, the Working Group concluded: (1) The MWCB mechanism set out in the Pilot Rules worked as intended during the March 2020 events; (2) the MWCB halts triggered in March 2020 appear to have had the intended effect of calming volatility in the market, without causing harm; (3) the design of the MWCB mechanism with respect to reference value (SPX), trigger levels (7%/13%/20%), and halt times (15 minutes) is appropriate; (4) the change implemented in Amendment 10 to the Plan to Address Extraordinary Market Volatility (the ''Limit Up/Limit Down Plan'' or ''LULD Plan'') did not likely have any negative impact on MWCB functionality; and (5) no changes should be made to the mechanism to prevent the market from halting shortly after the opening of regular trading hours at 9:30 a.m.

In light of the foregoing conclusions, the Working Group also made several recommendations, including that the Pilot Rules should be permanent without any changes.[15]

Proposal To Extend the Operation of the Pilot Rules Pending the Commission's Consideration of the Exchange's Filing To Make the Pilot Rules Permanent

On July 16, 2021, NYSE proposed a rule change to make the Pilot Rules permanent, consistent with the Working Group's recommendations.[16] On August 27, 2021, the Commission extended its time to consider the proposed rule change to October 20, 2021.[17] The Exchange now proposes to extend the expiration date of the Pilot Rules to the end of business on March 18, 2022.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[18] in general, and furthers the objectives of Section 6(b)(5) of the Act,[19] in particular, in that it is designed to

[7] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012). The LULD Plan provides a mechanism to address extraordinary market volatility in individual securities.

[8] *See, e.g.,* Securities Exchange Act Release Nos. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NYSE–2011–48) (Approval Order); and 68784 (January 31, 2013), 78 FR 8662 (February 6, 2013) (SR–NYSE–2013–10).

[9] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019).

[10] *See, e.g.,* Securities Exchange Act Release No. 85560 (April 9, 2019), 84 FR 15247 (April 15, 2019) (SR–NYSE–2019–19).

[11] *See* Securities Exchange Release No. 88806 (May 4, 2020), 85 FR 27451 (May 8, 2020).

[12] *See* Securities Exchange Act Release No. 90159 (October 13, 2020), 85 FR 66373 (October 19, 2020) (SR–MEMX–2020–12).

[13] *See https://www.cmegroup.com/content/dam/cmegroup/market-regulation/rule-filings/2020/9/20-392_1.pdf; https://www.cmegroup.com/content/dam/cmegroup/market-regulation/rule-filings/2020/9/20–392_2.pdf.*

[14] *See Report of the Market-Wide Circuit Breaker (''MWCB'') Working Group Regarding the March 2020 MWCB Events,* submitted March 31, 2021 (the ''Study''), available at *https://www.nyse.com/publicdocs/nyse/markets/nyse/Report_of_the_Market-Wide_Circuit_Breaker_Working_Group.pdf.*

[15] *See id.* at 46.

[16] *See* Securities Exchange Act Release No. 92428 (July 16, 2021), 86 FR 38776 (July 22, 2021) (SR–NYSE–2021–40).

[17] *See* Securities Exchange Act Release No. 92785A (August 27, 2021), 86 FR 50202 (September 7, 2021) (SR–NYSE–2021–40).

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

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 market-wide circuit breaker mechanism under Rule 11.16 is an important, automatic mechanism that is invoked to promote stability and investor confidence during a period of significant stress when securities markets experience extreme broad-based declines. Extending the market-wide circuit breaker pilot for an additional five months would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Commission reviews the proposed rule change to make the Pilot Rules permanent.

The Exchange also believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Based on the foregoing, the Exchange believes the benefits to market participants from Pilot Rules should continue on a pilot basis because they will promote fair and orderly markets and protect investors and the public interest.

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 because the proposal would ensure the continued, uninterrupted operation of a consistent mechanism to halt trading across the U.S. markets while the Commission reviews the proposed rule change to make the Pilot Rules permanent.

Further, the Exchange understands that FINRA and other national securities exchanges have already filed or will file proposals to extend their rules regarding the market-wide circuit breaker pilot. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

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

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 [20] and Rule 19b–4(f)(6) [21] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [22] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[23] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange asked that the Commission waive the 30 day operative delay so that the proposal may become operative immediately upon filing. Extending the Pilot Rules' effectiveness to the close of business on March 18, 2022 will extend the protections provided by the Pilot Rules, which would otherwise expire in less than 30 days. Waiver of the operative delay would therefore permit uninterrupted continuation of the MWCB pilot while the Commission reviews the NYSE's proposed rule change to make the Pilot Rules permanent. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–MEMX–2021–14 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–MEMX–2021–14. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MEMX–2021–14 and should be submitted on or before November 12, 2021.

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

[21] 17 CFR 240.19b–4.

[22] 17 CFR 240.19b–4(f)(6).

[23] 17 CFR 240.19b–4(f)(6)(iii).

[24] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22937 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93346; File No. SR–PEARL–2021–32]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Withdrawal of a Proposed Rule Change To Amend the MIAX Pearl Options Fee Schedule To Remove Certain Credits and Increase Trading Permit Fees

October 15, 2021.

On July 1, 2021, MIAX PEARL, LLC (''MIAX Pearl'' or the ''Exchange'') 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 amend the MIAX Pearl Options Fee Schedule to remove certain credits and increase monthly Trading Permit fees for Exchange Members. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] On July 15, 2021, the proposed rule change was published for comment in the **Federal Register**.[4] On August 27, 2021, pursuant to Section 19(b)(3)(C) of the Act, the Commission: (1) Temporarily suspended the proposed rule change; and (2) instituted proceedings to determine whether to approve or disapprove the proposal.[5] The Commission received one comment letter on the proposal.[6] On October 12, 2021, the Exchange withdrew the proposed rule change (SR–PEARL–2021–32).

[25] 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. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 92366 (July 9, 2021), 86 FR 37379.

[5] *See* Securities Exchange Act Release No. 92797, 86 FR 49399 (September 2, 2021).

[6] *See* Letter from Richard J. McDonald, Susquehanna International Group, LLP, to Vanessa Countryman, Secretary, Commission, dated September 28, 2021, available at: *https://www.sec.gov/comments/sr-pearl-2021-32/srpearl202132-9295793-259789.pdf.*

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22925 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–330, OMB Control No. 3235–0372]

For Submission Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, Washington, DC 20549–0213

Extension:
Rule 15c2–12

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 15c2–12—Municipal Securities Disclosure (17 CFR 240.15c2–12) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Paragraph (b) of Rule 15c2–12 requires underwriters of municipal securities: (1) To obtain and review an official statement ''deemed final'' by an issuer of the securities, except for the omission of specified information prior to making a bid, purchase, offer, or sale of municipal securities; (2) in non-competitively bid offerings, to send, upon request, a copy of the most recent preliminary official statement (if one exists) to potential customers; (3) to contract with the issuer to receive, within a specified time, sufficient copies of the final official statement to comply with Rule 15c2–12's delivery requirement and the rules of the Municipal Securities Rulemaking Board (''MSRB''); (4) to send, upon request, a copy of the final official statement to potential customers for a specified period of time; and (5) before purchasing or selling municipal securities in connection with an offering, to reasonably determine that the issuer or the obligated person has undertaken, in a written agreement or contract, for the benefit of holders of such municipal securities, to provide certain information on a continuing basis to the MSRB in an electronic format as prescribed by the MSRB. The information to be provided consists of: (1) Certain annual financial and operating information and audited financial statements (''annual filings''); (2) notices of the occurrence of any of 16 specific events (''event notices''); and (3) notices of the failure of an issuer or obligated person to make a submission required by a continuing disclosure agreement (''failure to file notices'').

Rule 15c2–12 is intended to enhance disclosure, and thereby reduce fraud, in the municipal securities market by establishing standards for obtaining, reviewing and disseminating information about municipal securities by their underwriters.

Municipal offerings of less than $1 million are exempt from the rule, as are offerings of municipal securities issued in large denominations that are sold to no more than 35 sophisticated investors or have short-term maturities.

It is estimated that approximately 28,000 issuers, 250 broker-dealers and the MSRB will spend a total of 797,681 hours per year complying with Rule 15c2–12.[1] Based on data from the MSRB through December 2020, issuers annually submit approximately 61,964 annual filings to the MSRB. Commission staff estimates that an issuer will require approximately seven hours to prepare and submit annual filings to the MSRB. Therefore, the total annual burden on issuers to prepare and submit 61,964 annual filings to the MSRB is estimated to be 433,748 hours. Based on data from the MSRB through December 2020, issuers annually submit approximately 54,121 event notices to the MSRB. Commission staff estimates that an issuer will require approximately four hours to prepare and submit event notices to the MSRB. Therefore, the total annual burden on issuers to prepare and submit 54,121 event notices to the MSRB is estimated to be 216,484 hours. Based on data from the MSRB through December 2020, issuers annually submit approximately 3,597 failure to file notices to the MSRB. Commission staff estimates that an issuer will require approximately two hours to prepare and submit failure to file notices to the MSRB. Therefore, the total annual

[7] 17 CFR 200.30–3(a)(57) and (58).

[1] 54,121 (annual number of event notices) × 4 (average estimate of hours needed to prepare and submit each) + 61,964 (annual number of annual filings) × 7 (average estimate of hours needed to prepare and submit each) + 3,597 (annual number of failure to file notices) × 2 (average estimate of hours needed to prepare and submit each) = 657,426 hours. 657,426 hours (estimated total annual burden on issuers) + 25,000 (estimated total annual MSRB burden) + 115,255 (estimated total annual burden on broker-dealers) = 797,681 hours.

burden on issuers to prepare and submit 3,597 failure to file notices to the MSRB is estimated to be 7,194 hours. Commission staff estimates that the total annual burden on broker-dealers to comply with Rule 15c2–12 is 115,255 hours. Finally, Commission staff estimates that the MSRB will incur an annual burden of 25,000 hours to collect, index, store, retrieve and make available the pertinent documents under Rule 15c2–12.

The Commission estimates that up to 65% of issuers may use designated agents to submit some or all of their continuing disclosure documents to the MSRB. The Commission estimates that the average total annual cost that may be incurred by issuers that use the services of a designated agent will be $15,470,000.[2] Further, the Commission estimates that issuers will retain outside counsel to assist with filing approximately 1,100 event notices. The Commission estimates the average total annual cost incurred by issuers to retain outside counsel to assist in the evaluation and preparation of certain event notices will be $1,760,000.[3] Thus, the total estimated cost to issuers to comply with the rule is $17,230,000.[4]

The Commission initially estimated that the MSRB would incur total annual costs of $670,000 to operate the continuing disclosure service for the MSRB's Electronic Municipal Market Access (''EMMA'') system. This estimate was based on prior discussions with MSRB staff. Based on more recent discussions with MSRB staff, the Commission now estimates the total cost to operate the continuing disclosure service for EMMA to be $1,055,000.[5]

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number. The public may view background documentation for this information collection at the following website: *www.reginfo.gov*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

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BILLING CODE 8011–01–P

[2] 28,000 (number of issuers) × .65 (percentage of issuers that may use designated agents) × $850 (estimated average annual cost for issuer's use of designated agent to submit filings to the Rule) = $15,470,000.

[3] 1,100 (estimate of number of event notices requiring outside counsel) × 4 (estimated number of hours for outside attorney to assist in the preparation of such event notice) × $400 (hourly wage for an outside attorney) = $1,760,000. The Commission recognizes that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis we estimate that costs of outside counsel would be an average of $400 per hour.

[4] $15,470,000 (estimated total cost for issuer's use of designated agent to submit filings) + $1,760,000 (estimated total cost for issuer to employ outside counsel in the examination, preparation, and filing of certain event notices) = $17,230,000.

[5] The updated figure is comprised of an approximate cost of $670,000 for hardware and software and an approximate cost of $385,000 for external third-party costs. $670,000 + $385,000 = $1,055,000.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93345; File No. SR–CboeEDGX–2021–045]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Current Pilot Program Related to Clearly Erroneous Executions, to the Close of Business on April 20, 2022

October 15, 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 October 14, 2021, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (''EDGX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to extend the current pilot program related to EDGX Rule 11.15, Clearly Erroneous Executions, to the close of business on April 20, 2022. 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 purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions to the close of business on October 20, 2021. Portions of Rule 11.15, explained in further detail below, are currently operating as a pilot program set to expire on October 20, 2021.[5]

On September 10, 2010, the Commission approved, on a pilot basis, changes to EDGX Rule 11.15 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[6]

[5] *See* Securities Exchange Act Release No. 91554 (April 14, 2021), 86 FR 20567 (April 20, 2021) (SR–CboeEDGX–2021–019).

[6] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–EDGX–2010–03).

In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[7] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[8]

On December 26, 2018, the Commission published the proposed Eighteenth Amendment[9] to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'')[10] to allow the Plan to operate on a permanent, rather than pilot, basis. On April 8, 2019, the Exchange amended EDGX Rule 11.15 to untie the pilot program's effectiveness from that of the Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019 in order allow the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules in light of the proposed Eighteenth Amendment to the Plan.[11] On April 17, 2019, the Commission published an approval of the Eighteenth Amendment to allow the Plan to operate on a permanent, rather than pilot, basis.[12] On October 21, 2019, the Exchange amended EDGX Rule 11.15 to extend the pilot's effectiveness to the close of business on April 20, 2020.[13] On March 18, 2020, the Exchange amended EDGX Rule 11.15 to extend the pilot's effectiveness to the close of business on October 20, 2020.[14] On October 20, 2020, the Exchange amended EDGX Rule 11.15 to extend the pilot's effectiveness to the close of business on April 20, 2021.[15] Finally, on April 14, the Exchange amended BYX Rule 11.17 to extend the pilot's effectiveness to the close of business on October 20, 2021.[16]

The Exchange now proposes to amend EDGX Rule 11.15 to extend the pilot's effectiveness to the close of business on April 20, 2022. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') have filed or plan to file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to EDGX Rule 11.15.

The Exchange does not propose any additional changes to EDGX Rule 11.15. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis. As the Plan was approved by the Commission to operate on a permanent, rather than pilot, basis the Exchange intends to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of EDGX Rule 11.15 for an additional six months should provide the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[17] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[18] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[19] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that extending the clearly erroneous execution pilot under EDGX Rule 11.15 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and the other national securities exchanges consider and develop a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange understands that FINRA and other national securities exchanges have or will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

[7] *See* Securities Exchange Act Release No. 68814 (February 1, 2013), 78 FR 9086 (February 7, 2013) (SR–EDGX–2013–06).

[8] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–EDGX–2014–12).

[9] *See* Securities Exchange Act Release No. 84843 (December 18, 2018), 83 FR 66464 (December 26, 2018) (File No. 4–631) (''Eighteenth Amendment'').

[10] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[11] *See* Securities Exchange Act Release No. 87364 (April 10, 2019), 84 FR 15652 (April 16, 2019) (SR–CboeEDGX–2019–018).

[12] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (File No. 4–631).

[13] *See* Securities Exchange Act Release No. 87367 (October 21, 2019), 84 FR 57519 (October 25, 2019) (SR–CboeEDGX–2019–062).

[14] *See* Securities Exchange Act Release No. 88500 (March 27, 2020), 85 FR 18628 (April 2, 2020) (SR–CboeEDGX–2020–013).

[15] *See* Securities Exchange Act Release No. 90233 (October 20, 2020), 85 FR 67787 (October 26, 2020) (SR–CboeEDGX–2020–051).

[16] *See* supra note 5.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] *Id.*

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 [20] and Rule 19b–4(f)(6) thereunder.[21]

A proposed rule change filed under Rule 19b–4(f)(6) [22] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [23] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–2021–045 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–2021–045. 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–2021–045 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

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BILLING CODE 8011–01–P

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 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.

[22] 17 CFR 240.19b–4(f)(6).

[23] 17 CFR 240.19b–4(f)(6)(iii).

[24] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93361; File No. SR–NASDAQ–2021–080]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Related to Clearly Erroneous Transactions Until April 20, 2022

October 15, 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 October 8, 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 extend the current pilot program related to Nasdaq Equity 11, Rule 11890 (Clearly Erroneous Transactions) to the close of business on April 20, 2022.

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 extend the current pilot program related to Equity 11, Rule 11890, Clearly Erroneous Transactions, to the close of business on April 20, 2022. The pilot program is currently due to expire on October 20, 2021.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Equity 11, Rule 11890 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[3] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[4] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[5]

These changes were originally scheduled to operate for a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down Plan'' or ''LULD Plan'').[6] In April 2019, the Commission approved an amendment to the LULD Plan for it to operate on a permanent, rather than pilot, basis.[7] In light of that change, the Exchange amended Equity 11, Rule 11890 to untie the pilot program's effectiveness from that of the LULD Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019.[8] Subsequently, the Exchange amended Rule 11890 to extend the pilot's effectiveness to the close of business on October 20, 2021.[9]

The Exchange now proposes to amend Equity 11, Rule 11890 to extend the pilot's effectiveness for a further six months until the close of business on April 20, 2022. If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) shall be in effect, and the provisions of paragraphs (g) through (i) shall be null and void.[10] In such an event, the remaining sections of Rule 11890 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 11890.

The Exchange does not propose any additional changes to Equity 11, Rule 11890. Extending the effectiveness of Rule 11890 for an additional six months will provide the Exchange and other self-regulatory organizations additional time to consider whether further amendments to the clearly erroneous execution rules are appropriate.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[11] in general, and Section 6(b)(5) of the Act,[12] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Equity 11, Rule 11890 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange and other self-regulatory organizations consider whether further amendments to these rules are appropriate. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

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.

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NASDAQ–2010–076).

[4] *See* Securities Exchange Act Release No. 68819 (February 1, 2013), 78 FR 9438 (February 8, 2013) (SR–NASDAQ–2013–022).

[5] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–NASDAQ–2014–044).

[6] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[7] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (approving Eighteenth Amendment to LULD Plan).

[8] *See* Securities Exchange Act Release No. 85603 (April 11, 2019), 84 FR 16064 (April 17, 2019) (SR–NASDAQ–2019–028).

[9] *See* Securities Exchange Act Release No. 91577 (April 15, 2021), 86 FR 20757 (April 21, 2021) (SR–NASDAQ–2021–022).

[10] *See* notes 3—5, *supra.* The prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [13] and subparagraph (f)(6) of Rule 19b–4 thereunder.[14]

A proposed rule change filed under Rule 19b–4(f)(6) [15] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [16] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2021–080 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–2021–080. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2021–080 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22936 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–392, OMB Control No. 3235–0447]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 17f–6

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17f–6 (17 CFR 270.17f-6) under the Investment Company Act of 1940 (15 U.S.C. 80a) permits registered investment companies (''funds'') to maintain assets (*i.e.,* margin) with futures commission merchants (''FCMs'') in connection with commodity transactions effected on both domestic and foreign exchanges. Before the rule's adoption, funds generally were required to maintain these assets in special accounts with a custodian bank.

The rule requires a written contract that contains certain provisions designed to ensure important safeguards and other benefits relating to the custody of fund assets by FCMs. To protect fund assets, the contract must require that FCMs comply with the segregation or secured amount requirements of the Commodity Exchange Act (''CEA'') and the rules under that statute. The contract also must contain a requirement that FCMs obtain an acknowledgment from any clearing organization that the fund's assets are held on behalf of the FCM's customers according to CEA provisions.

Because rule 17f–6 does not impose any ongoing obligations on funds or

FCMs, Commission staff estimates there are no costs related to *existing* contracts between funds and FCMs. This estimate does not include the time required by an FCM to comply with the rule's contract requirements because, to the extent that complying with the contract provisions could be considered ''collections of information,'' the burden hours for compliance are already included in other PRA submissions.[1] Commission staff estimates that approximately 1,302 series of 155 funds report that futures commission merchants and commodity clearing organizations provide custodial services to the fund.[2]

Commission staff, however, estimates that any burden of the rule would be borne by funds and FCMs entering into *new* contracts pursuant to the rule as set forth in Table 1 below:

TABLE 1—BURDEN OF INFORMATION COLLECTION FOR COMPLYING WITH RULE 17f–6

	Estimated responses	Estimated hours burden	Estimated cost burdens
New contracts with FCMs annually	130 series 15 funds [1]	130 series × 0.1 hours = 13 hours 15 funds × 1 hour = 15 hours 13 hours + 15 hours = 28 hours [3]	13 hours × $425 (attorney) [4] = $5,525 15 hours × $425 (attorney) [4] = $6,375 $5,525 + $6,375 = $11,900
Totals	130 series and 15 funds annually [2].	28 hours annually	$11,900 annually

[1] These estimates are based on the assumption that 10% of series and funds that currently effect commodities transactions enter into new FCM contracts each year. This assumption encompasses series and fund that enter into FCM contracts for the first time, as well as fund complexes and fund that change the FCM with whom they maintain margin accounts for commodities transactions.

[2] Commission staff estimates that approximately155 funds, representing 1,302 separate fund series, currently effect commodities transactions and could deposit margin with FCMs in connection with those transactions pursuant to rule 17f–6. Staff further estimates that of this number, 15 funds and 130 series enter into new contracts with FCMs each year.

[3] Based on conversations with fund representatives, Commission staff understands that funds typically enter into contracts with FCMs on behalf of series that engage in commodities transactions. Series covered by the contract are typically listed in an attachment, which may be amended to encompass new series. Commission staff estimates that the burden for a fund to enter into a contract with an FCM that contains the contract requirements of rule 17f–6 is one hour, and further estimates that the burden to add a series to an existing contract between a fund and an FCM is 6 minutes.

[4] The $425 per hour figure for an attorney is from SIFMA's *Management & Professional Earnings in the Securities Industry 2013,* updated for 2021 modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

These estimates are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Compliance with the collection of information requirements of the rule is necessary to obtain the benefit of relying on the rule. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days after this publication.

Please direct your written comments to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, C/O Cynthia Roscoe, 100 F Street NE, Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: October 15, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22899 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–348, OMB Control No. 3235–0394]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 15g–5

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 15g–5—Disclosure of Compensation of Associated Persons in Connection with Penny Stock Transactions—(17 CFR 240.15g–5) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 15g–5 requires brokers and dealers to disclose to customers the amount of compensation to be received by their sales agents in connection with penny stock transactions. The purpose of the rule is to increase the level of disclosure to investors concerning penny stocks generally and specific penny stock transactions.

[1] The rule requires a contract with the FCM to contain two provisions requiring the FCM to comply with existing requirements under the CEA and rules adopted thereunder. Thus, to the extent these provisions could be considered collections of information, the hours required for compliance would be included in the collection of information burden hours submitted by the CFTC for its rules.

[2] This estimate is based on the number of funds that reported on Form N–CEN from July 31, 2020–July 31, 2021, in response to sub-items C.12.6. and D.14.6. Money market funds are excluded from this estimate because they are not eligible securities.

The Commission estimates that approximately 178 broker-dealers will spend an average of approximately 87 hours annually to comply with the rule. Thus, the total time burden is approximately 15,486 burden-hours per year.

Rule 15g–5 contains record retention requirements. Compliance with the rule is mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 15, 2021

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22900 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93355; File No. SR–FINRA–2021–026]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Program Related to FINRA Rule 11892 (Clearly Erroneous Transactions in Exchange-Listed Securities)

October 15, 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 October 5, 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 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 current pilot program related to FINRA Rule 11892 (Clearly Erroneous Transactions in Exchange-Listed Securities) (''Clearly Erroneous Transaction Pilot'' or ''Pilot'') until April 20, 2022.

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

FINRA is proposing a rule change to extend the current pilot program related to FINRA Rule 11892 governing clearly erroneous transactions in exchange-listed securities until the close of business on April 20, 2022. Extending the Pilot would provide FINRA and the national securities exchanges additional time to consider a permanent proposal for clearly erroneous transaction reviews.

On September 10, 2010, the Commission approved, on a pilot basis, changes to FINRA Rule 11892 that, among other things: (i) Provided for uniform treatment of clearly erroneous transaction reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of FINRA to deviate from the objective standards set forth in the rule.[4] In 2013, FINRA adopted a provision designed to address the operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS (''Plan'').[5] Finally, in 2014, FINRA adopted two additional provisions addressing (i) erroneous transactions that occur over one or more trading days that were based on the same fundamentally incorrect or grossly misinterpreted information resulting in a severe valuation error; and (ii) a disruption or malfunction in the operation of the facilities of a self-regulatory organization or responsible single plan processor in connection with the transmittal or receipt of a trading halt.[6]

On April 9, 2019, FINRA filed a proposed rule change to untie the effectiveness of the Clearly Erroneous Transaction Pilot from the effectiveness of the Plan, and to extend the Pilot's effectiveness to the close of business on October 18, 2019.[7] On October 10, 2019, FINRA filed a proposed rule change to extend the Pilot's effectiveness until April 20, 2020.[8] On March 18, 2020, FINRA filed a proposed rule change to extend the pilot's effectiveness until October 20, 2020.[9] On October 16, 2020, FINRA filed a proposed rule change to extend the Pilot's effectiveness until April 20, 2021.[10] On March 15, 2021, FINRA filed a proposed rule change to extend the Pilot's effectiveness until October 20, 2021.[11] FINRA now is proposing to further extend the Pilot until April 20, 2022, so that market

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 62885 (September 10, 2010), 75 FR 56641 (September 16, 2010) (Order Approving File No. SR–FINRA–2010–032).

[5] *See* Securities Exchange Act Release No. 68808 (February 1, 2013), 78 FR 9083 (February 7, 2013) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2013–012).

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (Order Approving File No. SR–FINRA–2014–021).

[7] *See* Securities Exchange Act Release No. 85612 (April 11, 2019), 84 FR 16107 (April 17, 2019) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2019–011).

[8] *See* Securities Exchange Act Release No. 87344 (October 18, 2019), 84 FR 57076 (October 24, 2019) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2019–025).

[9] *See* Securities Exchange Act Release No. 88495 (March 27, 2020), 85 FR 18608 (April 2, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–008).

[10] *See* Securities Exchange Act Release No. 90219 (October 19, 2020), 85 FR 67574 (October 23, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–036).

[11] *See* Securities Exchange Act Release No. 91373 (March 19, 2021), 86 FR 16003 (March 25, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2021–004).

participants can continue to benefit from the more objective clearly erroneous transaction standards under the Pilot.[12] Extending the Pilot also would provide more time to permit FINRA and the other self-regulatory organizations to consider what changes, if any, to the clearly erroneous transaction rules are appropriate.[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 promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning the review of transactions as clearly erroneous. FINRA believes that extending the Pilot under FINRA Rule 11892, until April 20, 2022, would help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, FINRA believes the Clearly Erroneous Transaction Pilot should continue to be in effect while FINRA and the national securities exchanges consider a permanent proposal for clearly erroneous transaction reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous transaction rules across the U.S. equities markets while FINRA and the national securities exchanges consider further amendments to these rules. FINRA understands that the national securities exchanges also will file similar proposals to extend their clearly erroneous execution pilot programs, as applicable. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

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)(iii) of the Act[15] and subparagraph (f)(6) of Rule 19b–4 thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6)[17] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[18] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. FINRA has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while FINRA and the national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[19]

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–FINRA–2021–026 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–2021–026. 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

[12] If the pilot period is not either extended or approved as permanent, the version of Rule 11892 prior to SR–FINRA–2010–032 shall be in effect, and the amendments set forth in SR–FINRA–2014–021 and the provisions of Supplementary Material .03 of the rule shall be null and void.

[13] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (Order Approving the Eighteenth Amendment to the National Market System Plan to Address Extraordinary Market Volatility).

[14] 15 U.S.C. 78*o*–3(b)(6).

[15] 15 U.S.C. 78s(b)(3)(A)(iii).

[16] 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.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–2021–026 and should be submitted on or before November 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–22930 Filed 10–20–21; 8:45 am]

BILLING CODE 8011–01–P

[20] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Request for Comments on Small Business Administration Draft FY 2022–2026 Strategic Plan Framework and Enterprise Learning Agenda

AGENCY: Small Business Administration (SBA).

ACTION: Notice and request for comment.

SUMMARY: The Small Business Administration (SBA) is requesting comments on its draft *Strategic Plan Framework and Enterprise Learning Agenda (ELA)* for fiscal years 2022–2026. The draft plan framework and ELA are available on SBA's website at *https://www.sba.gov/sp.*

DATES: Comments must be received on or before Friday, November 19, 2021.

ADDRESSES: You may submit comments by the following methods (Please send comments by one method only):

Email: Address to *FY22-26StrategicPlan Feedback@SBA.gov.* Include ''Comments on SBA FY 2022–2026 Strategic Plan'' in the email subject line.

Mail: Due to the ongoing COVID–19 pandemic, mailed comments cannot be accepted at this time.

Hand/Delivery/Courier: Same as Mail above.

FOR FURTHER INFORMATION CONTACT: Kathleen Graber, Lead Performance Analyst, Small Business Administration by email: *FY22-26StrategicPlanFeedback@SBA.gov.*

SUPPLEMENTARY INFORMATION: The draft Small Business Administration *FY 2022–2026 Strategic Plan Framework and ELA* are provided for public input as part of the strategic planning process under the Government Performance and Results Modernization Act of 2010 (GPRA–MA) (Pub. L. 111–352) and Foundations for Evidence-Based Policymaking Act of 2018 (the ''Evidence Act'') (Pub. L. 115–435) to ensure that the public and stakeholders are provided an opportunity to comment. This Strategic Plan provides a framework that will support greater equity, customer service and technology modernization of SBA's programs while leveraging partnerships across the government and private sector to maximize the tools small business owners and entrepreneurs need to strengthen our economy, drive American innovation, and increase global competitiveness. The ELA sets a learning agenda to identify top priority evidence-building activities, such as program evaluation, research, and policy analysis.

The SBA proposes three strategic goals for the next five years: (1) Ensure Equitable and Customer-Centric Design and Delivery of Programs to Support Small Businesses and Innovative Start-ups; (2) Build Resilient Businesses and a Sustainable Economy; and (3) Implement Strong Stewardship of Resources for Greater Impact.

The draft SBA *FY 2022–2026 Strategic Plan Framework and ELA* are available through the SBA's website at *https://www.sba.gov/sp.*

Dated: October 21, 2021.

Jason Bossie,

Acting Associate Administrator for Performance, Planning, and the Chief Financial Officer.

[FR Doc. 2021–23001 Filed 10–20–21; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[License No. 04/04–0352]

Ballast Point Ventures IV, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Ballast Point Ventures IV, L.P. 401 East Jackson Street, Suite 2300, Tampa, FL 33602, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). Ballast Point Ventures IV, L.P., is seeking a written exemption from SBA for a proposed financing to Symphonic Distribution Inc., 707 N Franklin Street, Suite 400, Tampa, FL 33602.

The financing is brought within the purview of § 107.730(a)(4) of the Regulations because Ballast Point Ventures IV, L.P. will provide financing where its Associate owns more than 10% equity ownership in the company, Symphonic Distribution Inc., and will have a portion of its obligation discharged, therefore this transaction is considered *Provide financing to an Associate of another Licensee to discharge an obligation of an Associate* requiring SBA's prior written exemption. Ballast Point Ventures IV, L.P. has not made its investment in Symphonic Distribution Inc., and is seeking pre-financing SBA approval.

Notice is hereby given that any interested person may submit written comments on this transaction within fifteen days of the date of this publication to the Associate Administrator, Office of Investment and Innovation, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.

Small Business Administration.

Bailey DeVries,

Associate Administrator, Office of Investment and Innovation.

[FR Doc. 2021–22960 Filed 10–20–21; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17217 and #17218; PENNSYLVANIA Disaster Number PA–00116]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the Commonwealth of Pennsylvania

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the Commonwealth of Pennsylvania (FEMA–4618–DR), dated 10/08/2021.

Incident: Remnants of Hurricane Ida.

Incident Period: 08/31/2021 through 09/05/2021.

DATES: Issued on 10/14/2021.

Physical Loan Application Deadline Date: 12/07/2021.

Economic Injury (EIDL) Loan Application Deadline Date: 07/08/2022.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the Commonwealth of Pennsylvania, dated 10/08/2021, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Bedford, Fulton, Huntingdon, Luzerne, Philadelphia, Schuylkill, York.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2021–22969 Filed 10–20–21; 8:45 am]

BILLING CODE 8026–03–P

SUSQUEHANNA RIVER BASIN COMMISSION

Grandfathering (GF) Registration Notice

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists Grandfathering Registration for projects by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: September 1–30, 2021.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries May be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists GF Registration for projects, described below, pursuant to 18 CFR 806, Subpart E for the time period specified above:

Grandfathering Registration Under 18 CFR Part 806, Subpart E

1. City of Corning—Public Water Supply System, GF Certificate No. GF–202109183, City of Corning, Steuben County, N.Y.; Wells 1, 2, 3, and 9; Issue Date: September 3, 2021.
2. Pennsylvania—American Water Company—White Deer District, GF Certificate No. GF 202109184, White Deer and Buffalo Townships, Union County, Pa.; White Deer Creek and Spruce Run; Issue Date: September 3, 2021.
3. Valley Proteins, Inc.—Terre Hill Facility, GF Certificate No. GF–202109185, East Earl Township, Lancaster County, Pa.; Wells 1 and 2 and consumptive use; Issue Date: September 3, 2021.
4. Knouse Foods Cooperative, Inc.—Gardners Plant, GF Certificate No. GF–202109186, Tyrone Township, Adams County, Pa.; Wells 3, 5, 6, 8, and 10; Issue Date: September 17, 2021.
5. The Pennsylvania State University—Blue and White Golf Courses and Public Water Supply System, GF Certificate No. GF–202109187, Ferguson Township and State College Borough, Centre County, Pa.; Well UN–28A; Issue Date: September 30, 2021.

Dated: October 18, 2021.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2021–22973 Filed 10–20–21; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Public Hearing

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice; correction.

SUMMARY: The Susquehanna River Basin Commission published a notice in the **Federal Register** of October 14, 2021 concerning projects to be presented for comment at a public hearing. A project was omitted from the document. The following project should replace the project currently listed under the heading of *Commission-Initiated Project Approval Modifications.*

DATES: The public hearing will convene on November 4, 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 earlier. The deadline for the submission of written comments is November 15, 2021.

ADDRESSES: This hearing will be held by telephone conference rather than at a physical location. Conference Call #1–877–668–4493 (Toll-Free number)/ Access code: 177 163 3585.

FOR FURTHER INFORMATION CONTACT: Jason Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423 or *joyler@srbc.net.*

Information concerning the applications for the 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.*

Correction

Commission-Initiated Project Approval Modification

1. Project Sponsor and Facility: Elkview Country Club, Greenfield and Fell Townships, Lackawanna County, PA. Conforming the grandfathering amount with the forthcoming determination for a surface water withdrawal up to 0.144 mgd (30-day average) from Crystal Lake (Docket No. 20021002).

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 November 15, 2021, to be considered.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: October 18, 2021.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2021–22976 Filed 10–20–21; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the projects approved by rule by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: September 1–30, 2021.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries May be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22(e) and 18 CFR 806.22(f) for the time period specified above:

Water Source Approval—Issued Under 18 CFR 806.22(f)

1. Chesapeake Appalachia, L.L.C; Pad ID: Jag; ABR–201109002.R2; Franklin Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: September 20, 2021.

2. Chesapeake Appalachia, L.L.C; Pad ID: LKM; ABR–201109014.R2; Litchfield Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: September 20, 2021.

3. Chesapeake Appalachia, L.L.C; Pad ID: McGroarty; ABR–201109012.R2; Albany Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: September 20, 2021.

4. SWN Production Company, LLC; Pad ID: Bernstein Pad; ABR–201107052.R2; Clifford Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: September 20, 2021.

5. EXCO Resources (PA) LLC; Pad ID: Cadwalader Pad; ABR–201103039.R2; Cogan House Township, Lycoming County, Pa.; Consumptive Use of Up to 8.0000 mgd; Approval Date: September 23, 2021.

6. EXCO Resources (PA) LLC; Pad ID: Arthur Pad; ABR–201103018.R2; Franklin Township, Lycoming County, Pa.; Consumptive Use of Up to 8.0000 mgd; Approval Date: September 23, 2021.

7. XTO Energy, Inc.; Pad ID: PA Tract Unit G; ABR–201109018.R2; Chapman Township, Clinton County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: September 23, 2021.

8. Repsol Oil & Gas (USA), LLC; Pad ID: CAMP COMFORT (07 185); ABR–201106025.R2; Middletown Township, Susquehanna County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: September 23, 2021.

9. Repsol Oil & Gas (USA), LLC; Pad ID: COOLEY (05 004) P; ABR–201007099.R2; Orwell Township, Bradford County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: September 23, 2021.

10. Repsol Oil & Gas (USA), LLC; Pad ID: WALTERS (05 001) J; ABR–201007096.R2; Herrick Township, Bradford County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: September 23, 2021.

11. Rockdale Marcellus, LLC; Pad ID: Sawyer 376; ABR–201007061.R2; Union Township, Tioga County; Pa.; Consumptive Use of Up to 4.9900 mgd; Approval Date: September 23, 2021.

12. ARD Operating, LLC; Pad ID: COP Tr 289 Pad D; ABR–201008030.R2; McHenry Township, Tioga County; Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: September 23, 2021.

13. Chief Oil & Gas, LLC; Pad ID: BAUMUNK NORTH UNIT PAD; ABR–202109001; Fox Township, Sullivan County, Pa.; Consumptive Use of Up to 2.5000 mgd; Approval Date: September 23, 2021.

14. Chief Oil & Gas, LLC; Pad ID: Yonkin Drilling Pad #1 ABR–201109020.R2; Cherry Township, Sullivan County, Pa.; Consumptive Use of Up to 2.0000 mgd; Approval Date: September 26, 2021.

15. SWN Production Company, LLC; Pad ID: Cramer Pad; ABR–201108007.R2; New Milford Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: September 26, 2021.

16. SWN Production Company, LLC; Pad ID: Folger Pad; ABR–201108022.R2; New Milford Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: September 26, 2021.

17. ARD Operating, LLC; Pad ID: Elbow Pad A; ABR–201008055.R2; Cogan House Township, Lycoming County; Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: September 26, 2021.

18. ARD Operating, LLC; Pad ID: COP Tract 356 Pad G; ABR–201108017.R2; Cummings Township, Lycoming County; Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: September 26, 2021.

19. Rockdale Marcellus, LLC; Pad ID: Foti 721; ABR–201007118.R2; McNett Township, Lycoming County; Pa.; Consumptive Use of Up to 4.9900 mgd; Approval Date: September 26, 2021.

20. ARD Operating, LLC; Pad ID: COP Tr 285 Pad H; ABR–201008018.R2; Chapman Township, Clinton County; Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: September 26, 2021.

21. Chief Oil & Gas, LLC; Pad ID: Kerr B Drilling Pad #1 ABR–201109031.R2; Lathrop Township, Sullivan County, Pa.; Consumptive Use of Up to 2.0000 mgd; Approval Date: September 28, 2021.

22. Repsol Oil & Gas (USA), LLC; Pad ID: BENNETT (05 164) R; ABR–201107049.R2; Pike Township, Susquehanna County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: September 23, 2021.

23. Rockdale Marcellus, LLC; Pad ID: Taylor 718; ABR–201007016.R2; Liberty Township, Tioga County; Pa.; Consumptive Use of Up to 4.9900 mgd; Approval Date: September 28, 2021.

24. BKV Operating, LLC; Pad ID: Bush Pad; ABR–201109028.R2; Bridgewater and Forest Lake Townships, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: September 28, 2021.

25. Blackhill Energy LLC; Pad ID: REITER 1H Pad; ABR–201008048.R2; Ridgebury Township, Bradford County, Pa.; Consumptive Use of Up to 4.9900 mgd; Approval Date: September 28, 2021.

26. SWN Production Company, LLC; Pad ID: Clark Pad; ABR–201107043.R2; Herrick and Orwell Townships, Bradford County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: September 28, 2021.

27. Chesapeake Appalachia, L.L.C; Pad ID: Circle H; ABR–201109033.R2; Wilmot Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: September 30, 2021.

28. Chesapeake Appalachia, L.L.C; Pad ID: Smurkoski; ABR–201109032.R2; Meshoppen Township, Wyoming County, Pa.; Consumptive Use of Up to

7.5000 mgd; Approval Date: September 30, 2021.

29. Chesapeake Appalachia, L.L.C; Pad ID: Stone; ABR–201109035.R2; Tuscarora Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: September 30, 2021.

30. Seneca Resources Company, LLC; Pad ID: C09–Q; ABR–202109002; Shippen Township, Cameron County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: September 30, 2021.

31. Seneca Resources Company, LLC; Pad ID: DCNR Tract 595 Pad F; ABR–201008044.R2; Bloss Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: September 30, 2021.

32. Blackhill Energy LLC; Pad ID: STAHL 1H; ABR–201107021.R2; Chapman Township, Clinton County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: September 30, 2021.

33. Repsol Oil & Gas USA, LLC; Pad ID: NOBLE (03 029) S; ABR–201007011.R2; Wells Township, Bradford County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: September 30, 2021.

34. Repsol Oil & Gas USA, LLC; Pad ID: THORP (03 049) D; ABR–201007082.R2; Wells Township, Bradford County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: September 30, 2021.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: October 18, 2021.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2021–22978 Filed 10–20–21; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Advisory Committee: Notice of Public Meeting

AGENCY: Federal Aviation Administration, Department of Transportation.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a meeting of the Commercial Space Transportation Advisory Committee (COMSTAC).

DATES: The November 5, 2021 meeting will be held from 9:00 a.m. to 4:15 p.m.

Requests to attend the virtual meeting must be received by November 3, 2021.

Requests for accommodations to a disability must be received by November 3, 2021.

Requests to speak during the meeting must be submitted to the Department of Transportation (DOT) by November 2, 2021 and include a written copy of the speaker's remarks. Registrants in the Zoom meeting room will have the opportunity to interact directly with committee members.

Requests to submit written materials to be reviewed during the meeting must be received by DOT no later than November 2, 2021.

ADDRESSES: The meeting will be an internet-only meeting. No physical meeting is planned. Instructions on how to attend the meeting, copies of meeting minutes, and a detailed agenda will be posted on the COMSTAC website at: *https://www.faa.gov/space/additional_information/comstac/.*

FOR FURTHER INFORMATION CONTACT: James Hatt, Designated Federal Officer, U.S. Department of Transportation, at *james.a.hatt@faa.gov,* (202) 549–2325. Any committee-related request should be sent to the person listed in this section.

SUPPLEMENTARY INFORMATION:

I. Background

The Commercial Space Transportation Advisory Committee was created under the Federal Advisory Committee Act (FACA), in accordance with Public Law 92–463. Since its inception, COMSTAC has provided information, advice, and recommendations to DOT through FAA regarding technology, business, and policy issues relevant to oversight of the U.S. commercial space transportation sector.

II. Proposed Agenda

DOT/FAA Welcome Remarks
VIP Remarks
FAA Updates
Review of Tasks Assigned at Previous Meetings [1]/COMSTAC Final Recommendations
Public Comment
Future COMSTAC Business

III. Public Participation

The meeting listed in this notice will be open to the public. DOT is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

There will be at least thirty minutes allotted for oral comments from members of the public joining a COMSTAC meeting. To accommodate as many speakers as possible, the time for each commenter may be limited. Individuals wishing to reserve speaking time during the meeting must submit a request at the time of registration, as well as the name, address, and organizational affiliation of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the FAA Office of Commercial Space Transportation may conduct a lottery to determine which registrants will have the opportunity to speak. Speakers are requested to submit a written copy of their prepared remarks for inclusion in the meeting records and for circulation to COMSTAC members. All prepared remarks submitted on time will be accepted and considered as part of the record. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, this 18th day of October, 2021.

Dated: October 18, 2021.

James A. Hatt,

Designated Federal Officer, Commercial Space Transportation Advisory Committee, Federal Aviation Administration, Department of Transportation.

[FR Doc. 2021–22993 Filed 10–20–21; 8:45 am]

BILLING CODE 4910–9X–P

[1] Current COMSTAC Tasks can be found at: *https://www.faa.gov/space/additional_information/comstac/media/COMSTAC_March_2021_revised_Task_List_16_April.pdf.*

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2010–0028]

CSX Transportation's Request for Testing Approval on Its Certified Positive Train Control System

AGENCY: Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT).

ACTION: Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that on August 22, 2021, CSX Transportation (CSX) submitted its Test Request for Trip Optimizer Air Brake Control (TO Air Brake Control), Revision 1, dated August 22, 2021, to FRA. CSX asks FRA to approve its Test Request so that it may test its TO Air Brake Control on

track that has been equipped with positive train control (PTC).

DATES: FRA will consider comments received by December 20, 2021 before taking final action on the Test Request. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to a PTC system.

ADDRESSES: All comments concerning this proceeding should identify the agency name and Docket Number FRA–2010–0028, and may be submitted on *http://www.regulations.gov.* Follow the online instructions for submitting comments. For convenience, all active PTC dockets are hyperlinked on FRA's website at *https://railroads.dot.gov/train-control/ptc/ptc-annual-and-quarterly-reports.* All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information.

FOR FURTHER INFORMATION CONTACT: Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816–516–7168, email: *Gabe.Neal@dot.gov.*

SUPPLEMENTARY INFORMATION: On June 21, 2021, FRA certified CSX's Interoperable Electronic Train Management System (I–ETMS) PTC system per Title 49 Code of Federal Regulations (CFR) Section 236.1015. Pursuant to 49 CFR 236.1035, CSX must request FRA-approval of any regression testing of a certified PTC system that is conducted on the general rail system. *See* 49 CFR 236.1035(a). CSX's Test Request describes the level of testing of its TO Air Brake Control required to confirm that the air brake control feature design, implementation, and safety mitigations comply with the document requirements outlined in the I–ETMS Onboard Segment Requirements Specifications.

CSX's Test Request are available for review online at *www.regulations.gov* (Docket No. FRA–2010–0028). Interested parties are invited to comment on the Test Request by submitting written comments or data. During its review of the Test Request, FRA will consider any comments or data submitted. 49 CFR 236.1011(e). However, FRA may elect not to respond to any particular comment and, under 49 CFR 236.1009(d)(3), FRA maintains the authority to approve or disapprove the Test Request at its sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See *https://www.regulations.gov/privacy-notice* for the privacy notice of regulations.gov. To facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2021–22911 Filed 10–20–21; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2017–0039; Notice 2]

Ride the Ducks International, LLC, Denial of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of petition.

SUMMARY: Ride the Ducks International, LLC (RTDI), has determined that certain model year (MY) 1996–2014 RTDI Stretch Amphibious passenger vehicles (APVs) do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 113, *Hood Latch System,* and FMVSS No. 302, *Flammability of Interior Materials.* RTDI filed a noncompliance information report dated March 15, 2017. RTDI also petitioned NHTSA on April 12, 2017, for a decision that the subject noncompliances are inconsequential as they relate to motor vehicle safety. This document announces the denial of RTDI's petition.

FOR FURTHER INFORMATION CONTACT: Abraham Diaz at (202) 366–5310 regarding FMVSS No. 302, and Neil Dold at (202) 366–7352 regarding FMVSS No. 113; Office of Vehicle Safety Compliance, NHTSA, facsimile (202) 366–5930.

SUPPLEMENTARY INFORMATION:

I. Overview: RTDI has determined that certain MY 1996–2014 RTDI APVs do not fully comply with paragraph S4.2 of FMVSS No. 113, *Hood Latch System* (49 CFR 571.113), and paragraph S2 of FMVSS No. 302, *Flammability of Interior Materials* (49 CFR 571.302). RTDI filed a noncompliance information report dated March 15, 2017 pursuant to 49 CFR 573, *Defect and Noncompliance Responsibility and Reports.* RTDI also petitioned NHTSA on April 12, 2017, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, for an exemption from the notification and remedy requirements of 49 U.S.C. chapter 301 on the basis that these noncompliances are inconsequential as they relate to motor vehicle safety.

Notice of receipt of the petition was published in the **Federal Register** (82 FR 43452) with a 30-day public comment period, on September 15, 2017. No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2017–0039.''

II. Vehicles Involved: Approximately 105 MY 1996–2014 RTDI Stretch APVs, manufactured between January 1, 1996 and December 31, 2014 are potentially involved.

III. Noncompliances: RTDI explained that the noncompliances are that the subject vehicles were not equipped with a secondary hood latch system, as required by paragraph S4.2 of FMVSS No. 113, and that there are interior components and materials that do not conform to the burn rate requirements of paragraph S2 of FMVSS No. 302.

IV. Rule Requirements: Requirements from FMVSS No. 113 and 302 are relevant to this petition. Specifically, paragraph S4.2 of FMVSS No. 113 requires that a front opening hood which, in any open position, partially or completely obstructs a driver's forward view through the windshield must be provided with a second latch position on the hood latch system or with a second hood latch system. Paragraphs S2 and S4 of FMVSS No. 302 explain that the purpose of FMVSS No. 302 is to reduce the deaths and injuries to motor vehicle occupants caused by vehicle fires, especially those originating in the interior of the vehicle from sources such as matches or cigarettes. FMVSS No. 302 lists the components of vehicle occupant compartments that shall meet the burn rate requirements of the standard and specifies the maximum allowable burn rate of material under specified test conditions.

V. Summary of RTDI's Petition: RTDI states that it began to produce APVs in

1996 by performing extensive modifications to General Motors (GM) amphibious military trucks, which were originally designated with product code DUKW per GM's nomenclature.[1] The resulting ''Stretch'' APVs were refurbished by RTDI in accordance with state and U.S. Coast Guard rules and regulations. RTDI has not manufactured any vehicles since 2014.

RTDI described the subject noncompliances as the lack of a secondary hood latch system and the failure of certain materials in the passenger compartment to meet burn resistance requirements. RTDI stated its belief that the noncompliances are inconsequential as they relate to motor vehicle safety.

In support of its petition, RTDI submitted the following reasoning:

1. FMVSS No. 113 specifies, ''a front opening hood which, in any open position, partially or completely obstructs a driver's forward view through the windshield must be provided with a second latch position on the hood latch system or with a second hood latch system.'' 49 CFR 571.113, S4.2. The purpose of FMVSS No. 113 is to establish requirements for vehicle hood latch systems so that the hood remains secure while the vehicle is operated even if the primary latch fails or is not properly engaged. The absence of a secondary latch increases the possibility that the hood may open during vehicle operation and prevent the driver from seeing the road ahead.

2. The U.S. Coast Guard has adopted specific design and operational requirements for APVs.[2] Pursuant to U.S. Coast Guard regulations, while an APV is operating on water, the hood is to remain in an ''open'' position. *See* 46 CFR 182.460 (''a space containing machinery powered by, or fuel tanks for, gasoline must have a ventilation system that complies with this section''), 46 CFR 182.465 (''a space containing diesel machinery must be fitted with adequate means . . . to provide sufficient air for proper operation of main engines and auxiliary engines.''). This requirement is intended to permit a sufficient amount of air flow around the engine compartment, which reduces the potential for the engine to overheat and potentially cause a fire.[3] During waterborne operation, the hood of the APV is opened or elevated by approximately four inches. Although the hood of the APV is slightly raised, it has vertical arms which rest on manually operated drop latches. The hood does not pose a risk of opening unexpectedly during operation, even without a secondary hood latch system. The hoods of the APVs are substantially heavier than the hoods of traditional motor vehicles. As a practical matter, it is highly unlikely that the force of the wind against the vehicle could move the hood of the APV. In its more than 30 years of operation, RTDI has never received a report or allegation involving the opening of a vehicle's hood while operating either on the public roads or in the public waterways.

3. FMVSS No. 302 sets out the burn resistance requirements for materials used in certain parameters within the occupant compartments of vehicles. The stated purpose of FMVSS No. 302 is ''to reduce the deaths and injuries to motor vehicle occupants caused by vehicle fires, especially those originating in the interior of the vehicle from sources such as matches or cigarettes.'' 49 CFR 571.302, S2.

The fire risks that exist in traditional motor vehicles are not the same concerns that present themselves in the APVs. Mitigating the risks of a fire occurring on board an APV are centered around the operation and safeguarding of the engine compartment and passenger egress conditions.

The APVs also have installed a series of systems designed to protect passengers and allow for ease of egress from the occupant compartment in the event of a fire. The RTDI vehicles have an open-air design with multiple areas of passenger egress. Additionally, and per U.S. Coast Guard requirements, all of the vehicles have a fire suppression system installed throughout the vehicle. The fire suppression systems include vent closures, heat detection devices, vapor detection systems and fire extinguishing systems. In the event of a fire in the APV, the operator will activate the fire suppression system which releases the carbon dioxide fire extinguishing agent. The vehicles are also equipped with two portable fire extinguishers and all vehicle operators receive emergency evacuation training on no less than a quarterly basis, per U.S. Coast Guard requirements, and often more regularly.

4. By contrast, FMVSS No. 302 is primarily concerned with protecting passengers against vehicle fires that occur due to flames or sparks inside the vehicle. In addition to the safety features described above, the vehicles have implemented other measures that provide an equivalent measure of safety to vehicle occupants. Smoking is expressly prohibited in the APVs. Passengers are advised of this requirement prior to the start of the tour. Onboard each vehicle there is a ''narrator'' or second crew member present. The narrator sits rearward, facing into the occupant compartment and in continuous view of the passengers' activities at all times while the APV is in operation. The narrator is physically located so that he/she would be able to see and stop a passenger attempting to light a match, flame or smoke on board.

In recognizing that APVs have a unique design and may encounter specialized hazard conditions, the U.S. Coast Guard employs a ''systems approach'' to certification for APVs. To meet U.S. Coast Guard requirements, the APVs must have ''a level of safety equivalent to that required for a vessel of similar size and service.'' *See* Navigation and Vessel Inspection Circular (NVIC) No. 1–01. These requirements are met, ''in part through a combination of design requirements and operational restrictions'' and by considering ''the entire vehicle and its equipment as a complete safety system.'' *Id.* The RTDI APVs are certified to meet U.S. Coast Guard fire safety requirements for T-boats.

5. From its inception, the Safety Act has included a provision recognizing that some noncompliances may pose little or no actual safety risk. The Safety Act exempts manufacturers from their statutory obligation to provide notice and remedy upon a determination by NHTSA that a noncompliance is inconsequential to motor vehicle safety. *See* 49 U.S.C. 30118(d). In applying this recognition to particular fact situations, the agency considers whether the noncompliance gives rise to ''a significantly greater risk than . . . in a compliant vehicle.'' 69 FR 19897, 19900 (April 14, 2000). The design and construction of the APVs address the potential risks to passenger safety arising from fire-related concerns to these vehicles. The safety features present on the APVs provide a level of protection that is, at a minimum, equivalent to the vehicle safety standards so that granting the

[1] NHTSA notes that the ability of the DUKW to transport troops, supplies or equipment across both land and water made them indispensable in World War II and the Korean War. The modifications performed by RTDI, which included replacement of the original drivetrain and enlarging the hull or body, were such that the end product was a newly manufactured vehicle employing donor parts.

[2] Under the U.S. Coast Guard rubric, APVs are classified as ''T-Boats'' which are small passenger vessels weighing less than 100 gross tons.

[3] U.S. Coast Guard regulations also require that while operating in the water, the engine compartment can be fully closed. In the event of a fire in the engine compartment, the operator will deploy the hood latch, dropping the hood and closing off the compartment. This feature is designed to contain the fire by preventing the flow of oxygen around the engine.

company's petition would be appropriate.

RTDI concluded by expressing the belief that the subject noncompliances are inconsequential as they relate to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliances, as required by 49 U.S.C. 30118, and a remedy for the noncompliances, as required by 49 U.S.C. 30120, should be granted.

VI. Supplemental Information: On October 10, 2017, RTDI, per a request from NHTSA's Office of Chief Counsel, provided the following supplemental information:

Regarding FMVSS No. 113, RTDI asserted that:

1. From the driver's seat with the hood open in the normal operating position there is no obstruction to the driver's view. When in the ''open'' position, the hood is elevated at an angle of approximately 4.5 inches to 5 inches. The tip of the bow of the APV remains visible with the hood open or closed. There is no visual obstruction to the driver when the hood is in the ''open'' position.

2. The vehicle's engine requires the hood to remain partially open to provide sufficient air flow to the engine. The engine's air supply is forced through the forward opening of the engine hood. The radiator has a reverse fan which draws fresh air through the radiator to keep the engine cool.

3. The hood incorporates a stand which rests on a cam lever that is mechanically operated by a cable and handle located in the driver's compartment. To close the hood, the driver simply pulls a handle which rotates the cam and closes the hood. The driver would only need to close the hood in the event of a fire in the engine compartment to cut off the supply of oxygen.

4. The hood itself weighs approximately 139 pounds. Given the heavy weight of the hood and low operating speeds of the APVs (maximum 50 miles-per-hour (mph)), these features preclude the hood from unexpectedly opening due to air flow lifting the hood open and forcing it upward. The design of the engine hood has been in service for nearly 30 years, without incident. During testing, as much as 69.5 pounds of force was needed to lift the hood assembly. RTDI's consultant completed an analysis of the aerodynamic loading of the unlatched hood for the subject vehicles and reviewed the parameters for the force of air flow that potentially would cause an unlatched hood to open. This analysis was done by determining the applied aerodynamic forces due to lift and drag. The resulting moments about the hood hinge were then compared to the moments created by the weight of the hood. The overall goal was to determine the air speed (combined vehicle and headwind speed) necessary for the moments created by aerodynamic forces to exceed that of the moment created by weight.

The hood consists of a flat steel plate which is 49.5 inches long, 53.5 inches wide, and weighs approximately 139 lbs. Calculations for aerodynamic forces utilized flat plate assumptions with an aspect ratio of 1.08. Under the worst-case scenario, RTDI's consultant estimated that the hood angle of attack (AoA) will not exceed +5° during use; however, calculations were completed up to and including 10° in an excess of caution. All calculations utilized highly conservative assumptions and approximations.

Below is a bulleted summary of the RTDI consultant's findings:

- Under normal fully-loaded driving conditions, the hood sits at a zero or slightly negative AoA. Given these conditions, no lift can be generated on the flat plate. Thus, there is no critical speed sufficient to pivot the hood open.
- At the maximum projected AoA (5°), an air speed of at least 100 mph would be needed to generate sufficient aerodynamic forces to begin to open the hood.
- Even at 10° AoA, double that expected in normal use, a minimum air speed of 70 mph is necessary to potentially open the hood. This speed is still beyond the maximum combined (vehicle and headwind) air speed that would be seen by these vehicles in normal operation.

Regarding FMVSS No. 302, RTDI asserted that:

1. It had not certified each of the individual components and materials listed in FMVSS No. 302, S4.2 to the burn rate requirements of S4.3. However, all of the materials used in the occupant compartment of the APVs do follow the guidance provided by the U.S. Coast Guard in NVIC 1–01: Guidelines For The Certification Of DUKW Amphibious Vehicles. The NVIC recommends that:

Operators should consider highway requirements and land use when selecting the type of fire extinguishing system. Pre-engineered automatic systems may be required to shut down the engine when activated. This could pose a safety hazard if the DUKW is equipped with power steering and or brakes and the shutdown occurs in traffic.

The fire protection system, as well as other safety devices of the RTDI APVs, are designed to take into consideration the various hazards the vehicle may encounter in different operating zones (*i.e.,* system approach).

2. The risk of fire associated with APVs stems primarily from mechanical and electrical faults serving as mechanisms for ignition. The risk of fire above deck is mitigated through constant visual monitoring by the onboard crew of the passenger compartment, as well as enforcement of a ''No Smoking'' policy. To satisfy U.S. Coast Guard requirements for commercial operations on water, RTDI APVs are outfitted with a robust fire protection system not normally found on land based vehicles, including the presence of fire extinguishers on board each vehicle. In addition, the construction of the APVs takes into account the particular risks associated with a vehicle that operates both on road and in the water. For example, traditional automotive wire is not allowed. Instead, marine electrical wire is required to be used, which is specifically designed for harsh environments: it is flexible yet heavily coated, resistant to corrosion and less likely to chafe and cause fires.

Below is a list of U.S. Coast Guard fire protection standards which the RTDI APVs meet. Although these standards are promulgated by the U.S. Coast Guard, they are all aimed at fire prevention and mitigation and would prevent a fire from occurring on the road as well as in the water.

- 46 CFR 185.504 Emergency Instructions List Posted
- 46 CFR 176.810 (a) and (7)/181.450 Fire and Smoke Detection System
- 46 CFR 176.810/176.810 (b) and (1) Portable Fire Extinguishers
- 46 CFR 181.500 Date Cylinder Hydro Tested
- 46 CFR 181.520 Proper Location
- 46 CFR 176.810 (a) and (b) Fixed Fire Extinguishing System
- 46 CFR 181.400 Annual Service
- 46 CFR 182.465 (h) Engine Power/ Ventilation Shut Down
- 46 CFR 182.425 Exhaust Systems
- 46 CFR 176.804 Fuel System
- 46 CFR 182.460 Tank Space Properly Vented
- 46 CFR 182.450 (e) Fuel Tank Vent
- 46 CFR 182.15–35 Vent Opening
- 46 CFR 182.440 (b/4) Independent Fuel Tank Ground
- 46 CFR 182.455 (b/4) Shut Off Valve (Tank/Engine)
- 46 CFR 182.20–40 (b/5) Fuel Tank Hose
- 46 CFR 182.20.30 (d) Flexible Hoses (SAE J–1942)

- 46 CFR 182.470 Ventilation of Machinery Spaces
- 46 CFR 182.470/182.460 (e)
- 46 CFR 182.15–45 Closure Devices for Spaces w/Fixed CO_2
- 46 CFR 182.710/182.40–1 Vital Systems Piping
- 46 CFR 182.720/182.40 Non-Metallic Piping
- 46 CFR 183.310 Primary Power and Lighting System
- 46 CFR 183.376 Grounding
- 46 CFR 176.806/183.310/183.350/183.354 Batteries/Alternators
- 46 CFR 183.330/183.05–15/183.10–15 Switchboards and Distribution Panels
- 46 CFR 183.340/183.05–45/183.05–50/183.10–20 Cable/Wiring
- 46 CFR 176.810 (b) (2) Fixed CO_2 Certificate

3. The fire protection features satisfying the list of requirements cited above are also relevant to the prevention or suppression of fire during on road use of the APVs and all RTDI operators are trained in the use of these systems for both land and water operation. The design and construction of the APVs is consistent with the requirements set out above. Further, RTDI APV operators hold both commercial driver's licenses and U.S. Coast Guard certified vessel captain licenses. As the purpose of FMVSS No. 302 is to ''reduce deaths caused by vehicle fires, especially those originating in the interior of the vehicle from sources such as matches or cigarettes,'' the measures taken to mitigate against the outbreak of fires in the APVs per U.S. Coast Guard regulations also mitigate against the risk of fire contemplated by the FMVSS.

4. The APVs meet all U.S. Coast Guard requirements related to fire prevention and emergency response, which provides an equivalent level of protection from the risks contemplated by FMVSS No. 302.

5. In recall 17V–193, RTDI determined that the amphibious vehicles it manufactured between 1996 and 2014 do not meet the requirements of FMVSS No. 302. To view NTHSA's information request to RTDI and RTDI's full response including pictures and further vehicle information please refer to the docket.

VII. NHTSA's Analysis: The agency has reviewed RTDI's petition and provides the following analysis:

The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* in a standard—as opposed to a *labeling requirement*—is more substantial and difficult to meet. Accordingly, the agency has not found many such noncompliances inconsequential.[4] Potential performance failures of safety-critical equipment, like seat belts or air bags, are rarely deemed inconsequential.

An important issue to consider in determining inconsequentiality based upon NHTSA's prior decisions on noncompliance issues was the safety risk to individuals who experience the type of event against which the recall would otherwise protect.[5] NHTSA also does not consider the absence of complaints or injuries to show that the issue is inconsequential to safety. ''Most importantly, the absence of a complaint does not mean there have not been any safety issues, nor does it mean that there will not be safety issues in the future.'' [6] ''[T]he fact that in past reported cases good luck and swift reaction have prevented many serious injuries does not mean that good luck will continue to work.'' [7]

Arguments that only a small number of vehicles or items of motor vehicle equipment are affected have also not justified granting an inconsequentiality petition.[8] Similarly, NHTSA has rejected petitions based on the assertion that only a small percentage of vehicles or items of equipment are likely to actually exhibit a noncompliance. The percentage of potential occupants that could be adversely affected by a noncompliance does not determine the question of inconsequentiality. Rather, the issue to consider is the consequence to an occupant who is exposed to the consequence of that noncompliance.[9]

RTDI has not met its burden of demonstrating that the noncompliance with FMVSS No. 113 is inconsequential. In regards to FMVSS No. 113, RTDI says that as a practical matter, the hood on these vehicles is heavier than hoods on traditional vehicles and because of the weight it is highly unlikely that the force of the wind against the vehicle could move the hood. As the agency understands the hood design, the hood simply rests in the down position due to its weight and the effects of gravity. RTDI explained that ''the hood incorporates a stand which rests on a cam lever that is mechanically operated by a cable and handle located in the driver's compartment. To close the hood, the driver simply pulls a handle which rotates the cam and closes the hood.'' RTDI also explained that the hood on these vehicles must remain in an elevated open position at all times while operating (*i.e.,* while on public roads and on waterways) in order to provide the engine with sufficient air flow. The agency is concerned, regardless of hood position (*i.e.,* fully closed or normally elevated), that any irregularities in the roadway (*i.e.,* humps, bumps, debris or pot holes) could cause the hood to bounce up and down from its resting place. In its normal partially opened position, and with no hood latching system, there is an increased risk that the hood on these vehicles could inadvertently fly open when encountering the right combination of vehicle loading, road geometry, road debris, vehicle speed, and wind speed.

RTDI had a consultant conduct an aerodynamic loading analysis to look at the possibility of the hood lifting, due to vehicle and wind speeds, and hood angle of incline. The actual analysis was not provided to the agency, but a summary of the results was provided by RTDI. The analysis concluded that under ''normal fully-loaded driving conditions'' and a wind speed in the range of 70–100 mph, based on different hood elevation levels, the hood could begin to open. The agency is unable to

[4] *Cf. Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance,* 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

[5] *See Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance,* 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance,* 78 FR 46000 (July 30, 2013) (finding occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

[6] *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 21663, 21666 (Apr. 12, 2016).

[7] *United States* v. *Gen. Motors Corp.,* 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it ''results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future'').

[8] *See Mercedes-Benz, U.S.A., L.L.C.; Denial of Application for Decision of Inconsequential Noncompliance,* 66 FR 38342 (July 23, 2001) (rejecting argument that noncompliance was inconsequential because of the small number of vehicles affected); *Aston Martin Lagonda Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 41370 (June 24, 2016) (noting that situations involving individuals trapped in motor vehicles—while infrequent—are consequential to safety); *Morgan 3 Wheeler Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 21663, 21664 (Apr. 12, 2016) (rejecting argument that petition should be granted because the vehicle was produced in very low numbers and likely to be operated on a limited basis).

[9] *See Gen. Motors Corp.; Ruling on Petition for Determination of Inconsequential Noncompliance,* 69 FR 19897, 19900 (Apr. 14, 2004); *Cosco Inc.; Denial of Application for Decision of Inconsequential Noncompliance,* 64 FR 29408, 29409 (June 1, 1999).

fully assess whether the consultant's analysis supports RTDI's claims because the underlying data, calculations, and supporting assumptions were not provided to the agency in a manner sufficient to accept the consultant's analysis. Even if the agency were to accept the consultant's analysis, the agency would remain concerned about the safety risk. For example, a vehicle traveling at or near the 50 mph maximum speed that encounters a strong wind gust could foreseeably experience total wind speed at or above the wind speed range of 70–100 mph, causing the hood to open and obstructing the driver's view.

RTDI stated that in 30 years it has never received a report or allegation involving the opening of the hood while operating on the public roads or in public waterways. From a safety perspective, the agency believes that the absence of prior reports or allegations of the hood opening under operation is not sufficient justification to ensure it will not happen in the future.

RTDI also stated that the presence of a secondary hood latch system is unnecessary because operating these vehicles with the hood slightly elevated diminishes the potential for a fire to occur in these vehicles. FMVSS No. 302 and FMVSS No. 113 are separate safety standards addressing separate safety needs. FMVSS No. 302 specifies burn resistance requirements for materials used in the occupant compartments of motor vehicles and FMVSS No. 113 establishes the requirement for providing a hood latch system or hood latch systems to reduce the risk of the hood opening and obstructing the driver's view. Reducing the probability of a vehicle fire is not an appropriate justification for not meeting the safety requirements of FMVSS No. 113.

RTDI also has not met its burden of demonstrating that the noncompliance with FMVSS No. 302 is inconsequential to safety, particularly without having provided information on the burn rates of the materials in the occupant compartment. The purpose of FMVSS No. 302 is to establish a burn rate for materials to reduce severity and frequency of burn injuries, allow the driver time to stop the vehicle, and increase occupant evacuation time.

FMVSS No. 302 differs from U.S. Coast Guard standards in that FMVSS No. 302 has a burn rate requirement for interior materials while U.S. Coast Guard standards focus on containment of fires originating in the engine and fire suppression. In response to an inquiry by the agency, RTDI stated that each of the individual components and materials within the boundaries of the occupant compartment of the subject APVs has not been certified to the burn rate requirements of paragraph S4.3 of FMVSS No. 302; however, it meets the standards and follows the guidelines provided by the U.S. Coast Guard. RTDI stated that the APVs are equipped with fire suppression systems and that the operators of the subject APVs hold both commercial driver's licenses and U.S. Coast Guard certified vessel captain licenses and are trained to identify and suppress a fire, should one occur.

While U.S. Coast Guard regulations are intended to mitigate some of the same fire risks as FMVSS No. 302, there are other potential sources of fire that the U.S. Coast Guard regulations do not address. In addition to fires originating in the engine compartment, NHTSA is concerned about other sources of fire, such as a fire originating from a vehicle crash, that may occur when the vehicle is operating on a roadway. Having trained personnel on board the subject APVs does not necessarily mitigate the need for compliance with FMVSS No. 302. Without information on the actual burn rates of the materials used in the vehicles' occupant compartment, NHTSA cannot evaluate whether the factors cited by RTDI mitigate the noncompliance to the point that it is inconsequential to motor vehicle safety. For instance, if the materials used in the occupant compartment are highly flammable, trained personnel may not have sufficient time to use a fire extinguisher in the event of a fire, or activate the fire suppression systems.

Lastly, RTDI also stated that it has a strict ''No Smoking'' policy and that the operators and crew monitor the passengers accordingly. Having a ''No Smoking'' policy does not necessarily appropriately mitigate safety risk in the subject APVs. A ''No Smoking'' policy would not prevent fires from other sources, even assuming that such a policy is always followed. Further, NHTSA cannot rely on RTDI's policies as a means to mitigate safety risks because later operations/owners may not implement on the same policies.

VIII. NHTSA's Decision: In consideration of the foregoing, NHTSA finds that RTDI has not met its burden of persuasion that the noncompliances with FMVSS No. 113 and 302 in the subject vehicles are inconsequential to motor vehicle safety.

Accordingly, RTDI's petition is hereby denied and RTDI is consequently obligated to provide notification of, and a free remedy for, the noncompliances under 49 U.S.C. 30118 and 30120.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

Joseph Kolly,

Acting Associate Administrator for Enforcement.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2017–0035; Notice 2]

Ride the Ducks International, LLC, Denial of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of petition.

SUMMARY: Ride the Ducks International, LLC (RTDI), has determined that certain model year (MY) 1996–2014 Ride the Ducks International Stretch Amphibious passenger vehicles (APVs) do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 103, *Windshield Defrosting and Defogging Systems.* RTDI filed a noncompliance information report dated March 15, 2017. RTDI also petitioned NHTSA on April 12, 2017, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

ADDRESSES: Neil Dold, Office of Vehicle Safety Compliance, NHTSA, telephone: (202) 366–7352, facsimile (202) 366–5930.

SUPPLEMENTARY INFORMATION:

I. Overview

RTDI has determined that certain MY 1996–2014 Ride the Ducks International Stretch APVs do not fully comply with paragraph S4.1 of Federal Motor Vehicle Safety Standard (FMVSS) No. 103, *Windshield Defrosting and Defogging Systems* (49 CFR 571.103). RTDI filed a noncompliance information report dated March 15, 2017, pursuant to 49 CFR 573, *Defect and Noncompliance Responsibility and Reports.* RTDI also petitioned NHTSA on April 12, 2017, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, 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.

Notice of receipt of RTDI's petition was published in the **Federal Register**

(82 FR 38992) with a 30-day public comment period, on August 16, 2017. No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2017–0035.''

II. Vehicles Involved

Approximately 105 MY 1996–2014 RTDI Stretch APVs, manufactured between January 1, 1996 and December 31, 2014 are potentially involved.

III. Noncompliance

RTDI explained that the noncompliance is that the subject vehicles were manufactured without a windshield defrosting and defogging system, as required by paragraph S4.1 of FMVSS No. 103.

IV. Rule Requirements

Paragraph S4.1 of FMVSS No. 103 includes the requirements relevant to this petition. Each vehicle shall have a windshield defrosting and defogging system.

V. Summary of RTDI's Petition

As background, in 1996, RTDI began to produce APVs by performing extensive modifications to General Motors amphibious military trucks originally designated as DUKWs. The ability of the DUKW to transport troops, supplies or equipment across both land and water made them indispensable in World War II and the Korean War. The modifications performed by RTDI, which included replacement of the original drivetrain and enlarging the hull or body, were such that the end product was a newly manufactured vehicle employing donor parts. The original APVs are based on military vehicles that were capable of operation over both land and water. The resulting ''Stretch Duck'' APVs were manufactured by RTDI until 2005 when RTDI introduced its ''Truck Duck'' APVs. The Truck Duck APVs are based on military cargo vehicles. Both the Stretch Duck and Truck Ducks were manufactured in in accordance with state and U.S. Coast Guard rules and regulations. RTDI has not manufactured any vehicles since 2014.

RTDI described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, RTDI submitted the following reasoning:

1. FMVSS No. 103 specifies that ''[e]ach vehicle shall have a windshield defrosting and defogging system.'' 49 CFR 571.103, S4(a), S4.1. The purpose of FMVSS No. 103 is to establish minimum performance requirements for vehicle windshield defrosting and defogging systems in order to ensure that the vehicle operator is able to sufficiently see through the windshield.

The APVs have features that are designed to achieve the same purpose as the standard. The APVs' ''open-air'' design precludes fog from building up on the windshield. Fog buildup on the interior or exterior of a motor vehicle windshield occurs when water condenses on the windshield. For water to condense on a windshield, the air next to the windshield must be humid and the air's dew point—the temperature to which air must be cooled to become saturated with water vapor—must be higher than the windshield's temperature. In other words, humid and warm air must surround a cool windshield. Because of its open-air design, the APVs will not encounter any of the physical conditions that create fog buildup on the windshield. The APVs do not have solid glass windows in the passenger compartment and the rear of the vehicle is also open to the air. The side panels of the driver's compartment are open on both sides of the windshield and the center windshield can be pushed outward and opened when needed. Because of the APVs' design, the ambient air is able to continually circulate within the interior of the vehicle, creating no difference between the temperature or humidity of the air outside and inside the vehicle. In the unlikely event that fog did accumulate on the windshield, the APVs have windshield wipers to clear the surface and the vehicle operator can also push down the windshield for visibility.

2. Frost builds up on the windshield of a vehicle when the temperature of liquid or condensation on the windshield decreases to the freezing point of water, turning the condensation into frost. The APVs' lack of a defrosting system similarly does not present a safety concern. The APVs are only operated on a seasonal basis and not during the winter months in any location where the vehicles provide tours. The APVs, therefore, are not operated during or exposed to weather conditions that would expose the vehicles to frost or create the need to defrost the windshields. As above, the operator also has the ability to push down the center windshield or use the windshield wipers to increase visibility in the unlikely event of frost.

3. From its inception, the Safety Act has included a provision recognizing that some noncompliances may pose little or no actual safety risk. The Safety Act exempts manufacturers from their statutory obligation to provide notice and remedy upon a determination by NHTSA that a noncompliance is inconsequential to motor vehicle safety. *See* 49 U.S.C. 30118(d). In applying this recognition to particular fact situations, the agency considers whether the noncompliance gives rise to ''a significantly greater risk than . . . in a compliant vehicle.'' 69 FR 19897, 19900 (April 14, 2000). As described above, the specialized design of the APVs and the vehicles' pattern of use does not expose the vehicles to conditions that could create an increased safety risk when compared to a vehicle that has a windshield defrosting and defogging system installed.

RTDI concluded by expressing the belief 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.

VI. Supplemental Information

On October 10, 2017, RTDI, per a request from NHTSA's Office of Chief Counsel, provided the following supplemental information:

Regarding FMVSS No. 103, RTDI asserted that:

1. The subject vehicles are equipped with heaters but not air conditioning. There are two types of heating systems used, depending on the type of vehicle.

a. For ''Stretch Duck'' APVs, heaters are located at the base of the passenger compartment side walls, with one heater located on each side. The heaters run lengthwise, from the front to the back of the vehicle's interior compartment. The heaters are radiant type heaters that utilize coils that are plumbed into the engine's water coolant system. Small blowers are located at one end of each heater box that force the radiant heat towards the passenger seated next to the exhaust vents.

b. The ''Truck Duck'' APVs use heaters with a similar design (plumbed into the engine's coolant system), however, there are two smaller heaters with larger blowers. These heaters are located under the left and right centermost passenger seats.

2. Due to the excessive ventilation of the passenger space (even when curtains are down) when the heaters are operational, they are not capable of maintaining an increased ambient temperature within the passenger space. Frost and fog cannot build on the

surface of the vehicle windshield without a difference between the ambient temperature in the passenger compartment and the outside air.

3. The interior space of the vehicle is under constant ventilation due to the configuration of the engine's reverse radiator fan, the various canopy openings, and the passenger deck design. The APVs are considered an ''open boat'' design under the U.S. Coast Guard regulations. Per the regulations, the deck of an open boat must be capable of draining any accumulation of water directly to the bilge pumps which are located below the deck. *See* 46 CFR 178.440. Additionally, U.S. Coast Guard regulations require spaces containing machinery powered by fuel to have ventilation. *See* 46 CFR 182.460. To comply with this regulation, the engines reverse radiator fan continuously draws air through the vessel's deck and ventilation piping towards the radiator. The engine's radiator fan exhausts the air through the vehicle exterior side vents located adjacent to the driver station.

4. RTDI claimed that the design of the APVs and the vehicles' use pattern precludes the accumulation of frost and fog on the windshield. RTDI asserted that this is consistent with the on-road experience of the APVs. Generally, the vehicles do not operate during the cold weather. In the event that fog or frost did accumulate on the front windshield, the driver would be able to quickly and easily lower the windshield. RTDI has established operational safety guidelines for the use of the drivers open/close feature. RTDI's guidelines states that an operator should not open the windshield ''unless the visibility through the windshield becomes obstructed, the opening and closing of the front windshield should only take place when the vehicle is traveling at a slow rate of speed (*i.e.,* slow-moving traffic conditions) and/or when the vehicle comes to a complete stop.''

5. The vehicles are equipped with clear PVC soft side curtains that can be lowered and raised by the driver. The side curtains' operational controls are located on the driver's dash and are operated by using two momentary switches (one switch operates the left side curtain and the second switch operates the right side curtain). When the operator holds the switch down the curtains will lower and when the switch is held up the curtain will raise. The curtains have limit switches that automatically stop the curtains once they reach a height of not less than 32″. This height restriction is consistent with U.S. Coast Guard requirements for means of escape which provides the ''minimum clear opening must be not less than 32 inches.'' 46 CFR 116.500. As a safety precaution, RTDI installed red markers on the canopy uprights to provide the APV operator with a visual means to ensure the limit switches are properly set and have reached the 32'' placement. Additionally, the U.S. Coast Guard inspects and tests the curtain safety feature annually.

6. The curtains are generally lowered due to inclement weather conditions. It takes the driver less than 30 seconds to lower the curtains. The side curtains do not enclose the entire passenger's space; only the left and right sides of the passenger compartment are enclosed by the side curtains. In the event of an emergency, the driver can deploy the side curtains from the driver's station to allow for quick egress. Passengers are also able to lift and push curtains out in the event of an emergency.

VII. NHTSA's Analysis

NHTSA has considered RTDI's arguments and has determined that RTDI has not met its burden of demonstrating that the subject noncompliance is inconsequential. The Agency responds to RTDI's arguments below.

The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* in a standard—as opposed to a *labeling requirement*—is more substantial and difficult to meet. Accordingly, the Agency has not found many such noncompliances inconsequential.[1] Potential performance failures of safety-critical equipment, like seat belts or air bags, are rarely deemed inconsequential.

An important issue to consider in determining inconsequentiality based upon NHTSA's prior decisions on noncompliance issues was the safety risk to individuals who experience the type of event against which the recall would otherwise protect.[2] NHTSA also does not consider the absence of complaints or injuries to show that the issue is inconsequential to safety. ''Most importantly, the absence of a complaint does not mean there have not been any safety issues, nor does it mean that there will not be safety issues in the future.''[3] ''[T]he fact that in past reported cases good luck and swift reaction have prevented many serious injuries does not mean that good luck will continue to work.''[4]

Arguments that only a small number of vehicles or items of motor vehicle equipment are affected have also not justified granting an inconsequentiality petition.[5] Similarly, NHTSA has rejected petitions based on the assertion that only a small percentage of vehicles or items of equipment are likely to actually exhibit a noncompliance. The percentage of potential occupants that could be adversely affected by a noncompliance does not determine the question of inconsequentiality. Rather, the issue to consider is the consequence to an occupant who is exposed to the consequence of that noncompliance.[6]

For safe viewing through the front windshield, FMVSS No. 103 specifies requirements for windshield defrosting and defogging systems. These systems are critical for removing and preventing frost and ice from the windshield during cold weather seasons, or fog anytime the ambient temperature, humidity and dew point are at the required combination between the windshield and the air inside or outside of the vehicle.

RTDI stated that without a windshield defrosting and defogging system the features of the APVs are designed to achieve the same purpose as the

[1] *Cf. Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance,* 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

[2] *See Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance,* 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance,* 78 FR 46000 (July 30, 2013) (finding occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

[3] *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 21663, 21666 (Apr. 12, 2016).

[4] *United States* v. *Gen. Motors Corp.,* 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it ''results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future'').

[5] *See Mercedes-Benz, U.S.A., L.L.C.; Denial of Application for Decision of Inconsequential Noncompliance,* 66 FR 38342 (July 23, 2001) (rejecting argument that noncompliance was inconsequential because of the small number of vehicles affected); *Aston Martin Lagonda Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 41370 (June 24, 2016) (noting that situations involving individuals trapped in motor vehicles—while infrequent—are consequential to safety); *Morgan 3 Wheeler Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 21663, 21664 (Apr. 12, 2016) (rejecting argument that petition should be granted because the vehicle was produced in very low numbers and likely to be operated on a limited basis).

[6] *See Gen. Motors Corp.; Ruling on Petition for Determination of Inconsequential Noncompliance,* 69 FR 19897, 19900 (Apr. 14, 2004); *Cosco Inc.; Denial of Application for Decision of Inconsequential Noncompliance,* 64 FR 29408, 29409 (June 1, 1999).

requirements in FMVSS No. 103. RTDI explained that the APVs are ''open-air'' (*i.e.,* without side and rear glass windows) and because of this will never encounter any physical conditions that would produce fog buildup on the windshield. RTDI explained, that in the unlikely event that fog did accumulate on the windshield, the APVs have windshield wipers to clear the surface and that the vehicle operator can also manually lower the windshield for better visibility. RTDI mentioned that frost and ice should not be an issue because the APVs are only operated on a seasonal basis and not during winter months in any of the locations they operate.

In a separate inquiry to RTDI, the Agency learned that APVs are equipped with plastic side windows that can be deployed to partially enclose the vehicle's interior during periods of inclement weather and that these vehicles are not equipped with air conditioning systems but are designed with interior heating units.

The Agency does not agree with RTDI's judgment that the subject APVs, designed without a defogging or defrosting system, achieve the same purpose as FMVSS No. 103. During times of inclement weather when the side curtains are deployed and the front windshield is in the up position, the vehicle is not in a fully ''open-air'' configuration as suggested by RTDI. If fog were to develop on the windshield, and the vehicle is being driven on public roadways at posted speeds, the driver would not be able to safely lower the front windshield to address the problem, as explained by RTDI. Furthermore, RTDI mentioned that the APVs are only operated on a seasonal basis and not during winter months, however, the vehicles were designed with heating systems which would suggest they can be operated at times when the outside temperature is too cool for passenger comfort or when or frost conditions may occur. In all events, RTDI has not provided sufficient information for NHTSA to determine that the conditions underlying the regulatory requirement at issue will not occur during operation of the subject APVs.

NHTSA notes that FMVSS No. 103 was amended in 1985 to explicitly provide in § 4(b) that passenger cars, multipurpose passenger vehicles, trucks, and buses manufactured for sale in the non-continental United States may, at the option of the manufacturer, have a windshield defogging system which operates either by applying heat to the windshield or by dehumidifying the air inside the passenger compartment of the vehicle, in lieu of meeting the requirements specified by paragraph (a) of this section (50 FR 48772, Nov. 27, 1985). While this section of FMVSS No. 103 does not apply to the RTDI vehicles at issue, the reasons for this amendment are relevant to RTDI's proffered rationale that vehicles operated only in warmer months need not have a windshield defogging system. The 1985 amendment was promulgated in response to a petition filed by an entity located in the Virgin Islands alleging that windshields in that locale fog up very badly in damp weather, creating a serious safety hazard in vehicles which do not have defogging systems. The petitioner requested that manufacturers be required to install defogging systems in passenger cars sold in the Virgin Islands. NHTSA reviewed the climatic conditions of the Virgin Islands as well as other non-continental areas of the United States and determined that the petitioner's claim that climatic conditions conducive to frequent windshield fogging were accurate. In these climes, fogging occurs when a cool windshield contacts warm, moist air and the water vapor in the air condenses in the form of a liquid on the windshield. NHTSA further found these areas to be characterized by high temperatures and high humidity and windshield fogging would be especially likely to occur in the morning hours.

Given the operating regime of the RTDI vehicles, where high humidity is likely to be encountered along with higher temperatures, NHTSA is concerned, that under some combinations of interior and exterior environmental conditions (*i.e.,* air temperatures, humidity and dew point) fog could begin to build on the windshield. There are many factors, both inside and outside of the vehicle that can contribute to temperature, humidity and dew point variations, the root cause of fog. The human body gives off heat and is continually exhaling warm moist air which is a key contributor to the development of fog on internal motor vehicle windows. If an APV is fully loaded with passengers, the heater is activated because the temperature is cool outside, and the side windows and front windshield are closed, these conditions could be cause for a fog build-up on a windshield. This situation could be exasperated if a rainstorm quickly passed by the location where an APV was operating, which dropped the ambient temperature rapidly and added moisture to the surrounding environment.

VIII. NHTSA's Decision

In consideration of the foregoing, NHTSA finds that RTDI has not met its burden of persuasion that the subject FMVSS No. 103 noncompliance in the subject vehicles is inconsequential to motor vehicle safety. Accordingly, RTDI's petition is hereby denied and RTDI is consequently obligated to provide notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

Joseph Kolly,

Acting Associate Administrator for Enforcement.

[FR Doc. 2021–22972 Filed 10–20–21; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2017–0038; Notice 2]

Ride the Ducks International, LLC, Denial of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of petition.

SUMMARY: Ride the Ducks International, LLC (RTDI), has determined that certain model year (MY) 1996–2014 Ride the Ducks International Stretch Amphibious passenger vehicles (APVs) do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 104, *Windshield Wiping and Washing Systems.* RTDI filed a noncompliance information report dated March 15, 2017. RTDI also petitioned NHTSA on April 12, 2017, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

FOR FURTHER INFORMATION CONTACT: Neil Dold, Office of Vehicle Safety Compliance, NHTSA, telephone: (202) 366–7352, facsimile (202) 366–5930.

SUPPLEMENTARY INFORMATION:

I. *Overview:* RTDI has determined that certain MY 1996–2014 RTDI Stretch APVs do not fully comply with paragraph S4.2.2 of FMVSS No. 104, *Windshield Wiping and Washing Systems* (49 CFR 571.104). RTDI filed a noncompliance information report dated March 15, 2017, pursuant to 49 CFR 573, *Defect and Noncompliance Responsibility and Reports.* RTDI also petitioned NHTSA on April 12, 2017,

pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, 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.

Notice of receipt of RTDI's petition was published in the **Federal Register** (82 FR 38993) with a 30-day public comment period on August 16, 2017. No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at: *http://www.regulations.gov/*. Then follow the online search instructions to locate docket number ''NHTSA–2017–0038.''

II. *Vehicles Involved:* Approximately 105 MY 1996–2014 RTDI Stretch APVs, manufactured between January 1, 1996 and December 31, 2014 are potentially involved.

III. *Noncompliance:* RTDI explained that the noncompliance is that the subject vehicles were manufactured without a windshield washing system, as required by paragraph S4.2.2 of FMVSS No. 104.

IV. *Rule Requirements:* Paragraph S4.2.2 of FMVSS No. 104 includes the requirements relevant to this petition. Each multipurpose passenger vehicle, truck, and bus shall have a windshield washing system that meets the requirements of SAE Recommended Practice J942 (1965) (incorporated by reference, see § 571.5), except that the reference to ''the effective wipe pattern defined in SAE J903, paragraph 3.1.2'' in paragraph 3.1 of SAE Recommended Practice J942 (1965) shall be deleted and ''the pattern designed by the manufacturer for the windshield wiping system on the exterior surface of the windshield glazing'' shall be inserted in lieu thereof.

V. *Summary of RTDI's Petition:* As background, RTDI began to produce APVs in 1996 by performing extensive modifications to General Motors amphibious military trucks originally designated as DUKWs. The ability of the DUKW to transport troops, supplies or equipment across both land and water made them indispensable in World War II and the Korean War. The modifications performed by RTDI, which included replacement of the original drivetrain and enlarging the hull or body, were such that the end product was a newly manufactured vehicle employing donor parts. The resulting ''Stretch'' APVs were refurbished by RTDI in accordance with state and U.S. Coast Guard rules and regulations. RTDI has not manufactured any vehicles since 2014.

RTDI described the subject noncompliance as the absence of a compliant windshield washer system and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, RTDI submitted the following reasoning:

1. FMVSS No. 104 specifies, in relevant part, that ''each . . . [vehicle] shall have a windshield washing system that meets the requirements of SAE Recommended Practice J942 (1965).'' 49 CFR 571.104, S4(a), S4.2.2. This FMVSS is designed to ensure that when activated, the windshield washing system is capable of reaching a sufficient portion of the exterior surface of the windshield, as designed by the manufacturer. The standard establishes minimum performance requirements for the windshield wiping and washing systems so that the vehicle operator is able to sufficiently see through the windshield. The APVs have features installed that are designed to achieve the same purpose as the standard. If there is debris present on the windshield, the driver is able to engage the vehicle's windshield wipers to clear the windshield's exterior surface. Further, the windshield of the APVs have a unique design that allows the driver to fully lower and raise the windshield glass. In the event that the windshield wipers could not clear the surface of the windshield, the driver has the option of lowering the windshield. Under either option, the visibility of the operator would not be compromised.

2. In the water portion of the vehicles' tours, the APVs are required to have the windshield lowered during operation, per U.S. Coast Guard regulations. The Coast Guard has recognized that in the event of an accident on the water, a raised windshield could impede passenger egress. Consequently, the Coast Guard has issued guidance which provides that the windshields of APVs be ''designed to fold down with minimal force to allow egress.'' U.S. Coast Guard Navigation and Inspection Circular (NVIC) 1–01, inspection of Amphibious Passenger Carrying Vehicles, p. 24. Further, the APV's exteriors, including the windshields, are washed after each tour, removing any debris that may have accumulated during the last tour.

3. From its inception, the Safety Act has included a provision recognizing that some noncompliances may pose little or no actual safety risk. The Safety Act exempts manufacturers from their statutory obligation to provide notice and remedy upon a determination by NHTSA that a noncompliance is inconsequential to motor vehicle safety. *See* 49 U.S.C. 30118(d). In applying this recognition to particular fact situations, the Agency considers whether the noncompliance gives rise to ''a significantly greater risk than . . . in a compliant vehicle.'' 69 FR 19897, 19900 (April 14, 2000). As described above, the specialized design of the APVs and the vehicles' pattern of use does not expose the vehicles to conditions that could create an increased safety risk when compared to a vehicle that has a windshield washing system installed.

RTDI concluded by expressing the belief 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.

VI. *Supplemental Information:* On October 10, 2017, RTDI, per a request from NHTSA's Office of Chief Counsel, provided the following supplemental information: Regarding FMVSS No. 104, RTDI asserted that:

a. As per U.S. Coast Guard NVIC 1–01 ''Guidelines for the Certifications of Amphibious Vessels,'' for the purposes of emergency egress the windshields of APVs should be designed to fold down with minimum force. The RTDI vehicles' front windshields are hinged at the bottom and there is a mechanical lever linked to the windshield frame. To quickly and safely lower or open the windshield, the driver simply lifts upward or pulls downward on the mechanical lever. The action of lowering and raising the windshield takes little effort as there are gas springs incorporated into the hinge which minimizes the weight and force involved in operating the windshield. Testing revealed the highest peak measurement at 22.6 lbs. of force. RTDI drivers often open the windshield when the vehicle is stopped or in slow moving heavy traffic and at a low rate of speed to allow fresh air into the driver and passenger space. The U.S. Coast Guard inspects and tests the windshield opening feature annually.

b. RTDI has established operational safety guidelines for the use of the drivers open/close feature. RTDI's guidelines states that an operator should not open the windshield ''unless the visibility through the windshield becomes obstructed, the opening and closing of the front windshield should only take place when the vehicle is traveling at a slow rate of speed (*i.e.,* slow moving traffic conditions) and/or when the vehicle comes to a complete stop.''

VII. *NHTSA's Analysis:* NHTSA has considered RTDI's arguments and has determined that RTDI has not met its burden of demonstrating that the subject noncompliance is inconsequential. The Agency responds to RTDI's arguments below.

The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* in a standard—as opposed to a *labeling requirement*—is more substantial and difficult to meet. Accordingly, the Agency has not found many such noncompliances inconsequential.[1] Potential performance failures of safety-

[1] *Cf. Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance,* 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

critical equipment, like seat belts or air bags, are rarely deemed inconsequential.

An important issue to consider in determining inconsequentiality based upon NHTSA's prior decisions on noncompliance issues was the safety risk to individuals who experience the type of event against which the recall would otherwise protect.[2] NHTSA also does not consider the absence of complaints or injuries to show that the issue is inconsequential to safety. ''Most importantly, the absence of a complaint does not mean there have not been any safety issues, nor does it mean that there will not be safety issues in the future.'' [3] ''[T]he fact that in past reported cases good luck and swift reaction have prevented many serious injuries does not mean that good luck will continue to work.'' [4]

Arguments that only a small number of vehicles or items of motor vehicle equipment are affected have also not justified granting an inconsequentiality petition.[5] Similarly, NHTSA has rejected petitions based on the assertion that only a small percentage of vehicles or items of equipment are likely to actually exhibit a noncompliance. The percentage of potential occupants that could be adversely affected by a noncompliance does not determine the question of inconsequentiality. Rather, the issue to consider is the consequence to an occupant who is exposed to the consequence of that noncompliance.[6]

For safe viewing through the front windshield, FMVSS No. 104 requires both a windshield wiping system and a washing system. The Agency believes that both systems are critical, and at times must work together, to ensure a clear view through the windshield. The purpose of the washing system is to aid the wiping system in the event that dust, dirt, mud, or other obstructions occur and the wipers are not sufficient to quickly and properly clear the windshield.

RTDI stated that the features of the APVs achieve the same purpose as the standard without a windshield washing system. According to RTDI, if debris is present on the windshield the driver can engage the windshield wiping system to clear the windshield exterior surface. RTDI also explained that in the event the windshield wipers could not clear the surface of the windshield the driver has the option of lowering the windshield.

The Agency does not agree with RTDI's assessment that the subject APVs are designed to achieve the same purpose as the standard without a windshield washing system. The Agency understands that these vehicles can be operated on public roadways at speeds up to 50 miles per hour. It is not uncommon while traveling at posted speeds to encounter conditions where the windshield wipers and the washing system must be used together to maintain forward visibility through the windshield. One good example of such a condition occurs shortly after a rain shower has ended, the roads are still wet, and other vehicles operating on the roadway are throwing up water spray and road dirt that can accumulate on following vehicle windshields. In this situation, both the windshield wipers and windshield washing systems would be required for safe operations.

Furthermore, in a follow-up response to a request from the Agency, RTDI informed the Agency that its safety guidelines only permit the driver to open and close the windshield should visibility become obstructed, and only when the vehicle is traveling at a slow rate of speed or is stopped. Thus, if the vehicle is moving at higher speeds under conditions as mentioned above, the Agency believes it would present a safety concern to lower the windshield.

VIII. *NHTSA's Decision:* In consideration of the foregoing, NHTSA finds that RTDI has not met its burden of persuasion that the subject FMVSS No. 104 noncompliance in the subject vehicles is inconsequential to motor vehicle safety. Accordingly, RTDI's petition is hereby denied and RTDI is consequently obligated to provide notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

Joseph Kolly,

Acting Associate Administrator for Enforcement.

[FR Doc. 2021–22974 Filed 10–20–21; 8:45 am]

BILLING CODE 4910–59–P

[2] *See Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance,* 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance,* 78 FR 46000 (July 30, 2013) (finding occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

[3] *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 21663, 21666 (Apr. 12, 2016).

[4] *United States* v. *Gen. Motors Corp.,* 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it ''results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future'').

[5] *See Mercedes-Benz, U.S.A., L.L.C.; Denial of Application for Decision of Inconsequential Noncompliance,* 66 FR 38342 (July 23, 2001) (rejecting argument that noncompliance was inconsequential because of the small number of vehicles affected); *Aston Martin Lagonda Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 41370 (June 24, 2016) (noting that situations involving individuals trapped in motor vehicles—while infrequent—are consequential to safety); *Morgan 3 Wheeler Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance,* 81 FR 21663, 21664 (Apr. 12, 2016) (rejecting argument that petition should be granted because the vehicle was produced in very low numbers and likely to be operated on a limited basis).

[6] *See Gen. Motors Corp.; Ruling on Petition for Determination of Inconsequential Noncompliance,* 69 FR 19897, 19900 (Apr. 14, 2004); *Cosco Inc.; Denial of Application for Decision of Inconsequential Noncompliance,* 64 FR 29408, 29409 (June 1, 1999).

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2021–0086]

Pipeline Safety: Pipeline Transportation; Hydrogen and Emerging Fuels Research and Development (R&D) Public Meeting and Forum

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of virtual public meeting and forum.

SUMMARY: This notice announces a virtual public meeting and forum titled: ''Pipeline Transportation and Emerging Fuels R&D Public Meeting and Forum.'' The public meeting and forum will serve as an opportunity for pipeline stakeholders to discuss research gaps and challenges in pipeline safety and emerging fuels, including hydrogen transportation. Furthermore, it will also serve as a venue for PHMSA, public interest groups, industry, academia, intergovernmental partners, and the public to collaborate on PHMSA's future R&D agenda.

DATES: The Pipeline Transportation and Emerging Fuels R&D Public Meeting and Forum will be held November 30, 2021, through December 2, 2021. Members of the public who wish to attend the public meeting and forum must register between October 15, 2021, and November 15, 2021. Individuals requiring accommodations, such as sign language interpretation or other aids, are asked to notify PHMSA no later than November 1, 2021. Individuals will have an opportunity on a first come first

serve basis to sign up to participate in specific workgroups between October 15, 2021, and November 15, 2021.

ADDRESSES: This public meeting and forum will be held virtually. The agenda and instructions on how to attend virtually will be published once they are finalized on the following public meeting registration page at: *https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=153.* Presentations will be available on the meeting website and on the E-gov website, *https://regulations.gov,* at docket number PHMSA–2021–0086, no later than 30 days following the meeting. You may submit comments, identified by Docket No. PHMSA–2021–0086, by any of the following methods:

- *E-Gov Web: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the online instructions for submitting comments.
- *Mail:* Docket Management System: U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* DOT Docket Management System: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.
- *Instructions:* Identify the Docket No. PHMSA–2021–0086, at the beginning of your comments. If you submit your comments by mail, please submit two copies. If you wish to receive confirmation that PHMSA received your comments, you must include a self-addressed stamped postcard. Internet users may submit comments at: *http://www.regulations.gov.*
- *Note:* All comments received are posted without edits to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.
- *Confidential Business Information:* 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 (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments in response to this notice 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 notice, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 Code of Federal Regulations (CFR) 190.343, you may ask PHMSA to provide confidential treatment to information you give to the agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ''Confidential;'' (2) send PHMSA a copy of the original document with the CBI deleted along with the original, unaltered document; and (3) explain why the information you are submitting is CBI. Submissions containing CBI should be sent to Nathan Schoenkin, 1200 New Jersey Avenue SE, DOT: PHMSA—PHP–80, Washington, DC 20590–0001. Any commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket.
- *Privacy Act:* DOT may solicit comments from the public regarding certain general notices. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*
- *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. Alternatively, you may review the documents in person at the street address listed above.

FOR FURTHER INFORMATION CONTACT: Nathan Schoenkin by phone at 202–740–1978 or via email at *nathan.schoenkin@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The mission of PHMSA is to protect people and the environment by advancing the safe transportation of energy products and other hazardous materials that are essential to our daily lives. PHMSA oversees the transportation of hazardous materials, including energy products, through all modes of the transportation industry—and is focused on the Biden-Harris Administration's whole-of-government approach to mitigating climate change. PHMSA collaborates with stakeholders from the public, academia, interagency, international partners, and pipeline industry that share PHMSA's goal of advancing knowledge and technology in the pursuit of improved pipeline safety. The PHMSA's research agenda will adapt to address existing and future initiatives such as the market shift to more climate friendly commodities.

Due to the importance of energy products and other hazardous materials to our economy and standard of living, it is essential that research projects promote safety, protection of the environment, reliability, and ensure our transportation system's efficient and reliable performance. To this end, PHMSA hopes to discuss and receive public feedback on repair, rehabilitation, or replacement of leak prone, legacy cast iron pipelines; integrity of underground fuel storage including hydrogen; utilization of inspection tools and network components on hydrogen pipeline facilities; integrity management of natural gas and hazardous liquids pipeline to include carbon dioxide lines; and methane mitigation from pipeline infrastructure.

II. Public Forum Details and Agenda

The virtual meeting and forum will take place November 30, 2021, through December 2, 2021. The first day of the virtual public meeting will include panel discussions in a general session between government, industry, research consortiums, and environmental advocacy stakeholders on emerging fuels and pipeline safety R&D. Each panel discussion will include an opportunity for questions and answers.

The second day will be the virtual public forum which will consist of smaller workgroups that members of the public will have an opportunity to sign up for in advance. The workgroups will explore specific research gaps and topics, including the transportation of hydrogen by pipelines, and develop relevant research topics to address the gaps. The third day of the virtual public meeting will be a report from the workgroups as well as a public comment period.

III. Public Participation

The virtual public meeting and forum will be open to the public. Members of the public who wish to attend must register on the meeting website and include their names and organization affiliation. PHMSA is committed to providing all participants with equal access to these meetings. If you need disability accommodations, please contact Nathan Schoenkin by phone at 202–740–1978 or via email at *nathan.schoenkin@dot.gov.*

PHMSA is not always able to publish a notice in the **Federal Register** quickly enough to provide timely notification regarding last minute changes that impact a previously announced meeting. Therefore, individuals should check the meeting website listed in the **ADDRESSES** section of this notice or contact Nathan Schoenkin by phone at 202–740–1978 or via email at

nathan.schoenkin@dot.gov regarding any possible changes.

PHMSA invites public participation and public comment on the topics addressed in this public meeting and forum. Please review the **ADDRESSES** section of this notice for information on how to submit written comments.

Issued in Washington, DC, on October 15, 2021, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2021–22913 Filed 10–20–21; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Bureau of Transportation Statistics

[Docket Number DOT–OST–XXX–XXXX]

Agency Information Collection Activity: Notice of Request for Approval To Continue To Collect Information: Oil and Gas Industry Safety Data Program

AGENCY: Bureau of Transportation Statistics (BTS), Office of the Assistant Secretary for Research and Technology (OST–R), U.S. Department of Transportation.

ACTION: Notice of request to continue to collect.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995, this notice announces the intention of BTS to request the Office of Management and Budget (OMB) to approve the data collection for: Oil and Gas Industry Safety Data. In August 2013, the Bureau of Safety and Environmental Enforcement (BSEE) and BTS signed an Interagency Agreement to develop and implement SafeOCS, a voluntary program for confidential reporting of 'near misses' occurring on the Outer Continental Shelf (OCS). The Oil and Gas Industry Safety Data (ISD) program, is a component of BTS's SafeOCS data sharing framework, that provides a trusted, proactive means for the oil and gas industry to report sensitive and proprietary safety information, and to identify early warnings of safety problems and potential safety issues by uncovering hidden, at-risk conditions not previously exposed from analysis of reportable accidents and incidents. Companies participating in the ISD are voluntarily submitting safety data, there is no regulatory requirement to submit such data.

DATES: Written comments should be submitted by December 20, 2021.

ADDRESSES: To ensure that your comments are not entered more than once into the docket, submit comments by only one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically. Docket Number: DOT–OST–XXXX–XXXX.
- *Mail:* Docket Services, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to mail address above between 9 a.m. and 5 p.m. EST, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Identify all transmission with ''Docket Number DOT–OST–XXXX–XXXX'' at the beginning of each page of the document.

Instructions: All comments must include the agency name and docket number for this notice. Paper comments should be submitted in duplicate. The Docket Management Facility is open for examination and copying, at the above address from 9 a.m. to 5 p.m. EST, Monday through Friday, except Federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: ''Comments on Docket Number DOT–OST–XXXX–XXXX.'' The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that all comments received, including any personal information, will be posted and will be publicly viewable, without change, at *www.regulations.gov.* You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; pages 19477–78) or you may review the Privacy Act Statement at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Demetra V. Collia, Bureau of Transportation Statistics, Office of the Assistant Secretary for Research and Technology, U.S. Department of Transportation, Office of Statistical and Economic Analysis, RTS–31, E36–302, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; Phone No. (202) 366–1610; Fax No. (202) 366–3383; email: *demetra.collia@dot.gov.* Office hours are from 8:30 a.m. to 5 p.m., EST, Monday through Friday, except Federal holidays.

Data Confidentiality Provisions: The confidentiality of oil and gas industry safety data information submitted to BTS is protected under the BTS confidentiality statute (49 U.S.C. 6307) and the Confidential Information Protection and Statistical Efficiency Act (CIPSEA), Public Law 115–435, Title III, Foundations for Evidence-Based Policymaking Act of 2018.

In accordance with these confidentiality statutes, only statistical (aggregated) and non-identifying data will be made publicly available by BTS through its reports. BTS will not release to BSEE or any other public or private entity any information that might reveal the identity of individuals or organizations mentioned in failure notices or reports without explicit consent of the respondent and any other affected entities.

SUPPLEMENTARY INFORMATION: The ISD identifies a broader range of data categories to ensure safe performance and appropriate risk management, which adds a learning component to assist the oil and gas industry in achieving improved safety performance. BTS will: Be the repository for the data, analyze and aggregate information given under this program, and publish reports providing identification of potential causal factors and trends or patterns before safety is compromised, and affording continuous improvement by focusing on repairing impediments to safety.

I. The Data Collection

The Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35; as amended) and 5 CFR part 1320 require each Federal agency to obtain OMB approval to initiate an information collection activity. BTS is seeking OMB approval to continue to collect the following new data:

Title: Oil and Gas Industry Safety Data (ISD) Program.

OMB Control Number: XXXX–XXXX.

Type of Review: Approval of data collection. This information collection for oil and gas Industry Safety Data is to ensure the safe performance and appropriate risk management within the oil and gas industry, including but not limited to exploration and production.

Respondents: Oil and gas industry companies involved in the exploration and/or production working in the Gulf of Mexico (GOM). Responsibility for establishing the actual scope and burden for this collection resides with BTS.

Number of Potential Responses: 30.

Estimated Time per Response: 8 hours.

Frequency: Bi-annual.

Total Annual Burden: 480 hours.

Abstract: The Confidential Information Protection and Statistical Efficiency Act (CIPSEA) of 2018 (Pub. L.

115–435 Foundations for Evidence-Based Policymaking Act of 2018, Title III), can provide strong confidentiality protection for information acquired for statistical purposes under a pledge of confidentiality. CIPSEA Guidance from the Office of Management and Budget advises that a non-statistical agency or unit (BSEE) that wishes to acquire information with CIPSEA protection, may consider entering an agreement with a Federal statistical agency or unit (BTS). BTS and BSEE have determined that it is in the public interest to collect, and process ISD reports and any other data deemed necessary to administer the Oil and Gas Industry Safety Data Program under a pledge of confidentiality to promote a culture of safety, and for statistical purposes only.

Working with subject matter experts, BTS will then aggregate and further analyze these reports to identify potential causal factors and trends. All data reviewers would be subject to non-disclosure requirements and training mandated by CIPSEA. The results of these aggregated analyses will be distributed by BTS through public reports, workshops, and other forms. Periodic industry workshops may be scheduled by BSEE/industry to discuss the data analysis and trend results, as well as share ideas and process improvements for preventing recurrence.

II. Background

The goal of the Oil and Gas Industry Safety Data program is to provide BTS with essential information about accident precursors and other hazards associated with the Outer Continental Shelf (OCS) oil and gas operations including but not limited to exploration and production (E&P.) This program collects voluntarily reported safety data.

A related goal of the ISD is to provide a mechanism whereby participating companies can submit safety data in whatever format they currently use to minimize incremental effort on the company's part. To realize the optimum benefits from an industrywide framework, all organizations associated with offshore E&P operations (operators, contractors, subcontractors, suppliers/OEMs) and/or regulatory agencies are encouraged to submit data voluntarily.

BTS conducted an Industry Safety Data (ISD) program pilot, in 2017–2018 with data from 2014 through 2017 with representatives from nine companies, which included seven operators, one drilling contractor and one service company. Within this program, all companies working in the Gulf of Mexico (GOM) joining the ISD would submit data for safety events occurring after January 1, 2018. During the pilot, a Phase I Planning Team, formed by BTS, consisted of representatives from the pilot companies working in the GOM who expressed interest in participating as early implementers for the suggesting enhancements to the SafeOCS program. This team discussed the type of data that should be submitted to ensure the data captured has appropriate learning value. The scope of data reported includes incidents, near misses, stop work events, and associated metadata for the period 2014 through 2017. The aggregated data was reviewed and analyzed, and the results were shared with the public in a report was released in 2019.

The value proposition of the ISD program is its focus on the continual improvement in safety performance, and its implementation of lessons learned from incidents and events that occur within the oil and gas industry. This is particularly important for major hazards and associated prevention/mitigation barriers. Several key aspects of this effort include:

- Continue efforts to build and maintain a central repository for collection, collaboration, and sharing of learnings of safety-related data,
- Identifying the type of data that will provide valuable information,
- Gaining alignment on incident and indicator definitions,
- Continuing to maintain a secure process for collection and analysis of the data,
- Implementing a robust methodology for identifying systemic issues,
- Disseminating the results to stakeholders who can then take actions to reduce or eliminate the risk of recurrence through greater barrier integrity,
- Providing opportunities for stakeholders to network and benchmark performance, both individually and as an organization, and
- Setting up a framework wherein adverse actions cannot legally be taken against data submitters nor can raw data be used for regulatory development purposes.

One other related goal of the ISD program is to provide a mechanism whereby participating companies can submit safety data in whatever format they currently use to minimize incremental effort on the company's part.

One of the key benefits associated with submitting safety data directly to BTS for aggregation and review, is that it addresses concerns related to protection of the data source. SafeOCS, including the ISD, operates under a Federal law, the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA), which requires the program to protect the identity of the reporter and treat reports confidentially. Information submitted under CIPSEA is also protected from release to other government agencies, Freedom of Information Act (FOIA) requests, and subpoena. Even regulatory agencies such as BSEE cannot have access to the identity of those submitting reports under the program. In addition, the information from individual records cannot be used for enforcement purposes. CIPSEA is subject to strict criminal and civil penalties for noncompliance.

Once data are aggregated, BTS will analyze safety data reports submitted by companies involved in OCS activities. BTS will also work with subject matter experts to further analyze these reports to identify potential causal factors and trends. The results of these aggregated analyses will be distributed by BTS through public reports. Industry workshops may then be scheduled to allow operators, service companies, drilling contractors, regulators, and other stakeholders to discuss the results and share lessons learned.

This data collection provides participating members within the oil and gas industry, a trusted means to report sensitive proprietary and safety information related to operations in the OCS, and to foster trust in the confidential collection, handling, and storage of the raw data. BTS uses the data collected to build a comprehensive source of safety related data for statistical purposes. With input from subject matter experts, information on incidents, near misses, stop work events, and associated metadata are analyzed, and results of such analyses are published. These reports provide the industry, all OCS stakeholders, and BSEE with essential information about critical safety issues for offshore operations and production.

BTS will also establish a Disclosure Review Board to review reports and other data products produced by the Data Review Team in accordance with CIPSEA disclosure requirements, with expected compliance principles and practices of a statistical agency. A senior level review of reports prior to publication will be conducted by a Senior Review Board, that may include representatives from key government agencies, wherein all members of this review board are designated as Agents under CIPSEA. The BTS Director or Deputy Director will review all analyses and reports, and issue approval for publication. While BTS's direct

involvement will end after the aggregated trends report is published, the ISD program may form a committee to address the analytical findings.

III. Request for Public Comment

BTS requests comments on any aspects of this information collection request, including: (1) Ways to enhance the quality, usefulness, and clarity of the collected information; and (2) ways to minimize the collection burden without reducing the quality of the information collected, including additional use of automated collection techniques or other forms of information technology.

Demetra V. Collia,

Director, Office of Safety Data and Analysis, Bureau of Transportation Statistics, Office of the Assistant Secretary for Research and Technology, U.S. Department of Transportation.

[FR Doc. 2021–22280 Filed 10–20–21; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Bureau of Engraving and Printing

Record of Decision for the Proposed Construction and Operation of a Currency Production Facility Within the National Capital Region

AGENCY: Bureau of Engraving and Printing, Department of the Treasury.

ACTION: Notice of availability (NOA).

SUMMARY: The U.S. Department of the Treasury (Treasury), Bureau of Engraving and Printing (BEP) announces the availability of the Record of Decision (ROD) for the proposed construction and operation of a Currency Production Facility (CPF) within the National Capital Region (NCR) (Proposed Action). Treasury previously published its Final Environmental Impact Statement (EIS) for the Proposed Action on June 4, 2021.

In accordance with the National Environmental Policy Act (NEPA), the ROD identifies all alternatives Treasury considered for the Proposed Action, identifies the environmentally preferable alternative, states Treasury's decision to implement the Preferred Alternative, and discusses factors balanced by the agency in making its decision. The ROD also adopts all practicable mitigation measures to avoid or minimize environmental harm and commits to monitoring their implementation. The Proposed Action will replace Treasury's insufficient Washington, DC production facility (DC Facility), and will provide Treasury with a modern, scalable, sufficiently sized production facility within the NCR that meets Treasury's needs. Treasury has also signed a Finding of No Practicable Alternative (FONPA) addressing potential impacts on wetlands Executive Order 11990, *Protection of Wetlands.*

DATES: Treasury's Acting Assistant Secretary for Management signed the ROD on October 8, 2021.

ADDRESSES: Electronic copies of the ROD, Final EIS, FONPA, and other related materials are available on the project website at *https://www.nab.usace.army.mil/home/bep-replacement-project.* If you cannot access the materials online, you may request hard copies of the materials via the methods identified in the **FOR FURTHER INFORMATION CONTACT** section of this NOA.

FOR FURTHER INFORMATION CONTACT: Please contact Mr. Harvey Johnson, USACE—Baltimore, Programs and Project Management Division: (1) By email to: *BEP-EIS@usace.army.mil;* (2) by phone at: (410) 977–6733; or (3) by mail to: U.S. Army Corps of Engineers, Baltimore District, ATTN: Bureau of Engraving and Printing (BEP) Project EIS, Michael Schuster, Planning Division, 2 Hopkins Plaza, 10th Floor, Baltimore, MD 21201.

SUPPLEMENTARY INFORMATION: BEP's mission includes manufacturing U.S. currency notes; research, development, testing, and evaluation of counterfeit deterrents; and development of production automation technologies. Treasury currently operates two production facilities for this purpose: The DC Facility and a facility in Fort Worth, Texas. The DC Facility has been in operation for more than 100 years and is neither able to support modern currency production nor able to support Treasury's, and specifically the BEP's, current and future mission.

Within the DC Facility, manufacturing processes are inefficient and inflexible. The DC Facility's configuration poses safety risks to staff, and the downtown location of the DC Facility prevents Treasury from complying with physical security standards. The condition, configuration, and location of the DC Facility severely limit Treasury's ability to modernize the DC Facility through renovation, rendering modernization of existing facilities an untenable long-term solution.

Over the past 20 years, Treasury has considered several scenarios to address the inadequacy of its current facilities in the NCR, including renovation of the DC Facility and new construction within the NCR. Treasury concluded that construction of a new replacement CPF, as opposed to renovation of the DC Facility, was the most efficient and cost-effective option. As such, Treasury, on behalf of the BEP, proposed to construct and operate a new CPF within the NCR to replace its existing DC Facility. The Proposed Action will provide Treasury with a modern, scalable, sufficiently sized production facility, resulting in more efficient, streamlined currency production, while allowing Treasury to maintain its presence within the NCR.

Treasury's Final EIS analyzed the potential environmental, cultural, and socioeconomic impacts associated with the Proposed Action, including cumulative effects. Minimization of adverse effects through avoidance and environmentally sensitive design will be used to avoid impacts to sensitive resources to the maximum extent practicable. Where these efforts are not sufficient to avoid adverse effects, the Final EIS identified additional mitigation measures that Treasury may implement to further reduce identified adverse impacts. The ROD identifies the mitigation measures that Treasury formally commits to implement and monitor.

In support of the EIS, Treasury, with assistance from USACE, conducted site-specific studies in accordance with federal and state requirements, such as Sections 404/401 of the Clean Water Act (CWA) and Section 106 of the National Historic Preservation Act.

As part of the planning process, Treasury gathered data on numerous potential sites in the NCR that had the potential to support Treasury's initial minimum criteria for construction of a new CPF. Treasury evaluated each potential site against various screening criteria to identify reasonable alternatives. Following an extensive and thorough screening process, Treasury identified one reasonable Action Alternative (the Preferred Alternative) that would meet the purpose of and need for the Proposed Action. This Preferred Alternative is summarized below and analyzed in detail in the Final EIS.

Preferred Alternative: Beltsville Agricultural Research Center (BARC) 200 Area—Former Poultry Research Area

This alternative includes a 104.2-acre parcel of land located in BARC's Central Farm in the 200 Area building cluster (Treasury's proposed parcel). The parcel is located in Prince George's County, Maryland, between Odell Road to the north and Powder Mill Road to the south; Poultry Road runs north to south through the parcel. The parcel, generally

consisting of grassland, cropland, scattered trees, and abandoned buildings, is available for redevelopment. Treasury would construct a new entrance road connecting its proposed parcel to Powder Mill Road and would construct several minor modifications to Powder Mill Road in the vicinity of the new intersection. The entrance road and Powder Mill Road modifications require construction activities in an additional 18-acre area, bringing the combined Project Site to a total of approximately 122 acres.

Treasury also carried forward the No Action Alternative for detailed analysis in the Final EIS. While the No Action Alternative would not satisfy the purpose of or need for the Proposed Action, Treasury retained this Alternative to provide a comparative baseline against which to analyze the effects of the Preferred Alternative as required under the Council on Environmental Quality's NEPA regulations (40 Code of Federal Regulations 1502.14[c]).

Resource areas analyzed in the Final EIS include: Land use; visual resources; air quality; noise; topography and soils; water resources; biological resources; cultural resources; traffic and transportation; utilities; socioeconomics and environmental justice (EJ); hazardous and toxic materials and waste; and human health and safety. Treasury dismissed air space, recreation, and geology from detailed study. Treasury determined the Proposed Action has no potential to cause significant adverse impacts to these resource areas.

Based on the Final EIS analysis, without implementation of mitigation measures, significant adverse impacts could occur to visual resources, water resources, cultural resources, traffic and transportation, and EJ communities (*i.e.,* due to disproportionate adverse traffic impacts). Impacts to all other resource areas would be less-than-significant adverse, negligible, or beneficial. However, in the ROD, Treasury has adopted all practicable means to avoid or minimize environmental harm from the Preferred Alternative. These mitigation measures will further minimize identified potential adverse impacts to each of these resource areas. Importantly, all potential significant adverse impacts will be reduced to less-than-significant levels.

The Preferred Alternative for the Proposed Action will also adversely impact wetlands. Accordingly, Treasury has prepared a FONPA to comply with Executive Order 11990. As described in the Final EIS and ROD, regulatory compliance measures (*e.g.,* permitting under Sections 404/401 of the CWA) and adopted mitigation measures will be implemented to minimize adverse impacts on wetlands.

A Notice of Intent to prepare an EIS for the proposed project was published in the **Federal Register** on November 15, 2019 (84 FR 62565) and the public scoping period closed on December 15, 2019. Treasury held one public scoping meeting on December 3, 2019. A Notice of Availability of the Draft EIS was published in the **Federal Register** on November 6, 2020 (85 FR 71074) and the public review and comment period closed on December 21, 2020. Treasury held a Virtual Public Meeting on December 2, 2020. Treasury considered and addressed in the Final EIS comments received on the Draft EIS during the comment period. A Notice of Availability of the Final EIS was published in the **Federal Register** on June 4, 2021 (86 FR 30040).

Treasury has taken into consideration information and analyses presented in the Final EIS, including potential environmental impacts and recommended mitigation measures; supporting studies; consultation with agencies and Native American Tribes; and the comments received from the public during formal review and comment periods. Treasury has also evaluated our national currency production needs, the BEP's mission requirements, and the purpose of and need for the Proposed Action. Based on these considerations, it is the decision of Treasury to implement the Preferred Alternative and the associated mitigation measures as outlined in the ROD.

Dated: October 15, 2021.

Charles C. Davis,

Project Manager, Bureau of Engraving and Printing.

[FR Doc. 2021–22909 Filed 10–20–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 4810

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service (IRS), 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 information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Request for Prompt Assessment Under Internal Revenue Code Section 6501(d).

DATES: Written comments should be received on or before December 20, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha R. Brinson, at (202) 317–5753, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Request for Prompt Assessment Under Internal Revenue Code Section 6501(d).

OMB Number: 1545–0430.

Form Number: 4810.

Abstract: Fiduciaries representing a dissolving corporation or a decedent's estate may request a prompt assessment of tax under Internal Revenue Code section 6501(d). Form 4810 is used to help locate the return and expedite the processing of the taxpayer's request.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, farms, and the Federal government.

Estimated Number of Respondents: 4,000.

Estimated Time per Respondent: 6 hours, 12 minutes.

Estimated Total Annual Burden Hours: 24,800.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments

will be of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 15, 2021.

Martha R. Brinson,

Tax Analyst.

[FR Doc. 2021–22959 Filed 10–20–21; 8:45 am]

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FEDERAL REGISTER

Vol. 86 Thursday,

No. 201 October 21, 2021

Part II

Postal Service

39 CFR Parts 111 and 211

Treatment of E-Cigarettes in the Mail; Final Rule

POSTAL SERVICE

39 CFR Parts 111 and 211

Treatment of E-Cigarettes in the Mail

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service revises its regulations in Publication 52, *Hazardous, Restricted, and Perishable Mail,* to incorporate new statutory restrictions on the mailing of electronic nicotine delivery systems. Like cigarettes and smokeless tobacco, such items are generally nonmailable, subject to certain exceptions.

DATES: This rule is effective October 21, 2021.

FOR FURTHER INFORMATION CONTACT: Dale E. Kennedy, Director, Product Classification, at 202–268–6592.

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IV. Explanation of Changes From Proposed Rule

I. Background

The Postal Service hereby amends Publication 52, *Hazardous, Restricted, and Perishable Mail,* with the provisions set forth herein. While not codified in Title 39, Code of Federal Regulations (''CFR''), Publication 52 is a regulation of the Postal Service, and changes to it may be published in the **Federal Register**. 39 CFR 211.2(a)(2). Moreover, Publication 52 is incorporated by reference into *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (''DMM'') section 601.8.1, which is incorporated by reference, in turn, into the Code of Federal Regulations. 39 CFR 111.1, 111.3. Publication 52 is publicly available, in a read-only format, via the Postal Explorer® website at *https://pe.usps.com.* In addition, links to Postal Explorer are provided on the landing page of *USPS.com,* the Postal Service's primary customer-facing website; and *Postal Pro,* an online informational source available to postal customers.

On February 19, 2021, the Postal Service published a notice of proposed rulemaking (86 FR 10218) to implement the Preventing Online Sales of E-Cigarettes to Children Act (''POSECCA''), Public Law 116–160, div. FF, title VI (2020). Section 602 of the POSECCA adds ''electronic nicotine delivery systems'' (''ENDS'') to the definition of ''cigarettes'' subject to regulation under the Jenkins Act, codified at 15 U.S.C. 375 *et seq.* As a result, ENDS are now subject not only to rules and restrictions governing remote sales under the Jenkins Act, but also to separate restrictions and exceptions for postal shipments, which rely on the same definition. 18 U.S.C. 1716E(a)(1). Section 603 of the POSECCA requires the Postal Service to promulgate implementing regulations and provides that the prohibition on mailing ENDS will apply immediately ''on and after'' the date of this final rule.

The statutory framework into which ENDS must now fit was established by the Prevent All Cigarette Trafficking Act of 2009 (''PACT Act''), Public Law 111–154, sec. 3, 124 Stat. 1087, 1103–1109 (2010), codified at 18 U.S.C. 1716E. Briefly, the PACT Act allows cigarettes and smokeless tobacco to be mailed only in the following circumstances:

Intra-Alaska and Intra-Hawaii Mailings: Intrastate shipments within Alaska or Hawaii;

Business/Regulatory Purposes: Shipments between verified and authorized tobacco-industry businesses for business purposes, or between such businesses and federal or state agencies for regulatory purposes;

Certain Individuals: Lightweight, noncommercial shipments by adult individuals, limited to 10 shipments per 30-day period;

Consumer Testing: Limited shipments of cigarettes sent by verified and authorized manufacturers to adult smokers for consumer testing purposes; and

Public Health: Limited shipments of cigarettes by federal agencies for public health purposes under similar rules applied to manufacturers conducting consumer testing.

18 U.S.C. 1716E(b)(2)–(6). Outside of these exceptions, the Postal Service cannot accept or transmit any package that it knows, or has reasonable cause to believe, contains nonmailable smokeless tobacco or cigarettes. *Id.* at (a)(1).

Nonmailable cigarettes and smokeless tobacco deposited in the mail are subject to seizure and forfeiture. 18 U.S.C. 1716E(c). Senders of nonmailable cigarettes or smokeless tobacco are subject to criminal fines, imprisonment, and civil penalties, in addition to enforcement under other Federal, State, local, and Tribal laws. *Id.* at (d), (e), (h).

In inviting public comment, the notice of proposed rulemaking highlighted certain topics on which comments would be especially helpful: The definition of ENDS, appropriate ''catch-all'' terminology, standards for determining mailability, and the potential applicability of the PACT Act's exceptions, particularly the Consumer Testing and Public Health exceptions. 86 FR 10219–10220. We received more than 15,700 comments on these and other topics, most of which appear to be electronically generated form letters and general expressions of ENDS users' dissatisfaction with the POSECCA.

In considering the comments, and in view of Congress's abrogation of the standard 30-day notice period for a final rule under the Administrative Procedure Act (''APA''), see *id.* at 10220, the Postal Service determined that additional guidance might assist the industry in preparing for the final rule. On April 19, 2021, the Postal Service published a guidance document (''April 2021 Guidance'') (86 FR 20287) on two topics. First, the Postal Service informed ENDS industry participants that it

would not accept exception applications until the final rule had been issued, but that industry participants might instead use the intervening period to compile various types of documentation for submission with exception applications following the final rule (should such exceptions be made available). Second, the Postal Service reminded ENDS industry participants that, regardless of the impending applicability of PACT Act restrictions or exceptions, certain ENDS products are currently, and will remain, subject to other mailability prohibitions and restrictions (*e.g.,* cannabis and other controlled substances, drug paraphernalia, lithium batteries, liquids, certain chemicals found in ENDS liquids, and certain advertisements and promotional materials). Readers of this final rule are encouraged to review the April 2021 Guidance and Publication 52 overall for additional information on these prohibitions and restrictions, which can render even a PACT-Act-exempt item nonmailable.

II. Summary of Final Rule

ENDS products are generally nonmailable, except as authorized by an exception, and then only if all PACT-Act-related and non-PACT-Act-related conditions of mailability are met. Congress did not grant the Postal Service authority to make policy decisions to waive or defer the operation of the POSECCA, to create new PACT Act exceptions, or to expand, restrict, or modify the scope of existing exceptions, beyond the reasonable application of the conditions enumerated in the PACT Act.

ENDS products comprise (1) any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device; and (2) any component, liquid, part, or accessory of an ENDS, regardless of whether sold separately from the device. This statutory definition resides in the Jenkins Act, which is administered by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (''ATF''), and inquiries about whether specific products are covered should be directed to ATF. Provisionally, however, certain aspects of the definition are apparent from the plain statutory language, such as that a user must inhale from the device and that a covered ENDS product must be, or be capable of use with, a liquid solution. At the same time, Congress expressly provided that covered ENDS products extend beyond nicotine-related use, as relevant products may deliver ''nicotine, flavor, or any other substance.''

The POSECCA excludes from the mailing ban any ENDS product that is approved by the U.S. Food and Drug Administration (''FDA'') for sale as tobacco cessation products or for other therapeutic purposes and marketed and sold solely for such purposes. At this time, the FDA has not approved any such devices or drugs.

The statutory parameters for the Intra-Alaska/Intra-Hawaii, Business/Regulatory Purposes, and Certain Individuals exceptions are compatible with and administrable for ENDS products, and so they will be made available for such products.

The preexisting centralized application process for the Business/Regulatory Purposes exception will be extended to ENDS products, albeit with certain modifications to improve administration. Other, statutorily-derived requirements relating to acceptance and delivery will apply to ENDS products in like manner to cigarettes and smokeless tobacco. For example, approved shippers of Business/Regulatory Purposes mailings must use specified product combinations that allow for age and identity verification at delivery (*e.g.,* Priority Mail with Adult Signature service) and must tender items in a face-to-face transaction either at a Postal Service retail office or at a Postal Service business mail acceptance location. For clarity, product combinations that include Adult Signature service can receive normal carrier delivery, subject to identity and age verification.

The Certain Individuals exception will apply to ENDS products, subject to all of the same frequency, weight, age-verification, and other conditions that apply to other shipments covered by the PACT Act. By statute, this exception applies to qualifying shipments by individual adult mailers without regard to the nature of the recipient entity, expressly including the return of damaged or unacceptable products to manufacturers. Among other conditions, however, the statute limits the exception to shipments for noncommercial purposes. Thus, the compatibility of ENDS manufacturers' recycling programs with this exception may depend on whether such programs are structured so as not to involve any exchange of commercial value. The final rule also clarifies the standard for noncommercial purposes in the context of returns of damaged or unacceptable products, to the effect that any value provided in exchange for the returned item cannot exceed that which would restore the sender to the status quo ante.

As for the Consumer Testing and Public Health exceptions, it is apparent that Congress intended those exceptions to apply only to combustible cigarettes, and not to ENDS products or smokeless tobacco. First, the Consumer Testing exception is statutorily restricted to cigarette manufacturers with a permit under section 5713 of the Internal Revenue Code (''IRC''), which does not apply to ENDS manufacturers. Second, shipments under the Consumer Testing exception (and, by extension, the Public Health exception) are expressly limited to specified quantities of ''packs of cigarettes'' containing 20 cigarettes each. This standardized quantification is meaningful in the context of combustible cigarettes, but not in the context of ENDS products or smokeless tobacco. Upon consideration of the public comments, there does not appear to be a workable standard by which to apply this material condition for the Consumer Testing and Public Health exceptions to ENDS products, notwithstanding their treatment as ''cigarettes'' for broader purposes of the PACT Act. Given this context-based plain reading of the statute and the narrow construction typically due exceptions, the Postal Service concludes that current law does not support applying these exceptions to ENDS products.

Upon original implementation of the PACT Act, the Postal Service determined that the PACT Act exceptions cannot feasibly be applied to inbound or outbound international mail or to mail to or from the Freely Associated States. The Postal Service cannot fulfill the PACT Act's verification requirements in locations where it does not interact directly with shippers and addressees. Nothing has changed in that regard. As such, all cigarettes and smokeless tobacco in such mail will continue to be nonmailable, without exception, and the same will be true of ENDS products.

Moreover, consultation with partner agencies regarding the PACT Act's requirements and the availability of relevant postal services has indicated that the statutory prerequisites for the PACT Act's exceptions cannot reliably be fulfilled at overseas U.S. military postal addresses. Thus, while shipments from such installations to the United States were already ineligible for any PACT Act exceptions, shipments from the United States to such installations must likewise be ineligible for the exceptions at this time.

III. Response to Comments

The Postal Service received more than 15,700 responses to the notice of

proposed rulemaking, several of which included comments on multiple topics. Commenters included businesses that ship ENDS products; individual consumers of ENDS products; organizations representing ENDS shippers and/or consumers; organizations representing taxpayer and/or business interests generally; a group of state and local attorneys general; public-health researchers, research institutions, and advocacy organizations; and a number of individual law students. In addition, the Postal Service consulted informally with ENDS researchers, industry participants, State and local attorneys general, and Federal agencies involved in regulating tobacco and ENDS products. Comments and Postal Service responses are summarized as follows.

A. Lack of Policy Discretion

1. Extra-Statutory Expansion of Mailability

A large number of ENDS consumers, ENDS shippers, and some law students (collectively, ''pro-ENDS commenters'') urged the Postal Service not to subject ENDS products to the PACT Act. As rationales, these commenters invoked the purported public benefits associated with ENDS products; the impact of a mailing ban on businesses and the Postal Service; the possibility of unanticipated and even perverse economic, distributive, and public-health effects of a mailing ban; doubts about the role that the mails may play in youth access to ENDS products (perceived to be the policy motivation for the mailing ban); skepticism about enforceability; [1] perceived hypocrisy in the roster of mailable and nonmailable items; [2] and concerns about restriction of individual liberty.

A number of ENDS consumers and shippers also proposed that the Postal Service implement some alternative method of regulating the mailability of ENDS products, in lieu of the PACT Act's ban and exceptions. Proposals included the following:

- Permit the mailing of ENDS products with age verification of recipients.
- Permit the mailing of ENDS products with warning labels.
- Permit the mailing of ENDS products under the same conditions provided for non-postal delivery channels under the Jenkins Act (as amended by section 2 of the PACT Act).
- Allow the ENDS industry to regulate itself, subject to a requirement to conduct age verification of consumers.
- Limit mailability to ENDS products containing less than a specified threshold of nicotine.
- Limit mailability to non-nicotine-containing ENDS products.
- Limit mailability to single-use ENDS products.
- Scale mailability restrictions according to a policy-based hazard assessment of the product, shipper, and recipient.

In addition, some public-health-oriented commenters and law students, as well as some Federal agency partners with which the Postal Service consulted, proposed that the Postal Service ensure that ENDS products can be shipped in circumstances not covered by any statutory exception, such as between public-health researchers and individual test subjects; between governmental actors for enforcement, investigative, or testing purposes; and from the government to non-governmental public-health entities. These commenters invoked the interests of promoting public-health research into and effective regulation of ENDS products. Many of these stakeholders also urged the Postal Service to allow use of the Public Health exception for ENDS products on policy grounds and to allow ENDS-industry businesses to ship ENDS products to governmental actors for any regulatory purpose, without regard to the statutory parameters of the existing PACT Act exceptions.

Finally, a number of commenters of varying orientations—including some in the ENDS industry—acknowledged that the POSECCA charges the Postal Service merely with incorporating ENDS products into the existing PACT Act framework, rather than authorizing it to revisit and alter that framework.

The latter group of commenters is correct: In this context, the Postal Service lacks the authority to adopt a regulatory scheme different from what Congress has prescribed. In general, the Postal Service, as part of the Executive Branch, is bound to faithfully execute the laws enacted by Congress and can act only within the scope of discretion that Congress has delegated to it. U.S. Constitution article I, section 1; *id.* at article II, section 3; see, *e.g., Gundy* v. *United States,* ____U.S. ____, ____, 139 S. Ct. 2116, 2123 (2019). The PACT Act expressly provides that cigarettes and smokeless tobacco are generally nonmailable, that the Postal Service generally may not accept them for delivery or transmit them through the mails, and that those prohibitions give way only in circumstances defined by a number of statutory parameters and conditions. 18 U.S.C. 1716E(a)–(b). The POSECCA extends that treatment to ENDS products by including them within the term ''cigarette.'' POSECCA section 602(a)(1)(C).

Neither the PACT Act nor the POSECCA includes any provision authorizing the Postal Service to waive the mailing ban for ENDS products or any other subcategory of ''cigarettes,'' with or without other regulatory conditions devised by the Postal Service (*e.g.,* age verification, nicotine limits). In particular, the POSECCA charges the Postal Service only with ''clarify[ing] the applicability'' of the PACT Act's mailing ban to ENDS products. POSECCA section 603(a). Clarification means to make something clear or understandable or to dispel confusion, presupposing the pre-establishment of the proposition being clarified: A self-evidently modest task that falls far short of substantive change to that proposition. See Clarify, Merriam-Webster.com (last visited Oct. 14, 2021). As such, whatever policy judgments the Postal Service might reach as to public-health effects, commercial impact, the need to facilitate effective regulation, or other considerations, those judgments have already been made by Congress in legislating that ENDS products cannot be mailed except in statutorily prescribed circumstances.

Congress could have left ENDS products mailable, subjected them to alternative restrictions (as section 2 of the PACT Act does for non-postal delivery carriers), or delegated authority to the Postal Service to grant waivers, create new exceptions, or devise some other appropriate mailability scheme. Cf. 18 U.S.C. 1716(b)–(e) (authorizing the Postal Service to permit or limit the mailing of potentially hazardous materials); 39 U.S.C. 3018(b) (giving the Postal Service discretion to declare hazardous materials to be nonmailable or to restrict the time, place, and manner of their mailing). Yet Congress did none of those things. Instead, it chose to bar the Postal Service from carrying ENDS products, except pursuant to a limited set of specifically delineated statutory exceptions. See

[1] These last two sets of arguments, typically expressed by ENDS consumers, are in tension with one another: One holds that youth do not tend to get ENDS products through the mails, the other that youth will continue to access ENDS products through the mails regardless.

[2] Some ENDS consumers expressed outrage that ENDS products should be nonmailable while alcohol, cigarettes, firearms, gun parts, lettuce, marijuana, and other controlled substances supposedly remain mailable. In fact, each of these types of items is nonmailable in at least some—and, in some cases, most or all—circumstances. See Publication 52 subchapters 42, 43, 47, 53 & part 453.

Treatment of Cigarettes and Smokeless Tobacco as Nonmailable Matter, 75 FR 29662, 29664 (2010) (notice of final rule); see also *Gordon* v. *Holder,* 721 F.3d 638, 657 (D.C. Cir. 2013) (declining, on rational basis review, to ''second-guess the wisdom of [Congress's] choice'' to enact the PACT Act's mailing ban in lieu of some alternative measure).

In sum, arguments to relax the PACT Act's application to ENDS products on policy grounds are misdirected to the Postal Service. Whatever the merits of ENDS products generally or the anticipated effects of the POSECCA, the forum for that debate is Congress, which has declined to delegate, and thus has reserved to itself, policy discretion over the pertinent parameters.

2. Extra-Statutory Restriction of Mailability

Conversely, some public-health-oriented commenters, State and local attorneys general, law students, and other individual commenters (collectively, ''anti-ENDS commenters'') urged the Postal Service to deny or restrict the application of the PACT Act's exceptions to ENDS products, due to concerns about hazardous materials, controlled substances, public health, youth access, and the purported risk of circumventing law enforcement.

For the reasons discussed in the preceding section, neither the PACT Act nor the POSECCA authorizes the Postal Service to make policy judgments to narrow or rescind the availability of the statutory exceptions. Cf. 18 U.S.C. 1716(d)–(e). The parameters of the exceptions are expressly set forth in the statute. Notwithstanding some limited interpretive and administrative latitude in implementing the statute, the Postal Service cannot repeal, disregard, or amend the statute's explicit parameters on policy grounds. Like policy arguments to relax the PACT Act for ENDS products, policy arguments to tighten it should be directed to Congress, not the Postal Service. See *United States* v. *Rodgers,* 466 U.S. 475, 484 (1984) (''Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.'').

Moreover, the public-health and worker-safety concerns raised by certain public-health-oriented commenters are already addressed by statutes and regulations independent of the PACT Act. As noted in the April 2021 Guidance, ENDS products that constitute controlled substances or drug paraphernalia are nonmailable regardless of whether the PACT Act would also preclude mailability. 21 U.S.C. 843(b)–(c), 863; Publication 52 part 453; see 86 FR at 20289.

Likewise independently of the PACT Act's application, liquids and hazardous materials are also nonmailable to the extent that the shipper has not observed applicable mailing requirements and restrictions. 18 U.S.C. 1716(a), (h); 39 U.S.C. 3018; DMM section 601.3.4; Publication 52 chapter 3 & parts 451, 711–728 & app. A, C; see 86 FR at 20289. The hazardous-materials rules already embody determinations by the Department of Transportation, the Postal Service, and other relevant authorities about how to balance worker safety against commercial interests, resulting in, for example, differing levels of restriction and mailing requirements for differing concentrations of nicotine.[3]

That said, the public-health-oriented commenters rightly point out that the broad array of covered ENDS products is more likely than cigarettes and smokeless tobacco to implicate mailability rules outside of the PACT Act. ENDS products include or may contain lithium batteries, as well as nicotine and other chemicals that are flammable or toxic. See April 2021 Guidance, 86 FR at 20289; Harmful and Potentially Harmful Constituents in Tobacco Products; Established List; Proposed Additions; Request for Comments, 84 FR 38032, 38033–38034 (2019). Once again, all mailers, including businesses, individuals, and governmental entities that may ship ENDS products pursuant to the PACT Act's exceptions, are strongly encouraged to review and comply with all pertinent statutes and Postal Service regulations.[4] ENDS manufacturers and distributors are further encouraged to educate ENDS consumers about the need to ensure that any further mailing of ENDS products conforms to applicable legal requirements regarding controlled substances, drug paraphernalia, and potentially hazardous materials, in addition to the PACT Act.

3. Effective Date

Some pro-ENDS commenters proposed that, if the Postal Service does implement the mailing ban, the Postal Service should defer its effective date or exercise its enforcement discretion to effectively allow the continued mailing of ENDS products for some period (*e.g.,* a period long enough to allow some segment of the ENDS industry to apply for and receive authorization to use the Business/Regulatory Purposes exception). One ENDS consumer urged the Postal Service to stay implementation until after the COVID–19 pandemic, and another suggested a delay in the general interest of facilitating industry compliance and reducing diversion to the black market. A law student suggested that the Postal Service could delay implementation in areas where brick-and-mortar stores do not meet ENDS demand.

The Postal Service lacks discretion as to the effective date. The POSECCA expressly provides that the prohibition will apply to mailings of ENDS ''on and after'' the publication date of the final rule. POSECCA section 603(b). If anything, it is the effective date of any applicable PACT Act exceptions, and not the PACT Act's general mailing ban, about which the POSECCA is silent. Whatever transition-related challenges that the POSECCA's effective date might pose on the industry (despite having had an extended period to prepare for the mailing ban), Congress conferred no authority on the Postal Service to derogate from the requirement that the final rule have immediate effect.

As for enforcement discretion, the scope of the Postal Service's enforcement discretion under the PACT Act is the subject of ongoing litigation. See generally *City of New York* v. *U.S. Postal Serv.,* No. 1:19–CV–05934 (E.D.N.Y. filed Oct. 22, 2019). To the extent that the Postal Service can exercise discretion as to enforcement of the PACT Act, however, the Postal Service declines to exercise it in the manner proposed by the commenters here. While law-enforcement discretion can encompass decisions not to enforce a law, such decisions are expressly and exclusively vested in the relevant Executive Branch entity, which must balance policy and resource considerations, and are not amenable to judicial review. *E.g., Heckler* v. *Chaney,* 470 U.S. 821, 831–32 (1985). The Postal Service does not regard the commenters' proposal—in effect, implementing the POSECCA on paper only while broadly

[3] One public-health-oriented commenter opined that PACT Act exceptions should be disallowed for ENDS products because they may contain hazardous materials and yet be transported by air, including in intrastate shipments pursuant to 18 U.S.C. 1716E(b)(2). But many hazardous materials are not categorically barred from air transportation; rather, they can be transported by air transportation so long as they are properly prepared and labeled and/or are packaged in limited quantities. See Publication 52 parts 327, 331–337, 343, 346, 349. To the extent that these restrictions are not observed, then—as was the case prior to this final rule—an ENDS shipment is nonmailable under the hazardous-materials rules regardless of the PACT Act.

[4] As noted in the April 2021 Guidance, advertisements and promotional or sales matter regarding controlled substances and certain hazardous materials are generally also nonmailable. 18 U.S.C. 1716(h); 21 U.S.C. 843(b), (c)(1); DMM section 601.9.4.1; 86 FR at 20289.

maintaining the status quo ante in practice—to be a viable or preferable exercise of its law-enforcement discretion.

B. Constitutionality

A number of pro-ENDS commenters advanced various theories as to the supposed unconstitutionality of the POSECCA and the proposed implementing regulations: They would impair the rights of adults to receive ENDS through the mails; the law is too vague; and the POSECCA is overbroad in its impact on adult users of ENDS products, not only minors.

As an initial matter, the constitutionality of the POSECCA has no bearing on the Postal Service's obligation to execute it. As discussed in section III.A.1, the Constitution requires the Postal Service, as an entity within the Executive Branch, to faithfully execute the laws. U.S. Constitution article II, section 3. By contrast, ''it is, emphatically, the power and duty of the [Judicial Branch], to say what the law is.'' *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). For the Postal Service unilaterally to decide not to execute a duly enacted law on constitutional grounds would abdicate its constitutional duty and usurp the powers of the Legislative and Judicial Branches. See *Ameron, Inc.* v. *U.S. Army Corps of Engineers,* 787 F.2d 875, 889 & n.11 (3d Cir. 1986) (the President can ''veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional,'' but may not refuse to execute them on constitutionality grounds) (citing *Marbury* and other significant Supreme Court opinions to that effect); *see also Am. Coalition for Competitive Trade* v. *Clinton,* 128 F.3d 761, 766 n.6 (D.C. Cir. 1997) (''administrative agencies . . . cannot resolve constitutional issues''). As such, barring a contrary judicial determination, any concerns about the POSECCA's constitutionality are no bar to its Congressionally mandated implementation by the Postal Service.

That said, by all indications, the relevant statutes appear to be constitutional. Congress has plenary powers to enact laws governing the postal system, as well as to regulate interstate commerce and commerce with foreign and Tribal nations. U.S. Constitution article I, section 8, clauses 3, 7. In exercising those powers, Congress's authority to ban a class of products from the mails—even those that are legal in all States and that are not harmful to Postal Service personnel—is well-established: Indeed, Congress has historically done so with a number of other such products. *U.S. Postal Serv.* v. *Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 126 (1981) (''The validity of legislation describing what should be carried has never been questioned. The power possessed by Congress embraces the regulation of the entire Postal System of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.'') (quoting *Ex parte Jackson,* 96 U.S. 727, 732 (1878)) (cleaned up); *Gordon,* 721 F.3d at 656; *Musser's Inc.* v. *United States,* 1 F. Supp. 3d 308, 318 (E.D. Pa. 2014). The PACT Act's mailing ban in particular has been upheld as a rational exercise of Congress's constitutional powers. *Gordon,* 721 F.3d at 657; *Musser's,* 1 F. Supp. at 318.

Given Congress's plenary power over the very existence of the postal system, it cannot be said that there is a fundamental right to mail any particular item, let alone ENDS products, and shippers or users of ENDS products do not constitute a protected class any more than shippers or users of cigarettes or smokeless tobacco. *See Gordon,* 721 F.3d at 657 (regarding the PACT Act as a ''law that does not infringe on a fundamental right or involve a suspect classification''). As such, Congress's action is presumptively legitimate as long as any rational basis is conceivable. *Id.* at 656–57 (plaintiff challenging the PACT Act must meet a ''high burden to negative every conceivable basis which might support'' it) (quoting *FCC* v. *Beach Communs., Inc.,* 508 U.S. 307, 315 (1993)).

It does not require much to conceive of a legislative rationale in this case. Although the task is ''by no means restricted to the stated reasons for passing a law,'' the statute here expressly offers multiple rational bases for a mailing ban on ENDS products. See *id.* at 657.

By modifying the PACT Act's definition of ''cigarettes'' to extend to ENDS products, the 116th Congress effectively incorporated ENDS products into the statement of findings and purposes underlying the PACT Act. Public Law 111–154, sec. 1(b)–(c), 124 Stat. 1087–1088. For example, the 116th Congress presumably believed that ''the sale of illegal cigarettes [now including ENDS products] and smokeless tobacco over the internet, and through mail, fax, or phone orders, makes it cheaper and easier for children to obtain tobacco products'' and that a mailing ban would ''prevent and reduce youth access to inexpensive cigarettes [including ENDS products] and smokeless tobacco through illegal internet or contraband sales'': Indeed, the title of the POSECCA and the relevant House committee report indicate as much. *See id.* at section 1(b)(4)–(5), (c)(6); H. Rept. 116–260 at 3–4 (2019).

Contrary to the commenters' overbreadth argument, the PACT Act's purposes are not limited to youth access. Other stated purposes of the PACT Act—combating illegal trafficking, circumvention of state and local laws, and unfair competition with law-abiding retailers—implicate adult as well as youth consumers and can apply as easily to ENDS products as to cigarettes and smokeless tobacco. See *id.* at section 1(b)(1)–(3), (b)(6)–(7), (c)(1)–(5); *Gordon,* 721 F.3d at 657.

So, too, can Congress's judgment that an outright ban on the mailing of ENDS products, notwithstanding the applicability of other, more targeted requirements and enforcement opportunities, is necessary to address these harms. *Gordon,* 721 F.3d at 657.

As discussed in section III.D.1.iii, many pro-ENDS commenters questioned the evidence of legislative intent to ban the mailing of ENDS products that do not contain nicotine. For purposes of the constitutionality discussion here, it is noted that plain language of the statute makes that intent clear, and the legislative history does, in fact, attest to the framers' public-health concerns in relation to non-nicotine-related ENDS products. Even without such expressions of intent, however, there would certainly be a rational basis for Congress to have specified the POSECCA's breadth as it did. Given operational and legal constraints, it is not simple—indeed, it is generally impossible—for Postal Service personnel prohibited from accepting or transmitting ENDS products to distinguish liquids that contain nicotine from those that do not, and it is equally difficult for acceptance personnel to distinguish devices intended to be used with nicotine-containing versus non-nicotine-containing liquids. Even barring any more specific motive for banning non-nicotine-related ENDS products from the mails, it would be conceivable that Congress intended to ensure effective enforcement against nicotine-related ENDS products, rather than letting a safe harbor for non-nicotine-related ENDS products get in the way of advancing Congress's nicotine-related policy concerns.

Again, however, such speculation is unnecessary, because the youth-access and public-health concerns underlying the POSECCA were not restricted to nicotine. The relevant House committee report cites information from the Centers for Disease Control and Prevention (CDC) about lung injuries associated with the use of ENDS

products, which were ultimately—after the committee report but prior to floor debate on and passage of the POSECCA—attributed to non-nicotine constituents of ENDS liquids. H. Rept. 116–260 at 3 & nn.22–23 (citing CDC, Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products, *https://go.usa.gov/xHd78* (last updated Feb. 25, 2020)). There is no indication in the legislative record that the POSECCA framers' concern about ENDS-related lung injuries was conditional upon or limited to any eventual nexus specific to nicotine-related ENDS products.

Turning to the vagueness contention, it is difficult to see what is ''vague'' about the POSECCA or the PACT Act. The POSECCA makes nonmailable (with exceptions) ''any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device,'' as well as ''any component, liquid, part, or accessory'' of such a device. 15 U.S.C. 375(7)(A), (7)(B)(vii). While certain terms may benefit from interpretation pursuant to well-established principles of administrative law, it cannot be said that the statute fails to give the public or law-enforcement agencies reasonable notice about what is prohibited. If anything, the POSECCA definition is more prescriptive than some other longstanding mailability statutes. Cf. 18 U.S.C. 1716(a) (''hazardous materials, inflammable materials, infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, . . . and all other natural or artificial articles, compositions, or material which may kill or injure another, or injure the mails or other property''); *id.* at (j) (''spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind''). While the POSECCA definition may be broad in a manner that some persons find objectionable, that is not the same as being vague.

For all of these reasons, the Postal Service maintains that it is not constitutionally barred from executing the POSECCA.

C. Relation to Other Laws

1. FDA Regulation of Certain ENDS as ''Tobacco Products''

Multiple pro-ENDS commenters noted the FDA's definition of ENDS as noncombustible tobacco products, asserted that the FDA has confined the scope of its regulations to devices intended to be used with nicotine-containing ENDS liquids, and urged us to harmonize the POSECCA's ENDS definition with this purported FDA policy. At least one commenter pointed to the POSECCA's rule of construction, which provides that the POSECCA definition shall not ''be construed to affect or otherwise alter any provision of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*), including its implementing regulations.'' POSECCA section 602(c). Additionally, some pro-ENDS commenters asserted that the FDA excludes ''accessories'' from regulation as ''tobacco products'' and urged the Postal Service to follow suit. See 21 CFR 1100.1–.2.

As an initial matter, the Federal Food, Drug, and Cosmetic Act (''FD&C Act'') and the PACT Act (as modified by the POSECCA) govern different subjects. Under the FD&C Act, the FDA regulates the manufacturing, marketing, and distribution of tobacco products to protect the public health. FDA regulation of tobacco products is not necessarily tied to a given distribution method. By contrast, the relevant portion of the PACT Act governs whether such products—following or pending authorization for interstate commerce—may be sent through the federally administered postal system, or whether they may be transported only through non-postal channels. Indeed, section 2 of the PACT Act provides that covered items may be carried through non-postal delivery channels, so long as carriers and sellers comply with various requirements. Although nonmailability may influence the practicalities of interstate commerce (*e.g.,* products' costs and accessibility), it does not constitute an outright legal bar to interstate commerce.[5]

The FDA's regulation of ENDS emanates from a statutory framework regarding tobacco products that is unrelated to and distinct from the POSECCA. More specifically, the Family Smoking Prevention and Tobacco Control Act (''Tobacco Control Act''), Public Law 111–31, granted the FDA the authority to regulate tobacco products by, among other things, adding Chapter IX (Tobacco Products) to the FD&C Act, 21 U.S.C. 387a. Section 901 of the FD&C Act provides that this chapter applies to cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco, as well as to any other tobacco products that the Secretary of Health and Human Services by regulation deems subject to it. It is pursuant to that delegation of ''deeming'' authority that the FDA decided to subject certain ENDS products—specifically, those that meet the FD&C Act definition of a ''tobacco product''—to tobacco regulation under the FD&C Act. 81 FR 28973, 28982 (2016). The FDA's broad discretion under the FD&C Act encompasses the ability to define the scope of ENDS products that the FDA considers amenable to regulation, subject to the FD&C Act's parameters. For example, FDA-regulated tobacco products (including ENDS products) must be either made or derived from tobacco and intended for human consumption, or else a part, component, or accessory of such a product. 21 U.S.C. 321(rr)(1), 387a(c)(1). Pursuant to its discretion, the FDA decided to regulate ''components or parts'' of ENDS products but not ''accessories.'' *Id.* at 28,975.

The context here is different, because the statute itself explicitly defines the scope of nonmailable ENDS in a manner that departs from the FD&C Act and FDA definitions. Specifically, the POSECCA makes nonmailable ''any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device.'' The POSECCA refers to ''nicotine'' without distinguishing on the basis of origin (tobacco or otherwise). Furthermore, the POSECCA definition of ENDS sweeps beyond nicotine to include, as standalone triggers, ''flavor[ ] or any other substance.'' Clearly, Congress could have phrased the POSECCA to tie to or mirror the FD&C Act terminology, or it could have used other terminology that aligned with the scope of FDA regulation. Yet Congress did not do so; instead, it chose to specify a broader universe of nonmailable items than those that are subject to FDA regulation.

It is apparent that the POSECCA neither alters nor conflicts with the FD&C Act, and that it impinges in no way on the FDA's implementing regulations. Rather, the two laws apply concurrently, albeit with only a partial overlap in scope. This is nothing new. For example, the universe of products subject to FDA regulation as ''tobacco products'' is itself broader than the scope of ''tobacco products'' subject to Treasury Department regulation under IRC chapter 52, which expressly does not include ENDS products. See 26 U.S.C. 5702. Among other laws, manufacturers of combustible cigarettes must contend with IRC chapter 52 and FDA tobacco regulation as well as the PACT Act; manufacturers of ENDS

[5] Of course, it is possible for multiple Federal authorities to apply concurrently. FDA authorization of a cigarette for introduction or delivery into interstate commerce does not absolve an actor from other Federal requirements that govern the manufacture and distribution of cigarettes and other covered products: Rather, all overlapping requirements must be complied with in order to offer the product in interstate commerce.

products within the FD&C Act definition of ''tobacco product'' must contend with FDA tobacco regulation and now the PACT Act, but not IRC chapter 52; and manufacturers of other ENDS products must now contend with the PACT Act, but neither IRC chapter 52 nor FDA tobacco regulation. There is no conflict of laws here; Congress simply chose to subject different products to different layers of regulation.

It also bears mention that certain commenters mischaracterized the FDA's policy on ENDS liquids, suggesting that the FDA has deemed only liquid nicotine and nicotine-containing liquid to fall within its regulatory purview. This is not necessarily true. Rather, the FDA observed that non-nicotine-containing liquids may be FDA-regulated as components or parts of ENDS liquids, to the extent that they are ''intended or reasonably expected to be used with or for the human consumption of a tobacco product and do not meet the definition of accessory.'' 81 FR at 29041. It therefore may be that the POSECCA's coverage of ENDS products that deliver ''flavor[ ] or any other substance'' beyond nicotine, as well as non-tobacco-derived nicotine, represents less of a step beyond FDA regulation than these commenters asserted.

As for ''accessories'' of ENDS products, it is true that the FDA's ''deeming'' rule exempted them from regulation under the FD&C Act. Yet Congress chose to render them nonmailable under the POSECCA. We note that the POSECCA does not define ''accessories,'' and so Congress has not spoken to whether the term should be interpreted in a manner consistent with the scope of items that the FDA has defined as outside of its regulatory framework. As discussed in section III.D, the POSECCA definition resides in a statute administered by ATF, and so the Postal Service will look to ATF for interpretive guidance about the scope of ''accessories'' for PACT Act purposes.

2. Laws Regarding Marijuana, Hemp, and Hemp Derivatives

Numerous pro-ENDS commenters urged that the POSECCA be construed, or the Postal Service's implementing regulations be written, to exempt ENDS items consisting of, containing, or used with marijuana and marijuana- or hemp-derived products. Many of these commenters asserted that rendering such items nonmailable would conflict with State and local laws decriminalizing or legalizing cannabis for medical or recreational purposes. Some claimed that the inclusion of such products would conflict with provisions in recent appropriations Acts (including that which includes the POSECCA) that bar the Department of Justice from using appropriated funds to prevent certain States and Territories ''from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.'' *E.g.,* Public Law 116–260, div. B, sec. 531. Finally, some argued that inclusion of such products would conflict with the removal of hemp and hemp derivatives (with not more than 0.3 percent tetrahydrocannabinol (''THC'') by dry weight) from the definition of marijuana in the Controlled Substances Act (''CSA''). See Agriculture Improvement Act of 2018, Public Law 115–334, sec. 10113, 12619, 132 Stat. 4490, 4908, 5018, Public Law 91–513, sec. 102(16)(B), codified at 7 U.S.C. 1639o(1); 21 U.S.C. 802(16)(B), 812(c)(17).

As discussed further in section III.D.1.i, notwithstanding Congress's use of ''nicotine'' in the term ''electronic nicotine delivery systems,'' the plain language of the POSECCA definition makes clear that nonmailable ENDS products include those containing or used with not only nicotine, but also ''flavor[ ] or any other substance.'' It goes without saying that marijuana, hemp, and their derivatives are substances. Hence, to the extent that they may be delivered to an inhaling user through an aerosolized solution, they and the related delivery systems, parts, components, liquids, and accessories clearly fall within the POSECCA's scope.

That said, THC is generally nonmailable for reasons independent of the POSECCA and the PACT Act. THC-containing substances remain generally prohibited under the CSA, regardless of whether they are intended for purportedly medical or recreational purposes or whether the shipper or recipient resides in a State or locality that has decriminalized either or both such uses. 21 U.S.C. 812(c)(17), 843(b); Publication 52 section 453. Devices, parts, components, and accessories used with such substances can qualify as drug paraphernalia, which is likewise nonmailable. 21 U.S.C. 863; Publication 52 part 453. The only exceptions to this mailing ban are for hemp and hemp derivatives that contain no more than 0.3 percent THC by dry weight. See Publication 52 section 453.37.

Thus, ENDS products containing or used with THC (*e.g.,* THC-containing liquids, cannabis waxes, dry cannabis herbal matter) are already nonmailable under the CSA. Congress's decision to keep such items out of the Federal postal network does not bear on whether their use or exchange violates State or local law. Nor does it alter whether the Department of Justice—a Federal entity independent of the Postal Service—may use its appropriated funds to interfere with the operation of State or local laws.

For clarity, even if a shipper could avail itself of a PACT Act exemption with respect to ENDS products generally, the shipper is still prohibited from mailing ENDS products that contain THC (other than hemp derivatives with no more than 0.3 percent THC by dry weight). Nor does the lack of civil or criminal sanction under State or local law entitle any person to ship THC through the Federal postal network or absolve them of penalties under Federal law, so long as the Federal CSA remains applicable.

Conversely, THC-containing substances that are excluded from the CSA—that is, hemp and hemp derivatives with no more than 0.3 percent THC by dry weight—are not subject to CSA-based mailability restrictions, and items used with such substances (and not with controlled substances) may fall outside the definition of drug paraphernalia. Publication 52 section 453.37. As such, those substances continue to be mailable generally, to the extent that they are not incorporated into an ENDS product or function as a component of one. To the extent that they do comprise or relate to an ENDS product, however, then that product is now nonmailable under the PACT Act and POSECCA, except pursuant to a PACT Act exception.

The POSECCA and the Agriculture Improvement Act overlap, but they do not conflict. The Agriculture Improvement Act merely excludes certain products from the CSA. It does not affirmatively declare hemp and hemp derivatives to be mailable in any and all circumstances, superseding all other relevant laws (such as the POSECCA). For its part, the POSECCA restricts the mailability of only certain hemp-based and related products; hemp-based non-ENDS products are unaffected, as are ENDS products falling within one of the PACT Act's exceptions. That Congress has rendered some subset of a class of goods to be nonmailable while leaving the remainder mailable is not some sort of legal conflict, but, rather, how mailability regulation typically works.

3. Other Issues

Certain ENDS industry commenters argued that the PACT Act should not apply to non-nicotine-related ENDS

products to avoid conflicts with State and local law. Specifically, commenters asserted that the PACT Act requires manufacturers to register and certify tax compliance to State and local authorities, yet some States and localities do not specially tax non-nicotine-related ENDS products. One cannabis industry coalition also opined that requirements to report consumer sales could violate State privacy laws. Another complained that statutory labeling requirements regarding ''nicotine'' and ''tobacco'' are inapt for non-nicotine-related ENDS products.

Whatever their merit, these comments are misdirected. It is true that section 2 of the PACT Act amended the Jenkins Act to impose various registration, labeling, and tax-compliance requirements on remote sales of cigarettes and smokeless tobacco, and that the POSECCA's amendment of the ''cigarette'' definition now subjects ENDS products to those requirements. See generally 15 U.S.C. 375 *et seq.* But that portion of the PACT Act is not germane here. Section 3 of the PACT Act—the portion at issue here—more broadly prohibits consumer sales from being effected through the mails (except for intrastate shipments within Alaska and Hawaii). Thus, the Jenkins Act requirements bear almost entirely on sales through non-postal delivery channels. Whatever their application to sales of ENDS products shipped through non-postal channels or to intrastate sales within Alaska and Hawaii effected through the mails, it should be noted that the Jenkins Act is administered by ATF, not by the Postal Service. As such, inquiries about the application of the Jenkins Act's requirements to non-nicotine ENDS products should be directed to ATF.

Finally, a Federal agency partner inquired whether the final rule would include an analysis pursuant to the Regulatory Flexibility Act (RFA). The Postal Service is generally exempt from Federal statutes that govern administrative matters. 39 U.S.C. 410(a); see *Kuzma* v. *U.S. Postal Serv.,* 798 F.2d 29, 31–32 (2d Cir. 1986) (exemption from Paperwork Reduction Act is consistent with legislative intent to expand business discretion and modernize day-to-day managerial operations of the postal system);[6] accord *Shane* v. *Buck,* 658 F. Supp. 908, 913–15 (D. Utah 1985), aff'd, 817 F.2d 87 (10th Cir. 1987).[7] The RFA is not among those statutes that Congress has enumerated as specifically applicable, 39 U.S.C. 410(b), nor does the RFA itself expressly include the Postal Service as a covered ''agency,'' such as might arguably supersede the Postal Service's general exemption. See 5 U.S.C. 601(1). Indeed, the RFA's definition of covered ''agencies'' points back to the APA, *id.* (cross-referencing 5 U.S.C. 551(1)), from the ambit of which Congress removed the Postal Service. 39 U.S.C. 410(a). Although Congress, as a narrow exception, has provided that proceedings concerning mailability, such as this one, must be ''conducted in accordance with chapters 5 and 7 of title 5'' (that is, the APA), 5 U.S.C. chapter 6 (the RFA) is conspicuously absent from this prescription. 39 U.S.C. 3001(m). Congress's decision to reference two sets of provisions but not a third is logically dispositive, *e.g., Longview Fibre Co.* v. *Rasmussen,* 980 F.2d 1307, 1312–13 (9th Cir. 1992); accord *Friends of the Earth* v. *EPA,* 333 F.3d 184, 189–90 (D.C. Cir. 2003), and the contrast is particularly conspicuous here, where the non-referenced chapter resides between the two referenced chapters. For all of these reasons, the RFA does not apply.

Even if the RFA did apply, however, the substance of this final rule would address all of the elements of a regulatory flexibility analysis. Sections I–II state the need for and objectives of the final rule: Namely, fulfillment of a specific statutory directive. See 5 U.S.C. 604(a)(1). This section III states the significant issues raised by public comments, the Postal Service's assessment of those issues, and any changes to the proposed rule made as a result of the comments. See *id.* at (a)(2). No response is made to comments by the Chief Counsel for Advocacy of the Small Business Administration because no such comments were filed; nonetheless, the Postal Service consulted informally with staff of that office, and issues raised by such staff are addressed throughout this section. See *id.* at (a)(3). Because of the breadth and heterogeneity of persons and entities who might send or receive ENDS products, there is no available estimate of the number of small entities to which the rule will apply. See *id.* at (a)(4). The final rule does not impose reporting or recordkeeping requirements; to the extent that the final rule—or, rather, the governing statute—imposes various types of compliance requirements, the classes of entities subject to those requirements should be evident from this final rule. See *id.* at (a)(5). Finally, as explained in section III.A and elsewhere, this rulemaking fulfills statutory directives as to which the Postal Service was not delegated substantial policy discretion. As such, the Postal Service has few, if any, means to minimize the economic impact on small entities. See *id.* at (a)(6). To the extent that the Postal Service, in this final rule, does exercise some limited administrative authority, such as with respect to the precise method for verifying eligibility for the Business/Regulatory Purposes exception, the relevant portion of section III will explain the legal, policy, and/or factual rationale for the chosen measures and why they are superior to alternatives. Thus, despite their inapplicability, the substantive requirements of the RFA are fulfilled in this instance.

D. Scope of Covered ENDS Products

1. Non-Nicotine-Related ENDS Products Generally

The POSECCA defines ENDS products in relation to their delivery of ''nicotine, flavor, or any other substance.'' 15 U.S.C. 375(7)(A). Through use of this list and the disjunctive ''or,'' this language is clear on its face: Covered ENDS products may be used to deliver nicotine, *or* they may be used to deliver flavor, *or* they may be used to deliver any other substance (with or without nicotine or flavor). For this reason, the Postal Service observed in the notice of proposed rulemaking that, ''[d]espite the name, an item can qualify as an ENDS product without regard to whether it contains or is intended to be used to deliver nicotine; liquids that do not actually contain nicotine can still qualify as ENDS, as can devices, parts, components, and accessories capable of or intended for

[6] The *Kuzma* court noted that the Paperwork Reduction Act was passed ten years after the enactment of 39 U.S.C. 410(a); that the Paperwork Reduction Act does not mention the Postal Service or otherwise expressly indicate Congressional intent that it apply to the Postal Service; and that repeals by implication are disfavored. *Kuzma,* 798 F.2d at 32. The same can be said of the RFA, which was likewise passed ten years after 39 U.S.C. 410(a), see Public Law 96–354 (1980), and does not expressly indicate intent to apply to the Postal Service.

[7] The *Shane* court noted that the Postal Service's businesslike economic operations and financial self-sufficiency framework, in contradistinction to typical Federal bureaucracies, give it inherent incentives to minimize paperwork for customers. *Shane,* 658 F. Supp. at 915. The same is true with respect to the policy motives for the RFA. Unlike most Federal agencies, the Postal Service is supported almost entirely by revenues, not appropriations. See generally 39 U.S.C. 2401. As such, the Postal Service has inherent business incentives to minimize burdens for small-business customers and to encourage their patronage, to the extent permitted by law. The Postal Service is highly mindful of the particular needs of small businesses and has designed various services and outreach tools especially with such customers in mind. See, *e.g.,* U.S. Postal Service, Small Business Solutions, *https://www.usps.com/smallbusiness* (last visited Oct. 14, 2021).

use with non-nicotine-containing liquids.'' 86 FR at 10219.

Before addressing comments on non-nicotine substances, it must be emphasized that ATF is charged with administering the statute in which the relevant definitions reside. While the Postal Service consulted with ATF in developing the discussion that follows, questions of whether a particular product falls within these definitions therefore should be directed to ATF.

i. Relation to Nicotine and Flavor

Two ENDS industry commenters presented multiple legal arguments for an alternative construction. First, they invoked the canon of statutory construction known as ejusdem generis, which ''instructs that, where general words follow specific words in an enumeration describing a statute's legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'' Norman & Shambie Singer, 2A Sutherland Statutes & Statutory Construction section 47:17 (7th ed. 2020). One of the commenters argued that, applied here, ''any other substance'' must be interpreted as ''any other substance that mimics nicotine or flavor.'' The other argued that ''any other substance'' should be ''limited to substances related to nicotine and flavor, such as liquid nicotine and liquid nicotine combined with colorings, flavorings, or other ingredients,'' and posited that Congress may have intended this to encompass non-nicotine liquids used with e-cigarettes but not with other ENDS devices.

This argument is unpersuasive. ''Nicotine'' and ''flavor'' do not admit of any common characteristic, such as might define a class of substances beyond nicotine and flavor. See *id.* section 47:18 (application of the canon requires the enumerated things to constitute a class that is not exhausted by the enumeration); see, *e.g., Yates* v. *United States,* 574 U.S. 528, 543–46 (2015) (''tangible object'' means ''object used to record or preserve information'' when used in connection with ''record [or] document''). The commenters do not propose any characteristic common to nicotine and flavor. Nor do they offer any examples of what things might share characteristics with nicotine and flavor besides substances that themselves contain nicotine and flavor. The impression left by these comments is that their proposals' chief import would be to render the catch-all ''any other substance'' a nullity, running headlong into the canon against superfluities. See Singer & Singer, 2A Sutherland Statutes section 46:6; *Ali* v. *Fed. Bureau of Prisons,* 552 U.S. 214, 227 (2008).

Moreover, the ejusdem generis canon readily gives way ''when the whole context dictates a different conclusion.'' *Norfolk & Western Ry. Co.* v. *Am. Train Dispatchers Ass'n,* 499 U.S. 117, 129 (1991); see also *Ali,* 552 U.S. at 227 (''we do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase''). Here, Congress's enumeration demonstrates its intent to include non-nicotine-containing substances within the scope of nonmailable ENDS: The definition includes solutions containing ''nicotine'' as well as—separately and thus independent of any nicotine content—those containing ''flavor.'' Thus, despite the focus on nicotine in the shorthand term ''electronic nicotine delivery system,'' the explicit listing of ''flavor'' shows that Congress intended the scope of covered ENDS products to cover some substances that do not contain nicotine. This enumeration strengthens, rather than weakens, the ordinary inference that ''any other substance'' extends to non-nicotine substances. Cf. *Norfolk & Western Ry.,* 499 U.S. at 129 (''all other law'' in exemption means that ''[a] carrier is exempt from *all law,*'' with enumeration of antitrust law serving merely to overcome presumptions against its inclusion).

As in *Norfolk & Western,* the enumeration here, with its lack of any reasonably salient shared characteristic among ''nicotine'' and ''flavor,'' implies that Congress intended covered ENDS products to be those used to deliver any substance, with nicotine and flavor indicated expressly as examples. The framers may have believed that ''nicotine'' was necessary to justify the use of the shorthand term ''electronic nicotine delivery systems,'' and/or that listing ''nicotine'' and ''flavor'' would most clearly evince the aim of combating youth access to nicotine products. As discussed in section III.D.1.iii, youth access was certainly a major focus of the framers' concern, albeit far from their exclusive focus: Hence their expressed intent not to limit the statute to ''nicotine or flavor.''

The statute here is clear on its face: ''any other substance'' means ''any other substance,'' limited not by some dubiously inferred principle but explicitly by the surrounding text, which confines the scope to substances delivered from an electronic device to an inhaling user via an aerosolized solution. Given that the enumerated list already includes one non-nicotine substance (''flavor,'' as an alternative to nicotine), it cannot be said that other non-nicotine substances are ''as dissimilar [from the enumerated items] as documents and fish.'' See *Yates,* 574 U.S. at 546; *id.* at 550 (Alito, J., concurring). In effect, the commenters' invocation of the ejusdem generis principle is an effort to create ambiguity where none exists, and so there is no occasion to resort to it here. See *Ali,* 552 U.S. at 227; *United States* v. *Turkette,* 452 U.S. 576, 581 (1981).

Finally, the second commenter's alternative hypothesis that Congress may have intended ''any other substance'' to encompass non-nicotine and non-flavor substances, but only in connection with e-cigarette devices, finds no support in the statute. The phrase ''delivers nicotine, flavor, or any other substance'' appears in the definition's opening paragraph, which establishes the qualifying parameters for all covered ENDS products, without differentiation as to any particular species of ENDS device. 15 U.S.C. 375(7)(A). The next paragraph offers an illustrative list of various devices that are included within the definition, such as an e-cigarette, e-hookah, e-cigar, or vape pen. *Id.* at (B). Nothing in either paragraph ties the phrase ''any other substance'' exclusively to e-cigarette devices. Absent such an indication, a plain reading of the statute indicates that any of the listed devices, along with any part, component, liquid, or accessory of the device, qualifies as an ENDS if it is used to deliver any substance through an aerosolized solution, whether or not the substance is or contains nicotine or flavor.

ii. Relation to Listed Devices

One ENDS industry commenter attempted to enlist a second canon of construction: Noscitur a sociis, whereby ''doubtful words in an ambiguous statute [are] given more precise content by the neighboring words with which [they are] associated.'' Singer & Singer, 2A Sutherland Statutes section 47:16. The commenter proposed that ''any other substance'' be construed in light of the list of included devices in 15 U.S.C. 375(7)(B), which, the commenter claimed, ''can only be used with nicotine-based products.'' The commenter further asserted that a nicotine-focused construction would be consistent with the FDA and CDC's construction of the term ''ENDS.''

This argument, too, founders for multiple reasons. First, the canon overlaps heavily with ejusdem generis and ''does not apply absent ambiguity, or to thwart legislative intent, or to make general words meaningless.'' *Id.;* see, *e.g., Yates* v. *United States,* 574 U.S.

528, 564 (2015) (Kagan, J., dissenting) (citing *Ali,* 552 U.S. at 227). As described in the preceding section, a construction of ''any other substance'' to mean only substances that contain nicotine, which is separately enumerated, would indeed make general words meaningless and thwart legislative intent. And there is no ambiguity in the phrase ''any other substance'': It means what it says, and there is no apparent reason to infer a (redundant) nicotine-only construction. See, *e.g., Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson,* 559 U.S. 280, 286–90 (2010) (rejecting noscitur a sociis as a basis to construe ''administrative'' to refer exclusively to Federal activities, as opposed to those by State and local governments).

Even if there were reason to resort to noscitur a sociis here, it would not produce the limiting construction proposed by the commenter. Several, and possibly even all, of the statutorily enumerated terms (not to mention parts, components, and accessories) are used to refer to devices marketed for use with cannabis, for example, without concomitant reference to nicotine.[8] Absent further technical specificity in the statute, there is no apparent technological or economic reason why such devices would be capable of use only with nicotine-containing substances.

Finally, as explained in section III.C.1, the FDA operates under statutory authority that explicitly requires a nexus to tobacco. The POSECCA does not; instead, it refers to ''any other substance'' in the alternative to ''nicotine'' and ''flavor.'' As such, the scope of ENDS products made nonmailable by the POSECCA is self-evidently and materially broader than the scope of ENDS products regulated as ''tobacco products'' by the FDA.

iii. Legislative History of the POSECCA

Some ENDS industry commenters purported that certain floor statements by the POSECCA's sponsors evince an exclusive focus on nicotine-containing or -delivering ENDS products. From these supposed floor statements, the commenters concluded that non-nicotine-related ENDS products are beyond the scope of what Congress intended.

Legislative history ordinarily is useful only for resolving ambiguity in a statute, not for superseding or ambiguating already-plain statutory text. See Singer & Singer, 2A Sutherland Statutes & Statutory Construction section 48:1. Here, the statutory text is clear in its coverage of ENDS used with ''nicotine, flavor, or any other substance [*i.e.,* any substance other than nicotine or flavor].'' Even if the legislative history contained only examples of concern relating to nicotine substances, that would not be a basis to read out of the statute the catch-all that Congress expressly included. In that hypothetical instance, absence of evidence of intent as to non-nicotine-related ENDS products would not equate to evidence of the absence of such intent.

Moreover, the commenters are incorrect: The legislative history of the POSECCA actually attests to concerns about non-nicotine-related and nicotine-related ENDS products alike. Bill sponsors frequently decried an epidemic of youth vaping without specifying the chemical composition of the vapors thus inhaled. One Senate sponsor spoke of teens ''regularly vaping both nicotine and THC products'' and singled out ''closed systems that deliver only nicotine'' as but one subset of a larger universe of devices, all of which his sponsored bill impliedly targeted. 165 Cong. Rec. S6,898 (daily ed. Dec. 9, 2019) (statement of Senator Cornyn).

Most tellingly, perhaps, the POSECCA was introduced in the 116th Congress during a widely reported health crisis related to vaping practices, which led to at least 68 deaths and 2,807 hospitalizations across the country from lung damage related to ENDS use. Hassan Z. Sheikh, Regulation of Electronic Nicotine Delivery Systems (ENDS): Background and Select Policy Issues in the 117th Congress 9 (Cong. Research Serv. Sept. 30, 2021). As discussed in section III.B, the House committee report on the POSECCA expressly adverted to this crisis as a motivating factor, as did floor statements regarding the POSECCA. See H. Rept. 116–260 at 3; 166 Cong. Rec. S7,028 (daily ed., Nov. 17, 2020) (statement of Senator Cornyn); 166 Cong. Rec. S4,174 (daily ed., July 2, 2020) (statement of Senator Feinstein); 165 Cong. Rec. H8,491 (daily ed., Dec. 9, 2019) (statement of Representative Mucarsel-Powell); 165 Cong. Rec. S6,586 (daily ed., Nov. 14, 2019) (statement of Senator Cornyn); 165 Cong. Rec. S5,431 (daily ed., Sept. 11, 2019) (statement of Senator Durbin). The CDC ultimately determined—several months prior to Congress's passage of the POSECCA, and some of the relevant floor statements—that this crisis was related to a chemical found in non-nicotine-related (specifically, THC-related) ENDS products. CDC, Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products, *https://go.usa.gov/xHd78* (last updated Feb. 25, 2020); see also Sheikh, Regulation of Electronic Nicotine Delivery Systems at 9 (''Among a subset of hospitalized [e-cigarette or vaping use–associated lung injury] patients, 82% reported using THC-containing products.'').

It is evident, then, that, while youth nicotine consumption was a prominent concern animating this bill, it by no means constituted the sole motivating concern. The framers' expressed concerns about the dangers of both nicotine-related and non-nicotine-related ENDS use underscore the plain import of the POSECCA's inclusion of all such ENDS products.

2. Products That Aerosolize Non-Solution Solids

Some ENDS industry commenters urged the Postal Service to exclude personal vaporizers intended for use with waxes or dry herbs, as such substances do not take the form of an ''aerosolized solution.'' However, one public-health-oriented commenter recommended including solid substances and devices that aerosolize them, noting that, according to at least one definition, ''solution'' includes solid as well as liquid mixtures.

Once again, ATF is charged with administering the statute in which the relevant definitions reside. Questions of whether a particular product falls within these definitions therefore should be directed to ATF.

As a further initial matter, we note that many such products are already nonmailable regardless of the POSECCA. To the extent that personal vaporizers are intended for use with waxes or dry herbs containing THC (other than the limited class of hemp and hemp-based products under Publication 52 section 453.37), those substances are controlled substances and the vaporizers are drug paraphernalia under the CSA. Indeed, online marketing, reviews, and blog posts frequently tout the suitability of such products for use with controlled substances. See Publication 52 section 453.131 (listing such circumstances as

[8] E.g., Jen Bernstein, ''The Best Vape Pens: High Times' Vape Pen Buyers' Guide,'' *High Times, https://hightimes.com/products/high-times-2015-vape-pen-buyers-guide* (last visited Oct. 14, 2021); ''Marijuana Vaporizers & Vapes,'' *Leafly, https://www.leafly.com/products/vaping* (last visited Oct. 14, 2021) (vape pens, portable vaporizers, batteries, power supplies, and accessories); ''Sherlock Vape Pipe,'' *WeedGadgets.com, https://www.weedgadgets.com/sherlock-vape-pipe* (last visited Oct. 14, 2021) (e-pipe); see also ''Cannabis E-Cigarettes: Risks vs. Advantages,'' *Way of Leaf* (last updated Mar. 17, 2021) (''An e-cigarette, also known as a vaporizer or a vape pen, is an electronic device that heats up your marijuana and enables you to consume it in vapor form.'').

evidence that an item is drug paraphernalia). For further discussion of the nonmailability of such products, see section III.C.2.

The Postal Service recognizes that some personal vaporizers may also be used as aromatherapy devices with herbs that do not contain controlled substances (*e.g.,* mint or chamomile). Of course, at least some of the same products may also be used with controlled substances, and some are capable of use with liquid solutions as well as solid matter. The remainder of this section will therefore consider aerosolizing devices (and their related parts, components, and accessories) intended for use with *solids other than controlled substances* (*e.g.,* aromatherapy herbs) and *incapable* of use with a liquid solution.

Such devices appear to fall outside of the POSECCA definition of a generally nonmailable ENDS product (and also would not be nonmailable as drug paraphernalia). As discussed in the preceding section, the POSECCA defines ENDS by reference to ''an aerosolized solution'' containing ''nicotine, flavor, or any other substance.'' Regardless of the constituent substance or substances, they must form part of a ''solution.'' A solution is a mixture of chemical substances that is both homogenous (*i.e.,* uniformly mixed) and stable (*i.e.,* not prone to separating upon standing or filtration).[9]

Raw or minimally processed organic matter, such as aromatic herb leaves, does not qualify as a ''solution.'' As such, if a device heats such matter to produce vapors for the user to inhale, that device does not operate ''through an aerosolized solution'' and thus falls outside the scope of the POSECCA definition. By the same token, its parts, components, and accessories (as well as the herbal matter used in the device) likewise fall outside of the POSECCA's scope.[10]

It is emphasized that this analysis covers only devices used *exclusively* with non-solution matter. If a device can be used to aerosolize a solution as well as non-solution matter for delivery to a user inhaling from the device, then the POSECCA definition applies notwithstanding the device's capability of alternative use with non-solution matter. Finally, it is emphasized again that a device intended for use with controlled substances (*e.g.,* cannabis herbal matter or wax) is nonmailable regardless of the POSECCA, irrespective of any dual capability of alternative licit use.

3. Heat-Not-Burn Cigarettes

One public-health-oriented commenter and two Federal agency partners inquired whether so-called ''heat-not-burn cigarettes'' are nonmailable under the PACT Act, either as ENDS products or as other forms of ''cigarettes.''

Once again, ATF is charged with administering the statutes in which the relevant definitions reside. Questions of whether a particular product falls within these definitions therefore should be directed to ATF.

To the extent that ''heat-not-burn cigarette'' refers to a product that functions by heating tobacco leaf matter just shy of the point of combustion, such products vaporize a solid mass of processed tobacco leaf, not an aerosolized solution. As discussed in the preceding section, it seems likely that such products fall outside the POSECCA's definition of ENDS products.

Nevertheless, many, and perhaps all, such products contain or comprise a roll of tobacco wrapped in paper or another substance not containing tobacco. As such, these products may already be nonmailable under the preexisting definition of ''cigarette'' used for PACT Act purposes. 18 U.S.C. 2341(1)(A), referenced in 15 U.S.C. 375(2)(A)(i), referenced in 18 U.S.C. 1716E(a)(1). Such products may also be nonmailable as ''smokeless tobacco,'' insofar as they contain tobacco and are intended to be consumed without being combusted. 15 U.S.C. 375(13). Parties interested in a definitive opinion are advised to contact ATF, as instructed in the new rules.

4. Products That Release Aerosols Into Ambient Air, Not for Direct Inhalation

One ENDS industry commenter expressed concern that the POSECCA definition of ENDS would prove so expansive as to encompass air fresheners, essential oil misters, portable aromatherapy diffusers, electric incense burners, household humidifiers, and other products that aerosolize matter for release into ambient air, rather than for direct inhalation. The commenter proposed that the Postal Service preclude this purportedly untoward construction by appending, to the statutory definition of ENDS (''any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device'') an implied limitation: ''into the lungs.''

We note again that ATF, not the Postal Service, is charged with administering the definitional statute. Nevertheless, we note that the commenter's concern may be misplaced. The POSECCA definition restricts the scope of covered ENDS products based on delivery of a substance ''to the user inhaling *from the device.*'' 15 U.S.C. 375(7)(A) (emphasis added). This language could suggest physical contact or proximity between the user's nose or mouth and the vapor-emitting ENDS device. By contrast, the products described in the comment release aerosolized matter into the ambient air, which in turn is breathed by persons in the room without directly placing their nose or mouth on the product. While these products may aerosolize solution to be inhaled by a user, the user arguably does not inhale directly ''from the device.'' As such, these products (and their components, liquids, parts, and accessories) might not fall within the scope of the POSECCA's definition of ENDS.[11] Again, however, these observations are necessarily tentative; for a definitive interpretation, parties are advised to contact ATF as directed in the new rules.

5. Natural vs. Synthetic Nicotine

One ENDS manufacturer, two public-health-oriented commenters, and a Federal agency partner asked the Postal Service to clarify that ENDS products include those containing or used with all forms of nicotine, whether natural or synthetic in origin.

The POSECCA defines ENDS products by reference to the delivery of ''nicotine,'' among other things. There is no statutory basis to read this term as referring only to natural-origin nicotine, as opposed to synthetic nicotine. As discussed in section III.C.1, this scope of regulation is different from that under the FD&C Act, for which purposes the FDA regulates nicotine-related ENDS products to the extent that the nicotine is made or derived from tobacco. Beyond this observation about the POSECCA's plain language, interested

[9] See, *e.g.,* Solution, in Int'l Union of Pure & Applied Chemistry, Compendium of Chemical Terminology (2d ed. 1997), *https://goldbook.iupac.org/terms/view/S05746* (last edited Feb. 24, 2014); Solution (chemistry), Brittanica, *https://www.britannica.com/science/solution-chemistry* (last edited Dec. 19, 2019); Solution (chemistry), Wikipedia, *https://en.wikipedia.org/wiki/Solution_(chemistry)* (last edited Aug. 26, 2021).

[10] As the public-health-oriented commenter noted, solutions may be typically liquid, but they are not exclusively so. Because the matter at issue here is not a solution in any event, it is unnecessary to discuss here whether the reference to ''liquid'' in the POSECCA's inclusion of ''any component, liquid, part, or accessory of [an ENDS] device'' excludes the possibility that covered devices may be used with solid solutions.

[11] We further note that the commenter's proposed addition of ''into the lungs'' would not have any material effect. By definition, all inhalation, whether of ambient air or of vapor directly from the emitting device, is ''into the lungs.''

parties are encouraged to contact ATF for further interpretive guidance.

6. Scope of Components and Parts

In addition to fully assembled vaping devices, the POSECCA includes in its definition of ENDS ''any component, liquid, part, or accessory of [an ENDS], without regard to whether the component, liquid, part, or accessory is sold separately from the device.'' 15 U.S.C. 375(7)(B)(vii). Some pro-ENDS commenters found this definition to create a line-drawing conundrum, noting that certain materials used in ENDS devices and liquids are used in a wide array of non-ENDS consumer products. A partner agency also suggested that the terms could be interpreted in a manner similar to the definitions of ''accessory'' and ''component or part'' for purposes of the FDA's regulation of certain ENDS products. See 21 CFR 1100.3.

The Postal Service recognizes the point and notes that it resonates with other contexts in which parts, components, or accessories of a given type of item may be regulated. *E.g.,* 18 U.S.C. 921(4)(C), (24), (29)(B); 22 U.S.C. 2778(b)(1)(B); 26 U.S.C. 5845(b), (f)(3); 15 CFR pt. 774, supp. no. 1; 22 CFR 121.1. It is necessarily a fact-specific question whether an item has a sufficient nexus to the regulated end product to itself warrant control; as such, such questions may require case-by-case determination.

Here, too, interpretative questions about whether the POSECCA definition codified in the Jenkins Act applies to specific precursor parts, components, or accessories should be directed to ATF.

E. Exclusion of Tobacco Cessation and Therapeutic Products

The POSECCA excludes from the definition of ENDS products any such products that are approved by the FDA for sale as a tobacco cessation product or for any therapeutic purpose, and that are marketed and sold solely for such purposes. 15 U.S.C. 375(7)(C).

Multiple public-health-oriented commenters and law students recommended that the Postal Service disallow the exclusion at this juncture, or at least establish a presumption that mailed ENDS products are not covered by the exclusion. These commenters pointed out that no such products have been approved by the FDA. Hence, given the prevalence of non-validated tobacco-cessation and other health claims by the industry in association with ENDS products, allowing mailers to purport to use the exclusion would arguably invite deceptive practices and complicate enforcement.

Two public-health-oriented commenters and one law student went farther and offered specific proposals for how the Postal Service could administer the exclusion if and when the FDA issues a pertinent approval. As envisioned by one public-health-oriented commenter, the FDA would formally inform the Postal Service of its approval, whereupon the Postal Service would collaborate with the FDA and manufacturers to establish a list of eligible shippers (*e.g.,* medical-product distributors, health departments, or healthcare facilities) who might apply for permission to mail under the exclusion. The second such commenter proposed that mailers should have to provide an FDA approval letter at the time of mailing, not merely mark the package as an excluded tobacco-cessation or therapeutic product. The law student recommended that mailers be required to clearly mark the manufacturer and brand on the exterior of mailpieces, to ease verification against a Postal Service list of approved products, and that age verification be required at delivery.

One ENDS industry commenter opined that the exclusion pertains to drug protocols and would paradoxically exclude the ENDS industry. The commenter went on to quote from a court opinion to the effect that the FDA is authorized to regulate ''customarily marketed tobacco products—including e-cigarettes—under the Tobacco Control Act'' and ''therapeutically marketed tobacco products under the [FD&C Act's] drug/device provisions.'' *Sottera, Inc.* v. *FDA,* 627 F.3d 891, 898–99 (D.C. Cir. 2010).

A manufacturer of herbal vaporizers proposed that mailers be allowed to self-certify the eligibility of a product for the exclusion via distinctive labeling on the package, backed by recordkeeping requirements similar to those for hemp-based cannabidiol (''CBD'') products. See Publication 52 section 453.37.b. The commenter considered the analogy to be apt because of the difficulty in distinguishing CBD products that do and do not qualify for the CSA exception, similar to the likely difficulty in distinguishing ENDS products that do and do not qualify for the POSECCA exclusion. The commenter opined that this approach would provide a credible means of verifying eligibility, while minimizing burdens on the Postal Service's operational and enforcement personnel.

Finally, a large number of individual ENDS consumers commented about the perceived tobacco-cessation benefits of ENDS products, both in their own experience and in relation to U.K. studies and purported official European health recommendations.[12] Other individual ENDS consumers wrote of the perceived therapeutic benefits of cannabis or, in rare instances, aromatherapy delivered using ENDS products.

The first set of commenters is correct: The FDA has not approved any ENDS product for smoking-cessation or other therapeutic use.[13] Unless and until the FDA approves any ENDS product for smoking-cessation or another therapeutic use, then, the statutory exclusion lies dormant and has no real-world import.

While the distinction between excluded and nonmailable ENDS products may be difficult to get right in practice, it is essential to get it right, given the PACT Act's directive that the Postal Service not ''accept for delivery or transmit through the mails'' any package as to which ''reasonable cause'' exists to believe that it contains nonmailable ENDS products. See 18 U.S.C. 1716E(a)(1). Whatever merit the ideas raised by commenters on this topic may have, the Postal Service finds it inadvisable to attempt (in consultation with ATF) to set forth appropriate standards in the abstract. Rather, if and when any product is approved by the FDA, concrete circumstances will guide the development of a practical approach.

Therefore, the final rule contains language clarifying that the exclusion does not apply at this time, but inviting

[12] See Máirtin S. McDermott et al., ''The Effectiveness of Using E-Cigarettes for Quitting Smoking Compared to Other Cessation Methods Among Adults in the United Kingdom,'' __ *Addiction* __(2021), *https://onlinelibrary.wiley.com/doi/10.1111/add.15474;* Peter Hajek et al., ''A Randomized Trial of E-Cigarettes Versus Nicotine-Replacement Therapy,'' 380 *New Eng. J. Med.* 629 (2019), *https://www.nejm.org/doi/full/10.1056/NEJMoa1808779;* Jamie Brown et al., ''Real-World Effectiveness of E-Cigarettes When Used to Aid Smoking Cessation: A Cross-Sectional Population Study,'' 109 *Addiction* 1531 (2014), *https://onlinelibrary.wiley.com/doi/full/10.1111/add.12623.* It should be noted that the Hajek article website includes a number of letters by other researchers pointing out limitations in the study design and questioning the reliability of its findings.

[13] FDA, Drugs@FDA: FDA-Approved Drugs, *https://go.usa.gov/xHHxa* (search for ''nicotine'' conducted Oct. 14, 2021 yielded no ENDS-related results); Hassan Z. Sheikh, Regulation of Electronic Nicotine Delivery Systems (ENDS): Background and Select Policy Issues in the 117th Congress 5 (Cong. Research Serv. Sept. 30, 2021); Richard J. Wang et al., ''E-Cigarette Use and Adult Cigarette Smoking Cessation: A Meta-Analysis,'' 111 *Am. J. Pub. Health* 230 (2020), *https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2020.305999* (''E-cigarettes have been promoted for smoking cessation even though, as of November 2020, no e-cigarette has been approved as a smoking cessation medication by the FDA Center for Drug Evaluation and Research (CDER).'' (citations omitted)).

any ENDS manufacturer of an FDA-approved product to notify ATF and the Postal Service in the event of such approval. At that time, ATF and the Postal Service may develop appropriate rules governing the exclusion.

The FDA likewise has not approved any ENDS product for therapeutic delivery of any non-nicotine substance, including, in particular, CBD or other substances derived from marijuana.[14] Once again, except for hemp-derived CBD containing no more than 0.3 percent THC by dry weight, cannabis and cannabis derivatives remain nonmailable under the Controlled Substances Act regardless of the POSECCA and notwithstanding any State or local laws on ''medical'' marijuana. See *supra* section III.C.2; 84 FR at 12970. Far from taking marketing claims of therapeutic benefit at face value, the FDA has undertaken enforcement action against companies making such claims about CBD and other cannabis-related products absent new drug approvals from the FDA. See 84 FR at 12970.

The concern that the statutory exclusion pertaining to FDA drug or device protocols would paradoxically exclude the ENDS industry appears to be off-base. The very court opinion quoted by the commenter notes that the FDA's regulatory authority extends to ''therapeutically marketed tobacco products under the [FD&C Act's] drug/device provisions.'' *Sottera,* 627 F.3d at 898–99. Moreover, with respect to ENDS comprising, containing, or used with CBD, the FDA's authority to approve drugs and medical devices extends to cannabis and cannabis-derived products that could form part of an ENDS. See 84 FR at 12972–12974.

Finally, a Federal agency partner suggested that the Postal Service clarify the scope of ''other therapeutic purposes,'' perhaps in line with the *Sottera* court's borrowing of ''diagnosis, cure, mitigation, treatment, or prevention of disease'' phraseology from the FD&C Act's ''drug'' and ''device'' definitions. *Sottera,* 627 F.3d at 894 (quoting 21 U.S.C. 321(g)(1)(B)); accord 21 U.S.C. 321(h)(1)(B). Such an interpretation may be reasonable, and even tautological, given that the POSECCA exclusion requires FDA approval of an ENDS product, which itself would require an FDA determination that the product meets the purposive criteria for a ''drug'' or ''device.'' However, it may also be that ''therapeutic purposes'' means something narrower in this context, given the term's juxtaposition with ''tobacco cessation.'' The Postal Service declines to announce any particular interpretation of ''therapeutic purposes'' at this time, both out of deference to ATF's authority to interpret the relevant statute and because no ENDS products have been FDA-approved for any arguably relevant purpose at any rate. In the event that any such product garners FDA approval for a use other than tobacco cessation, then ATF may find it appropriate to opine on whether that product fulfills a ''therapeutic purpose'' for purposes of the POSECCA exclusion.

F. Intra-Alaska/Intra-Hawaii Shipments

One public-health-oriented commenter proposed that the Postal Service clarify that, while the PACT Act's exception for intrastate shipments within Alaska and Hawaii may apply to ENDS products, it does not apply to interstate ENDS shipments into or out of either state.

The Postal Service does not believe that such clarification is necessary. The PACT Act is already abundantly clear that the exception applies only to ''mailings *within* the State of Alaska or *within* the State of Hawaii.'' 18 U.S.C. 1716E(b)(2) (emphasis added). Longstanding Postal Service rules, which will now encompass ENDS products, make this even more explicit, by requiring such a mailing to be tendered to a Postal Service employee in a face-to-face transaction within the relevant State, to destinate in the same state as the state of origin, and to bear a valid, complete return address within the state of origin. Publication 52 section 472.21.a–.c.[15] These requirements allow Postal Service personnel at the point of acceptance to verify that the shipment will destinate in the noncontiguous state of origin. Treatment of Cigarettes and Smokeless Tobacco as Nonmailable Matter, 75 FR 24534, 24535 (2010) (notice of proposed rulemaking). It is difficult to imagine how the geographic limitation on this exception could be made any clearer.

G. Business/Regulatory Purposes Exception

The Business/Regulatory Purposes exception was a major area of commenter discussion, and so it is discussed extensively here. In short, the exception permits shipments between legally operating businesses in certain industry sectors and between such businesses and Federal or State government agencies, subject to multiple conditions. 18 U.S.C. 1716E(b)(3)(A). Those conditions include Postal Service verification of the sender and recipient's respective eligibility, as well as the recipient's age and employee status; restriction of available products to those that allow tracking and confirmation of delivery; capture and retention of package-specific identifying information by the Postal Service; and certain package markings. *Id.* at (b)(3)(B).

In implementing these requirements, the Postal Service adopted a process whereby potential senders must first submit an advance application to the Postal Service's Pricing and Classification Service Center (PCSC) for an eligibility verification as to the applicant and any anticipated recipients of that applicant's shipments. Publication 52 section 472.221. Upon a PCSC determination of eligibility, the authorized sender must show the resulting authorization letter when tendering any covered mailing via a face-to-face transaction with a Postal Service employee at an approved acceptance location. *Id.* section 472.222. The mailer may use only certain combinations of postal services that allow for age verification, tracking, and confirmation of delivery, as well as a return receipt returnable to the PCSC for recordkeeping purposes. *Id.* section 472.222.a–.b. Finally, the Postal Service conducts the requisite verification of age, identity, and employment status upon face-to-face delivery. *Id.* section 472.223.

In the notice of proposed rulemaking, the Postal Service proposed a simple amendment to the terminology used in the Business/Regulatory Exception rules, such that the same rules would automatically apply to ENDS products as to other PACT Act–covered products. 86 FR at 10220.

1. Availability in General

As an initial matter, a few comments dealt with existential aspects of the exception. Two ENDS industry commenters sought confirmation that the exception would extend to ENDS products, in order to sustain industry supply chains, regulatory activities, and the channeling of ENDS to retail outlets subject to State and local law (in lieu of direct-to-consumer shipments). Conversely, one law student urged the abolition of the exception for ENDS

[14] The FDA has approved a small number of drugs that contain CBD, a synthetic THC (dronabinol), and a synthetic chemical similar to THC (nabilone), but only for oral delivery in capsule or solution form, not via an ENDS. FDA, Drugs@FDA: FDA-Approved Drugs (searches conducted Oct. 14, 2021); see Scientific Data and Information About Products Containing Cannabis or Cannabis-Derived Compounds, 84 FR 12969, 12972–12973 (2019).

[15] All citations to Publication 52 chapter 47 throughout this section III refer to the version in effect prior to this final rule.

products except as necessary for regulatory activities.

As discussed in section III.A.2, the Business/Regulatory Purposes exception is established by statute, and the Postal Service lacks the delegated authority to modify or restrict the exception's applicability on policy grounds. Unlike the Consumer Testing and Public Health exceptions discussed in section III.I, nothing in the statutory language concerning the Business/Regulatory Purposes exception indicates Congressional intent to exclude ENDS products from the exception, and there is no other basis to find such products to be incompatible with the exception's terms. As such, the exception is available in connection with ENDS products as a legal matter, regardless of whatever policy arguments might militate for or against it.

Another pro-ENDS commenter feared that the conditions for the exception could be expanded into termination of the exception altogether. This comment appears to misconstrue the exception as a freestanding entitlement, upon which the Postal Service somehow discretionarily grafted conditions as a means to subvert the intended scope of the exception. In fact, however, Congress itself specified the criteria as conditions precedent that must be met in order to qualify for the limited exception: The conditions are therefore integral to the statutory framework for the exception. The longstanding conditions in Publication 52 merely bear out that framework, either by literally transmuting the statutory requirements or by means designed to fulfill those requirements. The regulatory framework has applied to cigarettes and smokeless tobacco since 2010. The POSECCA charges the Postal Service with clarifying the applicability of the limited exception, with its eligibility conditions, to ENDS products, and the final rules here do that.

One public-health-oriented commenter viewed the Business/Regulatory Purposes exception as being cabined by 18 U.S.C. 1716, such that 18 U.S.C. 1716(a) and (e) would preclude use of the Business/Regulatory Purposes exception as a ''bulk distribution method'' for manufacturers and wholesalers to transport ENDS products to retailers. It is true that eligibility to use the Business/Regulatory Purposes exception to the PACT Act does not excuse a mailer from compliance with other applicable mailability statutes, including 18 U.S.C. 1716. But the Postal Service cannot join the commenter's sweeping conclusion that all ''bulk distribution'' shipments of ENDS products that could be sent under the Business/Regulatory Purposes exception would necessarily be prohibited or restricted under 18 U.S.C. 1716. Many ENDS products do not qualify as injurious articles subject to 18 U.S.C. 1716, and as discussed in section III.A.2, Postal Service regulations permit many hazardous materials to be mailed pursuant to specified precautions. The precautions in existing regulations have historically been deemed sufficient to fulfill 18 U.S.C. 1716 for otherwise mailable shipments of ENDS products; it has never been the case that otherwise mailable ENDS products were deemed so extraordinarily dangerous as to warrant outright prohibition in the face of lesser applicable hazardous-materials safeguards. While the scope of generally mailable ENDS products will now be limited by the PACT Act's exceptions, the Postal Service perceives no rational basis to upset the highly reticulated harm-based framework for hazardous-materials regulation.

In the course of its 18 U.S.C. 1716 argument, the same commenter raised policy concerns about use of the Business/Regulatory Purposes exception to evade state and local taxes. But 18 U.S.C. 1716 has nothing to do with tax collection or evasion. Nor has Congress specifically conditioned eligibility for the Business/Regulatory Purposes exception on any particular standard of tax compliance, as it expressly did for the Consumer Testing exception. 18 U.S.C. 1716E(b)(5)(A)(iv), (b)(5)(C)(ii)(III) (Consumer Testing exception). Of course, noncompliance with applicable tax laws may subject a business to penalties under other Federal, State, local, or Tribal laws. It may also affect the business's ability to obtain relevant licenses or permits, which is a prerequisite for eligibility to use the Business/Regulatory Purposes exception. *Id.* at (b)(3)(A)(i). Where information may indicate that an entity that may be authorized to use the Business/Regulatory Purposes exception is not, in fact, operating lawfully, all parties are encouraged to bring such information to the attention of the Postal Inspection Service.

Finally, a Federal agency partner sought clarification of whether the Business/Regulatory Purposes exception encompasses shipments from businesses to Federal regulatory agencies and vice versa for enforcement or investigational purposes. The PACT Act permits use of the exception ''for regulatory purposes *between* any [covered] business . . . and an agency of the Federal Government or a State government.'' *Id.* at (b)(3)(A)(ii) (emphasis added). The word ''between'' plainly denotes movement in either direction. See, *e.g., Atlas Aerospace LLC* v. *Advanced Transp., Inc.,* No. 12–1200–JWL, 2012 WL 5398027, at *1 (D. Kan. Nov. 2, 2012); Union Pacific Corp. et al., 2 S.T.B. 276, 280 (1997) (''Citation is hardly necessary on this point.''). It is further apparent that ''regulatory purposes'' encompasses enforcement against and investigation of regulated entities, among other governmental activities. Therefore, shipments from a business to a Federal or State governmental body and vice versa are within the ambit of the Business/Regulatory Purposes exception, provided that all of the other conditions for use of the exception are met.

2. Eligible Parties

The Business/Regulatory Purposes exception permits shipments of PACT Act-covered products between ''legally operating businesses that have all applicable State and Federal Government licenses or permits and are engaged in tobacco product manufacturing, distribution, wholesale, export, import, testing, investigation, or research'' and between such businesses and Federal or State government agencies. 18 U.S.C. 1716E(b)(3)(A)(i)–(ii).

A number of ENDS industry commenters opined that ''businesses . . . engaged in . . . distribution'' should be understood to include retailers, common carriers, and contract delivery services. This interpretation accords with the Postal Service's longstanding practice in applying the statutory term, as well as with dictionary and related statutory definitions. See, *e.g.,* Distribute, Black's Law Dictionary (11th ed. 2015) (''3. To deliver.''); Distribute, Merriam-Webster.com (last visited Oct. 14, 2021) (''2b: To give out or deliver especially to members of a group''); cf. 21 U.S.C. 802(8), (11) (distribution of a controlled substance or listed chemical generally means transfer between parties). Because the Postal Service considers this meaning to be plain from the statutory term, there does not appear to be a basis to deviate from or elaborate upon the statutory language. It is emphasized that the statutory Business/Regulatory Purposes exception permits shipments between a retail or other distributor and another industry business or regulator, but not a distributor's (or any other entity's) direct shipments to consumers. The measures discussed in sections III.G.3–.7 are designed to ensure that the Business/Regulatory Purposes exception is used only for eligible business-to-business or business-to-government shipments and not for shipments to or

from ineligible parties, including retail consumers.

An ENDS industry association proposed to clarify that ''testing, investigation, or research'' includes contracted research organizations and laboratories. It seems self-evident that such entities would be covered, to the extent that they are ''engaged in . . . testing, investigation, or research'' as to PACT Act-covered products; the statute provides no basis for distinction according to such entities' contractual relationships. Here, too, the Postal Service regards the statutory language as sufficiently clear in encompassing the relevant entities, without further elaboration. While the statute does not appear to preclude eligibility for such parties generally, verification of any particular research organization or laboratory's eligibility will involve a case-specific determination based on the documentation submitted with the relevant application.

The same ENDS industry association asked that marketing firms be treated as eligible. The PACT Act does not appear to permit such treatment. None of the categories of business activity enumerated in the statute encompasses marketing or related activities, such as advertising or promotion. Nor does the statute extend eligibility to agents of enumerated businesses, in contrast to the Consumer Testing exception. Cf. 18 U.S.C. 1716E(b)(5)(A). As an exception to a general policy of nonmailability, the Business/Regulatory Purposes exception merits narrow construction. See, *e.g., Maracich* v. *Spears,* 570 U.S. 48, 60 (2013) (quoting *Comm'r* v. *Clark,* 489 U.S. 726, 739 (1989)). The PACT Act delegates to the Postal Service only the authority to ''establish the standards and requirements that apply to all mailings'' defined by the statutory criteria for the Business/Regulatory Purposes exception, 18 U.S.C. 1716(b)(3)(B)(i), and the POSECCA permits the Postal Service only to ''clarify the applicability'' of the PACT Act's prohibition (and, by implication, its exceptions). POSECCA section 603(a). As discussed in section III.A.1, neither statute permits the Postal Service to modify those criteria themselves. As such, the Postal Service lacks any authority or basis to add businesses engaged in marketing to the roster of eligible entities.

An ENDS manufacturer asserted that licensed independent mystery-shopper contractors should count as entities ''engaged in . . . testing, investigation, or research.'' To the extent that such a contractor is a business entity, then it could potentially come within the scope of the exception, depending on the Postal Service's assessment of the documentation submitted with the relevant application. To the extent that the contractor is an individual tester, however, then it would appear to fall outside of the scope of the exception, which is restricted to ''legally operating businesses that have all applicable State and Federal Government licenses or permits.'' Rather, shipments from businesses to individual testers would appear to be akin to the shipments governed by the Consumer Testing and Public Health exceptions, which Congress narrowly circumscribed and, as discussed in section III.I, did not make available for ENDS products in any event. To the extent that individual testers may wish to send ENDS products to a manufacturer, testing firm, or other entity, these shipments would fall within the scope of the Certain Individuals exception, subject to the relevant criteria and limitations.

The same manufacturer inquired whether ''between legally operating businesses'' would be construed to include shipments between two offices of the same eligible firm, in addition to shipments between separate firms. The Postal Service agrees that this construction makes sense, provided that all relevant intra-firm sender and recipient addresses are listed in the firm's application and approved by the Postal Service. Indeed, it is difficult to conceive of why Congress would permit shipments between duly authorized facilities of separate firms, while prohibiting them between identical facilities that happen to be within the same corporate structure. This understanding accords with the Postal Service's historical practice in administering the exception prior to the POSECCA.

Certain pro-ENDS commenters suggested that the Business/Regulatory Purposes exception could be used to facilitate the return of ENDS products from consumers to businesses. The PACT Act does not permit this use of the Business/Regulatory Purposes exception. Eligibility for the Business/Regulatory Purposes exception is restricted to shipments between eligible businesses or between such businesses and Federal or State government agencies. By contrast, 18 U.S.C. 1716E(b)(3) does not contain any indication of legislative intent to encompass shipments either to or from individual consumers. That said, business-to-business product returns and recycling- or reuse-related shipments may be permissible between eligible and approved businesses, and consumer-to-business shipments for such purposes may be permissible under the Certain Individuals exception, as discussed in section III.H.

State and local attorneys general opined that a business's status as ''legally operating'' implies compliance with all pertinent laws, and that a business does not qualify as ''legally operating'' for purposes of the Business/Regulatory Purposes exception if it markets products that are counterfeit, that are not the subject of a timely premarket application to the FDA, or that are otherwise inconsistent with applicable law. The Postal Service agrees that all mailers must comply with all applicable laws with respect to products that they mail, and that a pattern of violations may rise to a level where a business may no longer be considered ''legally operating.'' It seems equally apparent, however, that a business may violate a law with respect to certain of its products while operating legally in other respects. Therefore, the Postal Service regards the question of whether and when violations suffice to render a business no longer ''legally operating'' to be a case-specific one, dependent on the totality of relevant facts and circumstances in a particular situation. The Postal Service encourages its Federal, State, local, and Tribal governmental partners, as well as any other party, to bring to the attention of the Postal Inspection Service any indication that an ENDS-industry business mailer may have committed material legal violations such that it may no longer be considered ''legally operating.''

The same commenters proposed that the Business/Regulatory Purposes exception be restricted to recipients using their physical address as the delivery address and that recipients using a different delivery address (such as a Post Office Box or private rental mailbox) be barred from eligibility. The Postal Service declines to adopt this recommendation. Such a restriction is not among the statutory eligibility criteria. Even if the Postal Service had the policy discretion to adopt such a categorical restriction, the basis for such a potentially overbroad rule is unclear. The Postal Service notes that Post Office Boxes and private rental mailboxes are used by a variety of business and governmental actors for a variety of reasons.[16] Most such uses are presumably lawful and legitimate, and while some such mail recipients may engage in unlawful activity, the same is

[16] Indeed, in subscribing to this set of comments, one of the commenting State attorneys general provided contact information that listed a Post Office Box address.

true of persons who use a physical mailing address. The commenters offer no empirical support for the implied notion that addressees who use certain types of mailboxes are more likely than other addressees to engage in activity disqualifying them from the Business/Regulatory Purposes exception, let alone to such an overwhelming and disparate degree as to warrant barring *all* persons using such mailboxes from otherwise permissible eligibility for the exception. That said, if any person or entity believes that a sender or recipient is using a Post Office Box or private mailbox to violate the law, such persons and entities are encouraged to notify the Postal Inspection Service and/or to nominate the entity to the List of Unregistered or Noncompliant Delivery Sellers compiled by the Attorney General under section 2A(e) of the Jenkins Act (''Noncompliant List''), if appropriate.

Two Federal agency partners inquired whether the Business/Regulatory Purposes exception, or some other exception, would accommodate shipments from one governmental actor to another, such as between a governmental field agent and an agency laboratory or between two separate agencies. Congress has made the Business/Regulatory Purposes exception available only for shipments (1) from one covered business to another and (2) from such a business and governmental actor or vice versa, 18 U.S.C. 1716E(b)(3)(A)(i)–(ii), but *not* (3) from one governmental actor to another. Nor does any other PACT Act exception encompass such shipments. While the Postal Service understands that effective regulation may require shipments of tobacco and ENDS products between governmental actors, such shipments must occur through non-postal channels unless and until Congress amends the PACT Act to permit the use of the mails for such shipments.

3. Application Process

The PACT Act charges the Postal Service with verifying that any person submitting an otherwise nonmailable tobacco product into the mails, and any person receiving such a product through the mails, as authorized under the Business/Regulatory Purposes exception, is a business or government agency within the scope of the exception. 18 U.S.C. 1716E(b)(3)(B)(ii)(I)–(II); see also *id.* at (b)(3)(B)(ii)(VI) (markings must enable Postal Service employees' awareness that the mailing ''may be delivered only to a permitted government agency or business''). To fulfill these eligibility verification requirements, the Postal Service created a centralized application process. 76 FR at 24535–24536; 76 FR at 29665–29666. The Postal Service reasonably determined that centralization of eligibility determinations would allow for more effective and efficient assessment of eligibility, and would be less disruptive to retail and delivery operations and the customer experience, than the alternative of having retail and delivery personnel attempt to verify documentation and other criteria for eligibility each and every time an ENDS mailing is tendered or delivered.[17] Eleven years of the existing practice have provided no fresh basis to think that a decentralized approach to eligibility verification would work better.

In general, pro-ENDS commenters expressed concern that the centralized authorization process set forth in Publication 52 section 472.221, in combination with the fact that the POSECCA's mailing prohibition would take effect immediately upon adoption of the final rule, would have an unduly disruptive effect on the ENDS industry, at least to the extent that supply-chain-related and regulatory mailing activity might ultimately be deemed permissible under the Business/Regulatory Purposes exception.

Some industry commenters recommended that the Postal Service develop a streamlined process involving an online application portal. The Postal Service agrees that this recommendation might well benefit applicants, as well as improve the effectiveness and efficiency of Postal Service review. Unfortunately, the Postal Service's existing information technology infrastructure does not allow for such a solution in the near term, and the need for prompt implementation precludes development and implementation of an online application portal prior to adoption of the final rule. The Postal Service will continue to explore the feasibility of digitizing the application process and may amend its rules appropriately at a later time.

Particularly given the lack of a digital-based application process, at least one industry commenter expressed concern that the Postal Service may not be prepared for a potential flood of applications, and two others asked the Postal Service to ensure adequate staffing to process applications. The Postal Service recognizes that the ENDS industry is less consolidated, more complex, and more reliant on the mail than the industries previously subject to the PACT Act. As such, the Postal Service shares the commenter's anticipation of a large number of applications that far exceeds the historical rate of such applications and involves numbers of parties and products far greater than past applications. See 86 FR at 20288. The Postal Service is therefore undertaking multiple steps in an effort to improve the efficiency of the application review process and to mitigate the likely increase in processing times:

- The Postal Service provided advance guidance to ENDS industry actors about application documentation that they could compile while awaiting the final rule, in the interest of filing an application as soon as possible following the final rule and minimizing the chances of delayed processing due to insufficient supporting documentation. *Id.*
- The Postal Service also provided advance guidance about other mailability restrictions that might apply to ENDS products, so that potential applicants may preemptively consider whether their products would be nonmailable in any case and, in appropriate cases, narrow the scope of their Business/Regulatory Purposes applications accordingly or forgo applying altogether. See *id.* at 20,289.
- For at least a temporary period, the Postal Service is assigning additional analyst resources to assist the PCSC with reviewing Business/Regulatory Purposes exception applications. This internal workload-management change does not affect any aspect of the rules themselves and therefore is not reflected in the text of the final rule.

Despite these measures, it must be recognized that the Postal Service has limited financial and other resources with which to fulfill its universal service mission and fulfill myriad other statutory obligations,[18] and Congress did not provide the Postal Service with any additional funding for POSECCA implementation activities. As such, there are limits to the Postal Service's ability to timely process substantial numbers of Business/Regulatory Purposes applications at any given time. The statutory requirements for Postal Service verification of mailers' and

[17] The Postal Service is statutorily obligated to pursue economy and efficiency in its operations. 39 U.S.C. 101(a), 403(a), (b)(1), 2010, 3661(a).

[18] Unlike most Federal agencies, the Postal Service is supported almost entirely by revenues, not appropriations of taxpayer dollars. See generally 39 U.S.C. 2401. The Postal Service incurred multibillion-dollar net losses in each the past fourteen years, with a cumulative deficiency of $87.0 billion as of the end of FY 2020 and liquidity levels that place the current and future fulfillment of its statutory mission at risk. U.S. Postal Serv., 2020 Report on Form 10–K, at 68, *https://about.usps.com/what/financials/10k-reports/fy2020.pdf.*

recipients' eligibility, 18 U.S.C. 1716E(b)(3)(B)(ii)(I)–(II), (b)(5)(C)(ii)(I), leave the Postal Service unable to simply suspend such verification. Hence, applicants and other interested parties should expect review of their applications to require potentially substantial processing time. The duration of any review would be determined by the number and complexity of the applications that the Postal Service receives and the amount of engagement with applicants during processing. The Postal Service recommends that applicants provide complete, accurate information in their applications and limit their current and anticipated mailing activity to bona fide mailable content, so that applications can be processed as efficiently and expeditiously as possible.

A number of pro-ENDS commenters expressed concern that an immediate effective date, coupled with a time-consuming application process for the Business/Regulatory Purposes exception, would disrupt the very industry supply chains and regulatory activities that the exception is intended to safeguard. To avoid such anticipated harms, these commenters asked the Postal Service either to accept Business/Regulatory Purposes exception applications in advance of the final rule, or else to defer the mailing ban until applications can be approved. In the April 2021 Guidance, the Postal Service explained that it would not accept early applications, as it was yet undetermined to what extent the exceptions would be available for ENDS products at all and on what terms. 86 FR at 20288. It is tautological that the Postal Service cannot announce and give effect to an exception to a mailing ban before the ban takes effect; prior to the ban, mailability is the rule, not an exception. As for accepting and processing applications in advance of the final rule, the course of intra- and interagency deliberations over the final rule—particularly in light of the voluminous number and range of public comments—required an extraordinary amount of time to process, to the point where any early acceptance period would have been too short to provide the substantial buffer that commenters sought. Nor is the Postal Service at liberty to further defer the effective date simply for the sake of a small group of pro-ENDS commenters, for the reasons discussed in section III.A.3. As it was, the same complex deliberations required far more time to complete the final rule than Congress had allotted in the POSECCA, and the policy interests evident in the statutory text and legislative history—none of which include solicitude toward industry supply chains or regulatory activities—do not support additional, discretionary delay beyond what was necessary to complete the final rule.[19]

Out of similar concerns over at least temporary disruption of industry supply chains, two ENDS industry commenters proposed that the Postal Service allow applicants to continue mailing ENDS products within the scope of the exception while awaiting approval of their application, subject to a sworn certification of eligibility, a bond or other security, or a provisional eligibility number provided by the Postal Service. The Postal Service declines to adopt this proposal as inconsistent with the aforementioned statutory requirements that the mailing ban take effect immediately and that the Postal Service verify the sender and recipient's eligibility prior to permitting any mailing under the Business/Regulatory Purposes exception.

Even if 18 U.S.C. 1716E(b)(3)(B)(ii)(I)–(II) were arguably ambiguous as to whether verification may happen after acceptance or even after delivery, the Postal Service considers the only reasonable interpretation to be that verification must occur prior to acceptance. Congress clearly expressed its intent that verification of the recipient occur prior to delivery: 18 U.S.C. 1716E(b)(3)(B)(ii)(VI) requires package markings apprising Postal Service personnel that a given mailing ''may be delivered only to a permitted government agency or business.'' Hence, ''permitted'' status must be ascertained as a condition precedent to delivery. Moreover, the exception is available ''only'' to eligible businesses and government agencies. 18 U.S.C. 1716E(b)(3)(A). The exception therefore may not be used to justify a mailing to or from an ineligible entity, regardless of whether the entity is the subject of a pending application. Because eligibility is not determined until it is determined, the presumption must necessarily be that a mailing is ineligible until demonstrated to be eligible, not the other way around. Moreover, the Postal Service is mindful that the Business/Regulatory Purposes exception is carved out from the general rule that ENDS products ''shall not be deposited in or carried through the mails.'' *Id.* at (a)(1). As such, the narrow construction typically due exceptions, discussed in the preceding section, militates against a liberal presumption of eligibility on the sheer basis of a mailer's self-certification or payment of a bond. Even if such a presumption were not inconsistent with the statute, the Postal Service would decline to adopt it as a policy matter, given the undue opportunity for abuse that it would present.

The same commenters urged the Postal Service to streamline or eliminate the process for updates to approved applications, which, the commenters argued, should not require a further application and approval process. The requirements for approval of updated applications were set forth and explained in the Postal Service's 2010 final rule implementing the PACT Act. As the Postal Service explained then, the PACT Act charges the Postal Service with verifying the eligibility of senders and addressees pursuant to the Business/Regulatory Purposes exception, and so mailers must be responsible for maintaining the accuracy of all information in their applications and await verification of eligibility before any mailing may be treated as permissible under the exception. 76 FR at 29666.

Indeed, an update may be just as substantive as the original application (*e.g.,* the addition of parties or products), and it may materially change circumstances relevant to mailability. Even updates to a single entry on the form can be material: A change of address could be legitimate or used to mask an ineligible party; ''legally operating'' status can hinge on rescission or extension of a permit; and a change in product composition may change its status vis-à-vis controlled-substance or hazardous-materials rules. Vetting only an initial application but not updates to it would invite efforts to evade review through overreliance on unreviewed updates, in violation of both the letter and the spirit of 18 U.S.C. 1716E(b)(3)(B)(ii)(I)–(II).

Nothing about the statutory verification requirement has changed since 2010, and so there is no basis to rethink the need to verify updated applications. That said, as noted earlier, the Postal Service will undertake to explore possibilities for streamlining the application process, including updates to applications, through automation and digitization.

Some pro-ENDS commenters opined that the centralized application process imposes red tape that favors large industry actors and poses undue obstacles to smaller businesses. While

[19] Moreover, it is difficult to see how the proposal to delay effectiveness until applications can be approved would work in practice. The Postal Service cannot predict how many applications it will receive, their timing and pacing, or their extensiveness, and so it cannot predict how long it will take to process even an initial batch of applications.

the Postal Service is sympathetic to the challenges faced by small and medium-sized enterprises, Congress has mandated that use of the Business/Regulatory Purposes exception be conditioned on Postal Service verification of eligibility. The PACT Act's verification requirements apply to all entities sending or receiving items under the exception, without distinction as to size. The Postal Service considers the alternative to centralized verification—verification at the point of acceptance and delivery of each mailing—to pose similar obstacles in terms of paperwork burden, as the sender or recipient would still need to compile and present the same license, permit, and other documentation to demonstrate eligibility. The only difference would be that the sender and recipient would have to do so for each and every mailing, rather than on a less frequent basis under the centralized process. It is difficult to see how the decentralized-verification alternative would be superior in terms of reducing administrative burden for small and medium-sized enterprises, given Congress's requirement of eligibility verification in all cases. That said, smaller businesses may benefit from proportionally faster processing times (within the bounds of application processing as discussed later in this section), to the extent that their applications involve fewer parties and products than those of larger businesses.

Two ENDS industry commenters suggested that the Postal Service provide a checklist for applicant documentation. Simultaneously to the final rule, the Postal Service is issuing a distinct version of its application form to account for ENDS products. The amended form will include detailed instructions and documentation requirements, as well as supporting worksheets.

Two ENDS industry commenters requested that the Postal Service confirm that it would process applications on a ''first in, first out'' (FIFO) basis, in the interest of equal treatment for all businesses. The PCSC generally uses a FIFO system for each stage of application processing, although the precise sequencing of application processing may be complicated somewhat by the expanded distribution of workload discussed earlier in this section.[20] It is certainly not the case that applications will be prioritized according to business size, industry reputation, or other applicant-specific circumstances.

State and local attorneys general proposed that the Postal Service share applications with State and local law enforcement officials to spread out the investigative workload. The Postal Service appreciates the suggestion and is willing to consider possibilities for enhancing application processing via intergovernmental and/or interagency information-sharing, subject to feasibility, appropriate protections for third-party information, and other pertinent conditions. The Postal Service regards such intergovernmental cooperation as part of what should be the normal administration of the PACT Act, see 18 U.S.C. 1716E(g), and looks forward to further dialogue with partners outside of the ambit of this rulemaking.

State and local attorneys general also proposed that the Postal Service use State and local governments' lists of licensees to verify eligibility. This suggestion is facially reasonable, but the Postal Service is unaware of any consolidated data source that would enable efficient and fair incorporation of such a resource into the application review process. Here, too, the Postal Service welcomes further dialogue with its intergovernmental partners about potential enhancements to PACT Act administration.

4. Documentation of Legally Operating Status

To support verification of eligibility as legally operating under 18 U.S.C. 1716E(b)(3)(A) and (b)(3)(B)(ii)(I), preexisting Publication 52 section 472.221.a required an applicant to submit information about its legal status, any applicable licenses, and authority under which it operates; information about the legal status, any applicable licenses, and operational authority for all entities to which the applicant's mailings under the exception would be addressed; and all locations where mail containing cigarettes and smokeless tobacco would be presented.

Some ENDS industry stakeholders expressed concern that the documentation requirements were geared exclusively toward tobacco licensing and would prejudice mailers of non-nicotine-related ENDS products. This concern is unfounded. Nothing in either 18 U.S.C. 1716E(b)(3)(A) or Publication 52 section 472.221.a is specific to tobacco or nicotine licensing. Instead, the statute conditions eligibility on the sender and recipient having ''all *applicable* State and Federal Government licenses or permits'': In other words, any license or permits that entitle the sender or recipient to engage in business activities relating to the product being shipped, whatever that product may be. 18 U.S.C. 1716E(b)(3)(A) (emphasis added). Similarly, Publication 52 section 472.221.a frames the documentation requirements solely in terms of licenses, permits, and authority, without specific reference to tobacco or nicotine or to documentation used exclusively with tobacco or nicotine. The existing language therefore requires no change to accommodate licensing, permit, or other documentation that may demonstrate legal authority to engage in business dealings concerning any or all types of ENDS products relevant to a shipment.

Insofar as the concern may pertain to a separate phrase in 18 U.S.C. 1716E(b)(3)(A)—''engaged in tobacco product manufacturing [or other specified types of business activity]''—it is evident that Congress used ''tobacco product'' in the PACT Act as a catch-all term encompassing all PACT Act-covered products, regardless of actual tobacco content. See 86 FR at 10219. To be sure, the phrase's import was clearer prior to POSECCA, when all PACT Act-covered products were derived from tobacco. But even after POSECCA's inclusion of non-tobacco-related ENDS products, see *supra* section III.D.1, the intent remains sufficiently clear. Given the thorough reliance on ''tobacco product'' throughout the PACT Act, construing the somewhat antiquated phrase literally as covering only bona fide tobacco-derived products and excluding non-tobacco-based ENDS products would vitiate the very language whereby Congress has now subjected to the PACT Act ENDS products related to delivery of any ''substance,'' including non-tobacco-derived substances. Indeed, the POSECCA places ENDS products within the definition of ''cigarette;'' however linguistically awkward this may be, it is evident that ''cigarette'' is now a term of art signaling the PACT Act's application to both tobacco and non-tobacco products. It is reasonable to extend the same understanding to ''tobacco product,'' within which ''cigarettes'' are subsumed. Thus, the only reasonable construction faithful to the POSECCA's text and intent is to treat ''tobacco product'' not as a term of limitation, but

[20] For example, if multiple analysts are conducting initial review of a batch of applications received on the same day, a later-filed application may advance in the review queue before an earlier-filed one that is still being reviewed by a different analyst. It would remain the case that any given reviewer will operate on a FIFO basis, however.

rather as a catch-all term encompassing all products subject to the PACT Act.[21]

In any event, the instance of ''tobacco product'' in 18 U.S.C. 1716E(b)(3)(A) cabins only the activity-based classes of entities eligible for the exception, and not the nature of the licenses or permits under which they may operate. Rather, licenses and permits go to whether the entity—whatever its market and field of activity—is legally operating.[22] As such, a cigarette manufacturer, for example, must have licenses and permits relating to cigarette manufacture, but whether it is legally operating may additionally depend on more general business licensure not specifically related to cigarettes. The same is true of an ENDS-related business. Indeed, the business activity that is the subject of an ENDS-related Business/Regulatory Purposes application may implicate multiple levels of licensure. For example, consider a business engaged in ENDS distribution and applying for the Business/Regulatory Purposes exception in connection with CBD-related products: ''All applicable State and Federal Government licenses or permits'' bearing on ''legally operating'' status might include a general operating license, permission to distribute ENDS products, and permission to distribute hemp-derived (*e.g.,* CBD) products, among other things, to the extent that any such licenses are required by applicable State or Federal law.

Certain other ENDS industry commenters inquire about a situation where neither Federal nor State law imposes any particular license or permit requirements on the same of a given ENDS product. The commenters propose that an applicant be permitted to simply cite a State statute allowing general business operations. The Postal Service appreciates the novelty of the situation, which would not have arisen with respect to the comprehensively regulated products previously subject to the PACT Act. As noted earlier, the PACT Act requires verification of all applicable State and Federal Government licenses or permits. If there are no applicable licenses or permits upon which ''legally operating'' status as to the relevant business activity depends, then that is that. At the very least, however, it seems unlikely that any State's laws would permit an applicant business to operate without a general business license. To the extent that the applicant's relevant business activity is not subject to any other license or permit requirements, then the applicant should be prepared to attest to and document that circumstance, either affirmatively or in response to further PCSC inquiry. Particularly where no other documentation may exist, a government-issued certificate of good standing may be helpful, although not necessarily dispositive. Applicants are reminded that they bear the burden of proof in establishing eligibility to the satisfaction of the PCSC, and applications will likely be processed faster if applicants affirmatively provide robust information about their legal status up front.

It should be noted that the same verification requirements apply with respect to all senders and recipients under the exception, regardless of their status as business actors or government agencies. See 18 U.S.C. 1716E(b)(3)(A), (b)(3)(B)(ii)(I)–(II). At the same time, however, only businesses' eligibility is conditioned upon ''legally operating'' status as evidenced by licenses and permits, compare *id.* at (b)(3)(A)(i) with *id.* at (b)(3)(A)(ii), and indeed, government agencies are not typically subject to licensure by other governmental bodies. Nevertheless, because the Postal Service is required to verify eligibility for governmental senders and recipients, applicants must provide the Postal Service with sufficient information to determine that the relevant governmental entity is an eligible one, and not merely an ineligible entity using a name identical to or resembling that of a bona fide governmental entity. Such information would include not only the entity's name and address, but also citations to the legal authority under which it operates.[23]

One ENDS business asked about how the documentation requirements would apply to contract research organizations and trade shows. The same principles would apply as discussed earlier in this section: To the extent that lawful operation of a contract research organization or trade show relating to the relevant PACT Act-covered products requires Federal or State licensing or permitting, then copies of such documentation must be included with an application concerning such a party. Again, particularly where other license or permit documentation may not exist, a government-issued certificate of good standing may be helpful, albeit not necessarily dispositive.

It is emphasized that the Postal Service is required not merely to collect Federal and State licenses and permits, but also to verify more broadly that a business is ''legally operating'' and ''engaged in'' the relevant business activity. This may require the submission of documentation beyond merely licenses and permits. For example, a university performing research on behalf of ENDS industry participants may need to submit not only copies of relevant licenses and permits, but also grant or contract documentation indicating that the research is within the scope of a legally authorized undertaking.

State and local attorneys general proposed that the Postal Service require applicants to provide information about the products that they intend to ship under the Business/Regulatory Purposes exception. The product suggestion is well-taken, given the various other regulatory and mailability concerns apart from the PACT Act that may pertain to certain ENDS products. The new application form and worksheet incorporate requirements for applicants to provide brand names and descriptions of each product that they intend to ship, as well as additional supporting documentation regarding products that contain lithium batteries, nicotine, THC, or CBD and any other ENDS liquids or solutions.

State and local attorneys general also recommended that applicants be required to certify that they will ship only between authorized persons (*i.e.,* persons whom the Postal Service has verified as eligible). While the concern for attestation is valid, the Postal Service believes that it is already adequately addressed, to the point where attestation at the point of acceptance would be redundant. The Business/Regulatory Purposes application form requires the customer to completely list all intended recipients and to certify as to the entries'

[21] To promote clarity, however, the Postal Service will use a different terminological approach in its regulations. See *infra* section III.J.3.

[22] It is possible that the commenters' concern arises not from the portion of the PACT Act that governs mailability, but from the separate portion that governs delivery sales more generally via modification of the Jenkins Act. See 15 U.S.C. 376a(a)(3)(B) (requiring delivery sellers to comply with ''all State, local, tribal, and other laws generally applicable to sales of cigarettes and smokeless tobacco,'' including ''licensing and tax-stamping requirements''). But that provision applies only to ''delivery sales'' to consumers. See 15 U.S.C. 375(5). Except for intrastate shipments within Alaska and Hawaii, such sales are beyond the scope of the exceptions to the PACT Act's mailing ban, and so they cannot be effectuated through the mails. As such, if the Jenkins Act provision is the basis for the commenters' concern, then it appears to be largely inapposite in this context. As noted in section III.C.3, inquiries about the application of Jenkins Act requirements to delivery-sale-related postal shipments of ENDS products within Alaska and Hawaii should be directed to ATF.

[23] While the Postal Service will retain the preexisting rule permitting waiver, upon request, of application requirements for mailings sent by State or Federal Government agencies, such waivers are not available to business applicants sending to government agencies.

completeness and accuracy. Any materially false or fraudulent statement or omission in the application could subject the applicant to liability under the False Claims Act. See 18 U.S.C. 1001(a). Furthermore, the PACT Act makes clear that the exception does not cover a shipment to an ineligible party, and so a shipment to such a party could subject the shipper to liability under the PACT Act. Moreover, the new rules, like the former rules, require shippers to present their PCSC eligibility determination letter to acceptance personnel for verification of the sender and addressee's eligibility. Here, too, presentment of false or misleading information, or concealment of relevant information, could subject a shipper to False Claims Act liability. As such, there does not appear to be any clear incremental value in adding a redundant attestation at the point of acceptance, let alone such value as might outweigh the administrative costs of doing so.

5. Qualifying Postal Service Products

Several pro-ENDS commenters asked the Postal Service not to limit the use of the Business/Regulatory Purposes exception to shipments via Priority Mail Express with Hold for Pickup service, but rather to allow such shipments via Priority Mail as a more affordable alternative. This concern appears to refer to the PACT Act rules initially implemented in 2010, and not to the current rules. Although Priority Mail Express with Hold for Pickup service was the only combination of services available at the time of original PACT Act implementation in 2010 that could permit the Postal Service to fulfill the PACT Act's age-verification, identity-verification, and tracking requirements, see 75 FR at 29665–29666, the subsequent creation of Adult Signature service enabled the Postal Service to expand the range of available product combinations to Priority Mail Express or Priority Mail with Adult Signature service. See Adult Signature Services, 76 FR 30542 (2011); Publication 52 section 472.222.a. Hence, the Postal Service has long since offered Priority Mail–based options. In this rulemaking, no commenter expressed opposition to the continued availability of Priority Mail Express or Priority Mail with Adult Signature Service for shipments under the Business/Regulatory Purposes exception, and the Postal Service is aware of no reason to restrict such availability in the context of ENDS products.

Upon further consideration, however, it is apparent that Hold for Pickup is now an inferior alternative for fulfilling the PACT Act's verification requirements. Unlike Adult Signature service, Hold for Pickup does not inherently require age or identity verification; rather, personnel must be instructed and expected to identify when a particular Hold for Pickup item requires such verification, based on mailers' compliance with the marking requirement. Because Adult Signature service now provides a more effective means to ensure verification, the Postal Service is discontinuing the option of Priority Mail Express with Hold for Pickup service for mailings under the Business/Regulatory Purposes exception, as well as all other PACT Act exceptions.

6. Methods of Tender

The Postal Service's preexisting PACT Act regulations require Business/Regulatory Purposes shipments to be tendered via a face-to-face transaction with a Postal Service employee, other than through package pickup by a letter carrier. Publication 52 section 472.222.a. A number of ENDS industry commenters asked the Postal Service to reconsider what they characterized as a requirement to tender at a Post Office and to allow Pickup on Demand, package pickup, or business mail acceptance for excepted shipments. Some such commenters noted that the purported requirement is not grounded in the text of the PACT Act.

The commenters misperceive somewhat the import of the face-to-face transaction requirement. For customers using the Business/Regulatory Purposes exception, only Pickup on Demand and package pickup are precluded; nothing in Postal Service regulations prohibits tender at a business mail entry unit or at authorized acceptance locations at a Post Office other than the retail counter, so long as a Postal Service employee accepts the items via an in-person, face-to-face encounter. But see DMM section 503.8.1.3 (requiring tender at a retail counter for customers using Adult Signature service to mail under the Certain Individuals exception). To promote clarity, the final rule includes explicit mentions of retail and/or business mail acceptance locations. The Postal Service hopes that this clarification should help to dispel the commenters' fears of bottlenecks at retail counters.

That said, the Postal Service declines to reconsider the prohibition on Pickup on Demand and package pickup. The centralized application process is intended to streamline the extent of verification that would otherwise be required upon acceptance pursuant to 18 U.S.C. 1716E(b)(3)(B)(ii)(I)–(II), but it cannot supplant acceptance verification entirely. Something must be done to associate the PCSC's determination of eligibility with a given mailing: otherwise, the Postal Service personnel faced with an apparent mailing of a prohibited product have no way to determine its legitimacy, defeating the whole purpose of PCSC verification. For this reason, while a mailer need not submit the entire dossier of eligibility documentation with each mailing, the mailer must at least show a Postal Service employee the PCSC's determination of eligibility, so that the Postal Service can be assured that the package may lawfully be accepted.

Pickup on Demand and package pickup do not provide adequate assurance that the face-to-face interaction necessary to connect PCSC authorization with a given package will occur in all cases. Much of the customer convenience underlying Pickup on Demand and package pickup is in the fact that packages may be left passively for a carrier to pick up *without* the need for in-person interaction. If Pickup on Demand and package pickup services were made available subject to a requirement for face-to-face interaction and verification, then this would raise secondary questions of how a carrier would know when the requirements apply and, more importantly, how the Postal Service could guard against circumvention by customers who do not engage in the requisite request for face-to-face pickup. Moreover, requiring carriers to take the time for face-to-face verification would increase the time required for carriers to service their routes, with negative effects on efficiency and service to other customers.[24] Because allowing Pickup on Demand and package pickup for excepted mailings would diminish the fulfillment of the Postal Service's obligations under both the PACT Act (*i.e.,* verification of eligibility prior to acceptance) and its governing statutes more generally, the Postal Service determines that Pickup on Demand and package pickup remain unacceptable.

7. Delivery Requirements

In addition to ensuring that the addressee is eligible to receive shipments under the Business/Regulatory Purposes exception, the PACT Act requires the Postal Service to ensure (1) that delivery is made only to a verified employee of the addressee; (2) that the receiving employee be verified to be at least the minimum age for

[24] As noted in section III.G.3, the Postal Service is statutorily obligated to pursue economy and efficiency in its operations.

purchase or sale of the relevant products; and (3) that the receiving employee be required to sign for the mailing. 18 U.S.C. 1716E(b)(3)(B)(ii)(II), (VII). Accordingly, the Postal Service's PACT Act regulations have required recipients to show proof of employment status with the addressee business or government agency; to show proof of age; and to sign the return receipt. Publication 52 section 472.223. The Postal Service did not propose to change these requirements.

Some ENDS industry commenters asked that delivery options be expanded from Priority Mail Express with Hold for Pickup service to allow carrier delivery. As discussed in section III.G.5, this request has long since been fulfilled. The Postal Service in 2011 expanded the range of available services to include Priority Mail Express or Priority Mail with Adult Signature service. Unlike Hold for Pickup, which requires a recipient to retrieve a package from a local Post Office, Adult Signature service can be fulfilled by a letter carrier. As such, the Postal Service's longstanding regulations already include carrier delivery options. As also noted in section III.G.5, however, the Postal Service has now determined to discontinue the availability of the Hold for Pickup option; this does not affect the availability of Adult Signature options that are compatible with carrier delivery.

One ENDS industry association recommended that the final rule expressly contemplate a signed letter from an employer as proof of employment. The Postal Service recognizes that the preexisting PACT Act regulations are not specific on this point, and that lay readers may benefit from additional clarity. Therefore, the final rule offers examples of acceptable employment documentation, including an employee identification badge or card, a recent letter on company or agency letterhead attesting to the recipient's employment, or any other documentation that the local postmaster deems to be of comparable reliability. In addition, where delivery is made to a business address, the carrier will be permitted to infer employment status from such factors as the recipient's uniform and presence at a reception desk or retail counter.

Finally, State and local attorneys general asked that the Postal Service bar delivery of shipments under the Business/Regulatory Purposes exception to Post Office Box or private mailbox addresses. The Postal Service declines to do so, for the reasons discussed in section III.G.2.

H. Certain Individuals Exception

As extended to ENDS, this exception allows individual adults to mail a limited number of lightweight packages containing ENDS products for noncommercial purposes. 18 U.S.C. 1716E(b)(4)(A). Some pro-ENDS commenters requested clarification on whether the return of damaged ENDS products to the manufacturer is covered by this exception. By way of clarification, the statute requiring this exception expressly includes the return by an individual of damaged or unacceptable goods to the manufacturer. *Id.* This language is mirrored in Publication 52 section 472.23, which the final rule extends to ENDS.

For additional clarity, the final rule adds language making explicit the permissibility of returning damaged or unacceptable products under this exception. The new language also clarifies the application of the exception's noncommercial-purpose condition to returns of damaged or unacceptable products, in that a product return remains noncommercial so long as any value offered to the sender is limited to the consumer's original outlays for the returned product and the cost of its return. Any additional exchange of value would not merely restore the consumer to their status quo ante; it would be tantamount to a higher-priced sale and thus no longer a noncommercial transfer.

Noting the noncommercial-purpose requirement, some ENDS industry commenters sought clarification regarding whether used disposable ENDS products, which they claim have no commercial value and are similar to damaged products, would be included as ''damaged or unacceptable'' goods under this exception if returned to manufacturers or other businesses for recycling.

The Certain Individuals exception allows shipments by individuals regardless of the type of recipient or the specific reason for mailing (subject to various limitations, including the noncommercial-purpose condition). Although the statute expressly lists the return of damaged or unacceptable products as an example, the use of ''including'' before this statutory phrase makes clear that it is merely illustrative, not exhaustive.

As noted earlier in this section, the Certain Individuals exception does contain a requirement that the mailing be ''for noncommercial purposes.'' *Id.* As the commenters maintain, the depleted merchandise is effectively scrap with no intrinsic commercial value to the consumer. Thus, this exception permits the mailing of used ENDS products for recycling purposes only so long as no net commercial value, such as a rebate, credit, or discount on future purchases, is offered to the mailer in exchange for the used or depleted merchandise. This clarification is reflected in new language expressly discussing the possibility of recycling-oriented shipments under this exception. It is possible that some arrangements involving the recycling of used merchandise might not constitute a commercial exchange and therefore might be permissible under the Certain Individuals exception, such as where the merchandise is merely loaned to an individual user subject to a deposit payment that is refundable upon return of the material. Persons seeking guidance about whether a particular program would constitute a legitimate use of the Certain Individuals exception are encouraged to seek a mailability ruling pursuant to Publication 52 part 215.

One commenter reasoned that, because the return of damaged or unacceptable goods to the manufacturer is expressly allowed under this exception, the manufacturer should be allowed to use the exception to mail warranty replacement goods to adult consumers. However, the Certain Individuals exception provides only for adult ''individuals'' to mail ENDS for ''noncommercial purposes.'' *Id.* The exception thus does not authorize shipments by businesses (or other organizational entities) for any purpose, not even to fulfill a repair or replacement triggered by a consumer's use of the exception. Nor does any other PACT Act exception permit business-to-individual mailings for such purposes.

A Federal agency partner inquired whether the availability of the Certain Individuals exception for products exchanged as gifts could be construed as allowing businesses to distribute free samples, notwithstanding the FDA's general ban on free samples of tobacco products. See 21 CFR 1140.16(d). The Postal Service emphasizes that its mailability regulations, including those administering the PACT Act, do not supersede any other applicable regulation that might restrict or prohibit a given transfer, distribution, or other activity effected through the mails. See Publication 52 part 412 (''The mailer is responsible for ensuring that all Postal Service requirements, as well as all federal and state laws and local ordinances that apply to the shipment of an article of restricted matter, have been met.''). That said, as the name indicates, the Certain Individuals exception is not available for any and all noncommercial

shipment of PACT Act-covered products, but rather only for such shipments by individuals. As such, while gifts from one individual to another may be within the exception's scope, it does not permit businesses to distribute free samples to consumers. Nor does any other exception permit promotional samples to consumers.[25]

Some anti-ENDS commenters suggested that this exception should be altogether abolished or disallowed, reasoning in one instance that the return of damaged or unacceptable ENDS products through the mail by individuals unlikely to be aware of hazmat requirements poses health risks to Postal Service employees. As discussed in section III.A.2, absent a legal impediment to its application to ENDS, the Postal Service lacks a delegation of legislative authority to disallow this or any other PACT Act exception on policy grounds.

Moreover, hazardous-materials concerns are already addressed through comprehensive mailing requirements in Publication 52. Those requirements have applied to individual mailers of ENDS products since long before the POSECCA, and they will continue to apply to mailings under the Certain Individuals exception. The hazardous-materials rules will continue to function to protect the health and safety of all who handle the mail. ENDS industry actors are strongly encouraged to promote awareness of all relevant mailing restrictions and requirements, including hazardous-materials rules, among ENDS consumers. See DMM section 601.9.4.1 (advertising, promotional, and sales matter soliciting or inducing the mailing of nonmailable hazardous materials is itself nonmailable).

Some anti-ENDS commenters recommended that mailers using the exception be required to sign a sworn, written statement or provide other verification that the recipient is above the age of 21, as opposed to the oral affirmation required under the preexisting rules and the proposed rule. See Publication 52 section 472.231.d. These commenters purported that such a measure is necessary because underage recipients continue to access mailed products that are putatively nonmailable under the PACT Act.

Such a requirement would be superfluous and unnecessarily burdensome. Age verification is already required at delivery. 18 U.S.C. 1716E(b)(4)(B)(ii)(V)–(VI). By contrast, the mailer is required merely to ''affirm that the recipient is not a minor.'' *Id.* at (b)(4)(B)(ii)(II). To the extent that any minors allegedly continue to receive mailings of products made nonmailable under the PACT Act, the commenters have pointed to no evidence that this is due to a deficiency in administration of the Certain Individuals exception.[26] Therefore, this recommended measure does not appear to address a demonstrable shortcoming in the Certain Individuals exception, let alone to do so in a way that would meaningfully improve compliance.

A coalition of State and local attorneys general urged the Postal Service to impose a host of additional conditions on this exception by reference to their proposals under the Business/Regulatory Purposes exception. Although it was not entirely clear from the comment, the recommended additional conditions presumably include requiring product identification, certification of mailer and recipient eligibility, exclusion of delivery to Post Office Boxes and commercial mail receiving agencies (''CMRAs''), and signature upon delivery. These commenters argued that delivery provisions set out in 15 U.S.C. 376a(b)(4)(ii) should apply because they assert that 18 U.S.C. 1716E(b)(4)(B), supposedly lacking comparably stringent age verification protocols, does not go far enough to prevent illegal deliveries.

As noted in section III.A.2, the Postal Service has no discretion to impose additional conditions that Congress did not specify in 18 U.S.C. 1716E(b)(4)(B). If anything, the contrast with measures that Congress simultaneously adopted through amendments to the Jenkins Act indicates that Congress did not intend for such measures to govern mailability. As such, the final rule maintains the age-verification and delivery requirements set out for this exception in Publication 52 section 472.23.

An industry coalition suggested that the Postal Service allow prepaid mailing labels to be used for this exception, so that consumers would not bear the costs of returns to manufacturers. As explained in section III.G.5, the Postal Service has determined that Adult Signature service permits the fulfillment of the Postal Service's verification responsibilities under the PACT Act. At present, Adult Signature service is not available in conjunction with domestic return services that would allow for the use of prepaid mailing labels in this manner. See DMM ex. 503.1.4.1, .1.4.3; Postal Regulatory Comm'n, Mail Classification Schedule sections 2120.5, 2645.1.1.d (last edited Oct. 3, 2021), available at *https://go.usa.gov/xFmHg.*

I. Consumer Testing and Public Health Exceptions

The Consumer Testing exception allows ''legally operating cigarette manufacturer[s]'' (and their legally authorized agents) ''to mail cigarettes to verified adult smoker[s] solely for consumer testing purposes.'' 18 U.S.C. 1716E(b)(5)(A). The exception is subject to a number of conditions regarding manufacturer permitting, cigarette quantity, shipment frequency, tax compliance, payments from the manufacturer to recipients (not the other way around), age and identity verification, tracking and delivery confirmation, and recordkeeping, among other things. *Id.* at (b)(5)(A)–(C).

The Public Health exception permits Federal agencies ''engaged in the consumer testing of cigarettes for public health purposes'' to mail ''cigarettes'' in the same manner as manufacturers under the Consumer Testing exception,

[25] The Consumer Testing exception does permit the distribution of cigarettes to individual consumers solely for testing purposes, subject to various conditions and, again, only to the extent consistent with applicable laws and regulations. As discussed in section III.I, the Consumer Testing exception does not apply to smokeless tobacco or ENDS products.

[26] The academic literature cited by these commenters is inapt. One cited study purports to present findings about a lack of age verification for postal deliveries of e-cigarettes in 2014 in violation of the PACT Act, but neither the PACT Act nor any age-verification condition on mailing applied to e-cigarettes at that time. See generally Rebecca S. Williams et al., ''Electronic Cigarette Sales to Minors Via the Internet,'' 169 *JAMA Pediatrics* e1563 (2015). The other allegedly relevant article claims that Postal Service letter carriers did not attempt to conduct age verification for deliveries of cigarettes by online businesses (not individuals, such as might be relevant to the Certain Individuals exception). Rebecca S. Williams et al., ''Cigarette Sales to Minors Via the Internet: How the Story Has Changed in the Wake of Federal Regulation,'' 26 *Tobacco Control* 415 (2017). That article focuses on the consumers' interactions with online vendors and the Postal Service. As recipients, of course, consumers' knowledge or behavior is not transparent to the Postal Service; rather, from the Postal Service's perspective, the mailer (here, the internet vendor) is responsible for compliance with mailing requirements. Publication 52 section 212. The article provides no basis to think that the mailers gave the Postal Service (and thus letter carriers) any indication, let alone a reasonable one, to perceive that the contents of their packages might be nonmailable or require age verification. Indeed, the researchers expressly allowed minor test subjects to misrepresent their age and use their parents' drivers' licenses to bypass age-verification questions. Rebecca S. Williams et al., ''Cigarette Sales to Minors Via the Internet.'' Notably, another study cited by the commenters attests that nearly 90 percent of youth access to tobacco products (including ENDS products) occurs via a third-party intermediary (*e.g.,* one who purchased them either lawfully or fraudulently), and not via an attempt by the underage user to order and obtain delivery the products directly. Sherry T. Liu, ''Youth Access to Tobacco Products in the United States, 2016–2018,'' 5 *Tobacco Regulatory Science* 491 (2019).

except that the payment requirement is waived. *Id.* at (b)(6).

As relevant to both exceptions, ''consumer testing'' is limited to ''formal data collection and analysis for the specific purpose of evaluating the product for quality assurance and benchmarking purposes of cigarette brands or sub-brands among existing adult smokers.'' *Id.* at (b)(5)(D).

In the notice of proposed rulemaking, the Postal Service noted that the use of ''cigarettes'' in these provisions raises an interpretive question. On the one hand, the POSECCA subsumes ENDS products within the term ''cigarettes.'' 15 U.S.C. 375(7). On the other hand, the exceptions are confined to packages containing ''not more than 12 packs of cigarettes (240 cigarettes)''—quantities that denote standard packaging of combustible cigarettes but not ENDS products—and Congress did not amend those provisions to indicate how the quantity limits should apply to ENDS products. 18 U.S.C. 1716E(b)(5)(A)(ii), (C)(ii)(III). The Postal Service tentatively opined that it would be reasonable to construe the lack of accommodation for ENDS products here as rendering the exceptions inapplicable to ENDS products, and the Postal Service invited views and proposed alternative standards from commenters. 86 FR at 10220.

1. Testing by Manufacturers

Public-health commenters generally opposed extending the Consumer Testing exception to ENDS manufacturers. One group of public-health organizations agreed with the notice of proposed rulemaking, in that the wide variety of ENDS packaging and Congressional silence on the matter indicate that Congress did not intend the exception to cover ENDS products. Another public-health organization noted that ENDS products do not have the same degree of standardization as cigarettes: For example, an ENDS pod containing 5 percent nicotine liquid may contain a roughly comparable amount of nicotine to 1–1.5 packs of combustible cigarettes, but more of the combustible cigarettes' nicotine is wasted, and less delivered to the user, due to so-called ''sidestream smoke.'' Moreover, ENDS liquids' sizes and concentrations vary widely. A third such organization raised policy objections regarding the likelihood that ENDS shipments would contain hazardous materials, would promote dangerous product returns under the Certain Individuals exception, and would pose difficulties in policing companies' representations about bona fide consumer testing.

On the other hand, one public-health organization, two law students, and certain ENDS industry commenters advocated for making the exception available to ENDS manufacturers. ENDS industry commenters relied on the POSECCA's inclusion of ENDS products within the term ''cigarette,'' concluding that ENDS products' entitlement to the exception must precede construction of the quantity condition, rather than the other way around. One such commenter, after repeating its general view that Congress did not intend to make ENDS products nonmailable, pointed out that consumer testing is necessary for ENDS manufacturers to fulfill requirements for FDA authorization. These and other commenters proposed various approaches to the quantity condition:

- *Nicotine-content equivalency:* Limit liquids to 12 units or cartridges, as the purported equivalent to 12 packs of cigarettes (based on the assumption that one 5 percent–nicotine ENDS pod equals one pack of cigarettes); either no limit on devices, or limit devices to the amount necessary to enable the use of that quantity of liquid.
- *Nicotine-consumption equivalency:* The quantity needed to supply the average user for the same period as 240 cigarettes. For example, if the average smoker consumes 14 cigarettes per day, then 240 cigarettes equates to 17 days of average consumption.[27] According to this commenter, most human studies of CBD use dosages ranging between 20 and 1,500 milligrams per day.[28] Thus, a median dosage of 740 milligrams per day would translate into 12,580 milligrams for 17 days.
- *Weight limit:* 5 pounds.
- *Package limit:* One package, regardless of contents, as the Postal Service allegedly cannot investigate the contents of shipments anyway; defer to FDA as to limits of consumer tests themselves.
- *Size limit:* Package dimensions equivalent to a package containing 12 packs of combustible cigarettes. This commenter submitted that one pack is typically 3.5 inches by 2.25 inches by 0.88 inch, for a volume of 6.93 cubic inches, hence 12 packs would be 83.16 cubic inches. The commenter noted that these external characteristics are objective and observable, thereby averting the need to open a package and inspect contents.
- *To be determined:* Collaborate with FDA and CDC to devise an appropriate equivalency standard, which may evolve with further data.

The Postal Service appreciates these thoughtful suggestions, which are discussed in greater depth later in this section. Upon further review, however, it is unnecessary to evaluate the suitability of a quantity standard for ENDS products in connection with the Consumer Testing exception. Beyond the interpretive difficulties posed by the quantity limit, Congress has provided at least two other indications of legislative intent that the Consumer Testing exception applies only to combustible cigarettes and not to ENDS products, notwithstanding their technical inclusion within the term ''cigarette'' generally. After all, even statutorily defined terms can give way where context indicates that Congress intended a different meaning. See, *e.g., Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund,* 500 U.S. 72, 80, 83 (1991); *In re Korean Air Lines Co.,* 642 F.3d 685, 692–93 (9th Cir. 2011).

First, the exception is available only to ''cigarette manufacturer[s]'' with a permit ''issued under section 5713 of the Internal Revenue Code of 1986.'' *Id.* at (b)(5)(A)(i). The only entities eligible for such permits are manufacturers and importers of cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco, with ''cigarette'' restricted here to rolls of tobacco wrapped in paper or another substance. 26 U.S.C. 5702(b)–(c), 5713(a). This definition does not describe ENDS products, and so manufacturers of ENDS products are not subject to the Internal Revenue Code section 5713 permit requirement. Accordingly, ENDS manufacturers are not within the ambit of manufacturers eligible to use the mails under the Consumer Testing exception. Here, too, the POSECCA contains no amendment expanding the scope of eligible manufacturers to cover ENDS.

Second, the exception refers repeatedly to cigarettes in connection with a ''smoker.'' 18 U.S.C. 1716E(b)(5)(A), (b)(5)(C)(ii)(II)(aa), (b)(5)(D)(ii). This language clearly denotes combustion, rather than the sub-combustion-level heating that occurs in most ENDS products.[29] The

[27] See CDC, Press Release, Smoking Is Down, But Almost 38 Million American Adults Still Smoke, Jan. 18, 2018, *https://go.usa.gov/x6qSt* (2016 data).

[28] Sian Ferguson, ''CBD Dosage: Figuring Out How Much to Take,'' *Healthline,* Aug. 1, 2019, *https://www.healthline.com/health/cbd-dosage.*

[29] ''E-cigarettes purportedly do not produce a combusted smoke; rather, they deliver an aerosol containing nicotine and other tobacco-related compounds.'' Megan J. Schroeder & Allison C. Hoffman, ''Electronic Cigarettes and Nicotine Clinical Pharmacology,'' 23 *Tobacco Control* ii30 (2014), *https://tobaccocontrol.bmj.com/content/tobaccocontrol/23/suppl_2/ii30.full.pdf.* ''Smoking'' and ''vaping'' are frequently placed in opposition to one another in popular discourse. See, *e.g.,* Julia Savacool, ''Vaping Vs. Smoking: Is One Better for

POSECCA contains no amendment that expands the term ''smoker'' to encompass the manner in which ENDS products are consumed.

It should be noted that the Consumer Testing exception is unique among the PACT Act's exceptions in that it pertains specifically to ''cigarettes'' and not to the full range of ''mailings'' or ''tobacco products'' covered by the PACT Act. Compare *id.* at (b)(2)–(4) with *id.* at (b)(5). Prior to the POSECCA, it was therefore clear that the Consumer Testing exception was confined to combustible cigarettes and did not apply to smokeless tobacco. While this history alone might not be relevant if Congress had used broader language in the Consumer Testing exception, Congress's retention of combustible-cigarette-specific conditions in the post-POSECCA Consumer Testing exception shows Congress's continuing intent that the exception apply only to combustible cigarettes, and not to other products that might now be encompassed within the otherwise-applicable statutory definition of ''cigarettes.''

Against this backdrop regarding Congress's intent to apply the Consumer Testing exception only to combustible cigarettes and not to ENDS products, it is all the more clear that the quantity limit of ''12 packs of cigarettes (240 cigarettes)'' is intended to govern only combustible cigarettes, in which context such quantities are commonplace, and not ENDS products, which are not so standardized. The language itself suggests this conclusion; the context solidifies it.

While the commenters have proposed a range of original ideas for a potential equivalency standard, the Postal Service finds no occasion to consider application of such a standard here, where Congress's intent to exclude ENDS products from the exception is clear. That decision is buttressed by the fact that no proposed equivalency standard is self-evident or compelling.

Proposals focused on the exterior of the package, rather than its contents, would impose virtually no limit on the amount or type of ENDS products sent in an ostensible consumer testing shipment. This unfettered latitude is far from Congress's design of limiting the quantity of product *within* a package.

Proposals focused on the amount of nicotine fail to account for the multiple layers of variability that complicate such an exercise: The range of nicotine content among combustible cigarettes,[30] the range of nicotine delivered to smokers [31] and users of nicotine-related ENDS products,[32] and the range of nicotine contained in ENDS products, which may contain as little as zero nicotine or be used with a limitless quantity of nicotine-containing solution, and which may vary even within the same brand and batch.[33] The difficulties in comparability are further compounded when considering how to equate combustible cigarettes with ENDS products related to non-nicotine substances, such as CBD.[34] And the ranges of variation increase still further when scaled up from a single cigarette to 240. Thus, it does not appear that an equivalency standard can be readily devised to reliably translate 240 cigarettes into some comparable number of ENDS products. The apparent impossibility of shoehorning ENDS products into the 240-cigarette limit underscores the conclusion—already apparent from other conditions of the Consumer Testing exception—that Congress intended this exception to be available only for combustible cigarettes and not for ENDS.

For these reasons, the Postal Service concludes that the PACT Act does not make the Consumer Testing exception available for ENDS products. It should be noted that the Intra-Alaska/Intra-Hawaii exception would permit the mailing of ENDS products for any purpose, including consumer testing, with the only restriction being that the mailing occur entirely within Alaska or Hawaii. Otherwise, barring further legislative change, such activities must employ transportation and delivery methods that do not involve the mails.

2. Testing by Federal Agencies

Two of the public-health organizations that opposed allowing the Consumer Testing exception for ENDS products nonetheless favored allowing the Public Health exception. One such commenter analogized the situation to the restrictions on mailing dangerous goods, which contain exceptions for scientific-use mailings, see 18 U.S.C. 1716(c), (e), and suggested that the Postal Service make the exception available only upon agreement with the relevant Federal agency. Federal agency partners with which the Postal Service consulted also expressed an interest in making the Public Health exception available for ENDS products, in order

Your Lungs? Here's What Experts Say,'' *Parade,* Feb. 20, 2021, *https://parade.com/1093720/julia-savacool/vaping-vs-smoking;* Scott Roberts Law, ''What's the Difference Between Smoking and Vaping?,'' *Michigan Cannabis Business Blog,* May 14, 2020, *https://scottrobertslaw.com/whats-the-difference-between-smoking-and-vaping;* Nick English, ''I Started Vaping to Quit Smoking, and It Was a Huge Mistake,'' *Men's Health,* Oct. 22, 2018, *https://www.menshealth.com/health/a23937726/vaping-vs-smoking.* Pro-ENDS commenters engaged in the same tendency when touting ENDS use as a beneficial alternative to combustible cigarettes. Two industry associations even styled themselves as promoters of ''smoke-free alternatives'' and ''smoking alternatives.''

[30] The nicotine content of combustible cigarettes in the United States has been measured to range from 7.2 to 13.4 mg per cigarette, or about ±30 percent around the mean of 10.2 mg per cigarette. Lynn T. Kozlowski et al., ''Filter Ventilation and Nicotine Content of Tobacco in Cigarettes from Canada, the United Kingdom, and the United States,'' 7 *Tobacco Control* 369, 370 (1998), *https://tobaccocontrol.bmj.com/content/tobaccocontrol/7/4/369.full.pdf;* see also Tobacco Product Standard for Nicotine Level of Combusted Cigarettes, 83 FR 11818, 11826 (2018) (10–14 mg of nicotine per cigarette in the United States, per Kozlowski et al. and others).

[31] One study measured nicotine delivery from the combustible cigarettes surveyed as averaging 1.04 mg ±0.36 mg, or a range of about 35 percent. Neal L. Benowitz & Peyton Jacob III, ''Daily Intake of Nicotine During Cigarette Smoking,'' 35 *Clinical Pharmacology & Therapeutics* 499 (1984), available at *https://ascpt.onlinelibrary.wiley.com/doi/abs/10.1038/clpt.1984.67;* see also 83 FR at 11826 (1.1–1.7 mg nicotine yield per cigarette)). In the Benowitz/Jacob study, cigarette smokers' daily nicotine intake averaged 37.6 mg ±17.7 mg at 1 standard deviation, but ranged overall from 10.5 to 78.6 mg, for a total range of more than ±75 percent around the median.

[32] The amount of nicotine emitted depends on multiple variables: Device power, nicotine concentration, ratio of propylene glycol to vegetable glycerin, and puff duration. Kathleen Stratton et al., Public Health Consequences of E-Cigarettes 92–94 (Nat'l Acads. of Scis., Eng'g, & Med. 2018), *https://www.ncbi.nlm.nih.gov/books/NBK507171/pdf/Bookshelf_NBK507171.pdf;* Soha Talih et al., ''Transport Phenomena Governing Nicotine Emissions from Electronic Cigarettes: Model Formulation and Experimental Investigation,'' 51 *Aerosol Sci. & Tech.* 1, 8–13 (2016); Ivan Gene Gillman et al., ''Effect of Variable Power Levels on the Yield of Total Aerosol Mass and Formation of Aldehydes in E-Cigarette Aerosols,'' 75 *Reg. Toxicology & Pharmacology* 58, 60 (2016); Maciej L. Goniewicz et al., ''Nicotine Content of Electronic Cigarettes, Its Release in Vapour and Its Consistency Across Batches: Regulatory Implications,'' 109 *Addiction* 500, 503 (2014). Although Gillman et al. describe the amount of total aerosol produced, the same percent range should apply to the amount of nicotine aerosolized, given the homogeneity of constituents throughout a solution. Variability in nicotine delivered by ENDS does not end with nicotine emitted, however; the amount delivered to a user's bloodstream also depends on user- and product-specific factors. See generally Schroeder & Hoffman, ''Electronic Cigarettes and Nicotine Clinical Pharmacology.''

[33] Stratton et al., Public Health Consequences of E-Cigarettes 89–92; Goniewicz et al., ''Nicotine Content of Electronic Cigarettes,'' 109 *Addiction* at 502.

[34] With respect to the proposal to equate CBD to combustible cigarettes based on daily use, even the CBD-dosage figures provided by the commenter present a range that is so wide (20–1,500 mg/day) as to render the commenter's focus on the average essentially meaningless. Moreover, the scholarly article referenced in the commenter's popular source does not discuss whether these dosages are representative of therapeutic practice; rather, they are characterized only as quantities that have been shown to be tolerated by humans from a safety perspective. Kerstin Iffland & Franjo Grotenhermen, ''An Update on Safety and Side Effects of Cannabidiol: A Review of Clinical Data and Relevant Animal Studies,'' 2 *Cannabis & Cannabinoid Research* 139, 140 (2017), *https://go.usa.gov/x6cWG,* cited in Ferguson, ''CBD Dosage.''

for them to carry out testing activities that they consider necessary for effective regulation. Law-student commenters asserted that Congress likely intended to permit continued Federal testing of ENDS products for public-health regulation, which one such commenter submitted is unlikely to contribute materially to youth-access and other policy concerns that motivated the POSECCA and the PACT Act. Although ENDS industry commenters did not express views specifically about the Public Health exception, the linkage between the Public Health and Consumer Testing exceptions suggests that such commenters' views on the availability of the Consumer Testing exception would likewise carry over to the Public Health exception.

The Postal Service reiterates that it must be guided by the parameters and policy decisions expressed in the statute; Congress did not authorize the Postal Service to make its own policy decisions about whether any exception, including the Public Health exception, ought to be extended to ENDS products. Particularly given that lack of policy discretion, the Postal Service is not at liberty to speculate about what Congress might have intended regarding public-health testing of ENDS products by Federal regulatory agencies, in the absence of any statutory language or legislative history clearly addressing the question.

Like the Consumer Testing exception, the statutory language establishing the Public Health exception, which Congress likewise did not amend in the POSECCA, makes clear that the exception applies only to combustible cigarettes and not to ENDS products.

First, the Public Health exception repeatedly uses the term ''consumer testing,'' a defined term restricted to testing involving ''smokers.'' 18 U.S.C. 1716(b)(5)(D)(ii), (b)(6). As discussed in the preceding section, the plain meaning of ''smoker'' indicates that the context is combustible cigarettes, not ENDS products.

Second, the Public Health exception allows Federal agencies to ''mail cigarettes under most of the same requirements, restrictions, and rules and procedures that apply to consumer testing mailings of cigarettes by manufacturers under'' the Consumer Testing exception. *Id.* at (b)(6).[35] Among those applicable requirements is that the entity mailing any shipments verify ''that the recipient is an adult established smoker'': a term that, again, indicates application only to combustible cigarettes and not to ENDS products. *Id.* at (b)(5)(C)(ii)(II)(aa).

Third, the quantity limit discussed in the preceding section also governs the Public Health exception in the same manner as the Consumer Testing exception. As discussed in the preceding section, the quantity limit reinforces the conclusion that only combustible cigarettes, and not ENDS products, are amenable to these exceptions.

Given these clear indications of Congressional intent and the Postal Service's general lack of statutory authority over the scope of PACT Act exceptions, the Postal Service finds no basis to treat the two exceptions as differing in scope due to policy reasons that were not expressed by Congress.[36] It may be that Federal regulatory agencies, like manufacturers, will continue to conduct consumer testing without using the mails, or via use of the mails only within Alaska and Hawaii (as permitted by the Intra-Alaska/Intra-Hawaii exception). To the extent that Federal agencies find those options to be insufficient, then Congress, not the Postal Service, is the appropriate outlet for policy concerns regarding this statutory scheme.

3. Testing by Public-Health Researchers

Certain public-health-oriented commenters urged the Postal Service to permit the mailing of ENDS products from independent researchers or research organizations—not manufacturers or Federal agencies—to individuals for purposes of federally-funded public health research.

As explained in section III.A.1, the Postal Service lacks statutory authority to create new exceptions. Congress provided narrow exceptions for consumer testing only by manufacturers and Federal agencies, and not by any other entity. Moreover, as explained in the preceding two sections, even those exceptions do not cover ENDS products. Therefore, other than mailings entirely within Alaska and Hawaii (as authorized by the Intra-Alaska/Intra-Hawaii exception), researchers must find ways to conduct their consumer testing that do not involve use of the mails. To the extent that a policy case can be made for this use of the mails, that case should be directed to Congress, which has reserved to itself the discretion to modify or augment the PACT Act's exceptions.

J. Other Issues

1. International, Military, and Diplomatic Mail

Except for the Intra-Alaska/Intra-Hawaii exception, the PACT Act's exceptions are not expressly confined to domestic mail. As the Postal Service explained in the 2010 rulemaking concerning PACT Act implementation, however, the complex verification requirements for the PACT Act's exceptions, combined with the strict consequences of any noncompliance, render it impracticable, if not impossible, for these requirements to be fulfilled as to mail originating or destinating outside of the United States. 75 FR at 29665; 75 FR at 24535. In the notice of proposed rulemaking, the Postal Service proposed to maintain the same approach to the exceptions in the context of ENDS products, except potentially with respect to any products that may eventually be covered by the tobacco-cessation/therapeutic exclusion. 86 FR at 10219.

One group of public-health-oriented commenters applauded the disallowance of exceptions for international mail and the extension of that policy to ENDS products. Contrariwise, one ENDS manufacturer asserted that the policy violates the statute, which, according to the commenter, frames the exceptions in terms that provide an affirmative entitlement to mail without restriction to domestic mail. The commenter noted that the Business/Regulatory Purposes exception expressly encompasses businesses involved in ''export'' and ''import,'' see 18 U.S.C. 1716E(b)(3)(A)(i), and opined that the statutory conditions for each exception

[35] One requirement is specifically excepted in the statute. Moreover, it is also reasonable to construe the Internal Revenue Code permit requirement as inapplicable to Federal regulatory agencies, given Congress's clear intent that they be eligible to mail under the Public Health exception notwithstanding their ineligibility for such permits.

[36] Regarding one commenter's comparison to 18 U.S.C. 1716(c)–(e) as a suggested basis for decoupling the Consumer Testing and Public Health exceptions vis-à-vis their applicability to ENDS products, the comparison is inapt. First, that statute is distinct from the PACT Act, which expressly provides that the same requirements apply to activities conducted under the Consumer Testing and Public Health exceptions. Second, 18 U.S.C. 1716(c)–(e) expressly confer discretion upon the Postal Service over the mailability of dangerous items for scientific purposes; the PACT Act does not provide such discretion. Third, 18 U.S.C. 1716(c)–(e) do not concern the mailing of otherwise nonmailable items to individuals, as the Consumer Testing and Public Health exceptions do; rather, the mailings covered by those provisions are more analogous to mailings under the PACT Act's Business/Regulatory Purposes exception. See 18 U.S.C. 1716(c) (shipments of live scorpions ''to be used for purposes of medical research or for the manufacture of antivenom''); *id.* at (d) (shipments of poisonous drugs and medicines from manufacturers or dealers to licensed medical professionals); *id.* at (e) (shipments of poisons for scientific use between manufacturers, dealers, laboratories, and Federal, State, or local government agencies).

can be applied to international as well as domestic mail, without any statutory basis for distinction on the basis of feasibility. One Federal agency partner also asked the Postal Service to reconsider the restriction, in the interest of facilitating effective Federal regulation of foreign parties' tobacco and ENDS products.

The final rule maintains the approach outlined in the notice of proposed rulemaking. The issue is not whether the statute expressly addresses international mail or whether it expressly provides for feasibility-based discretion. Rather, the statutory exceptions permit mailing only to the extent that the Postal Service is able to verify certain things about the mailer and/or recipient. See, *e.g., id.* at (b)(3)(B)(ii)(I)–(II), (b)(3)(B)(ii)(VII), (b)(4)(B)(ii)(I)–(II), (b)(4)(B)(ii)(V). In contrast to private-sector delivery carriers' integrated international networks, the Postal Service does not collect or deliver international mail outside of the United States (other than in the Freely Associated States); it must rely on foreign postal operators and other third-party agents to perform acceptance and delivery abroad. Given the specificity of the statutory verification obligations and their lack of extraterritorial applicability to or contemplation of foreign postal operators and agents, the Postal Service is unable to fulfill, and is not confident in its ability to ensure reliable fulfillment of, the verification tasks upon which these exceptions condition mailability. To the extent that the Postal Service cannot ensure verification, then the statute bars exceptional mailability for the relevant class of shipments.

As the industry commenter observes, the Business/Regulatory Purposes exception is available to legally operating businesses ''engaged in tobacco product . . . export [and] import.'' *Id.* at (b)(3)(A)(i). But these descriptors are used only to define the class of businesses that may be eligible to mail to other eligible parties under the exception; it does not, by itself, establish entitlement to use the mails for export and import activities. Thus, upon fulfilling all of the conditions for the exception, an export business could receive ENDS products from a domestic manufacturer or wholesaler, for example, and an import business could send ENDS products to domestic wholesalers and distributors. To the extent that the Postal Service can verify all required facts about these senders and recipients, their shipments are mailable under the exception. But because the Postal Service cannot conduct the statutorily required verification for overseas parties, the exporter's exports and importer's imports cannot themselves qualify for use of the mails. Those legs of the products' journey must be accomplished through commercial export and import channels, not through the international mail channel.

In response to the Federal agency partner's concern regarding effective regulation, the Postal Service is sympathetic to this policy interest. Again, however, Congress has imposed verification conditions for use of the mails that the Postal Service is unable to fulfill with respect to international shipments. Non-postal delivery channels may be available to facilitate the transfer of samples and covered items between foreign businesses and U.S. regulators. To the extent that use of the mails would be necessary or expedient to effective regulation, it is for Congress to weigh whether that policy interest warrants relaxation of the PACT Act's verification mandates, creation of a new exception, or some other legislative accommodation.

Certain pro-ENDS commenters urged the Postal Service to ensure that ENDS products will be mailable to U.S. military service members overseas on the same terms as cigarettes and smokeless tobacco. As stated in the notice of proposed rulemaking, the PACT Act exceptions have long been inapplicable to ''mail *presented at* overseas Army Post Office (APO), Fleet Post Office (FPO), or Diplomatic Post Office (DPO) locations and destined to addresses in the United States.'' 86 FR at 10219 (emphasis added). This is because these overseas acceptance locations are operated not by the Postal Service, but by the Department of Defense's Military Postal Service Agency (MPSA) and by the Department of State. Although U.S. postal laws and regulations apply to U.S. mail operations in these locations, it was determined that the acceptance conditions for the PACT Act's exceptions cannot reliably be fulfilled at these overseas sites.

Upon further review and interagency consultation, it appears that the same is true for the PACT Act exceptions' requirements of age, employment, and identity verification at the place of delivery. See 18 U.S.C. 1716E(b)(3)(B)(ii)(II), (b)(3)(B)(ii)(VII), (b)(4)(B)(ii)(V),[37] (b)(5)(C)(ii)(VI)–(VII). The postal services that enable fulfillment of these requirements—Adult Signature Required and Adult Signature Restricted Delivery—are not currently available for items sent to APO/FPO/DPO addresses. Because the verification requirements cannot reliably be fulfilled upon delivery to APO/FPO/DPO addressees, shipments to such addressees are incompatible with the statutory criteria for the exceptions.

2. Reasonable Cause

The PACT Act bars the acceptance or transmission of mailed packages as to which the Postal Service ''knows or has reasonable cause to believe contains'' matter made nonmailable by the PACT Act. 18 U.S.C. 1716E(a)(1). ''Reasonable cause'' can be based upon certain public statements of intent to mail nonmailable items or the presence of a person on the Noncompliant List. *Id.* at (a)(2). Under the Postal Service's longstanding PACT Act regulations, the presence of reasonable cause imposes on the mailer a burden of establishing eligibility to mail. Publication 52 section 472.1.

In the notice of proposed rulemaking, the Postal Service noted that the statute's use of ''includes'' before these enumerations of ''reasonable cause'' plainly indicates that the list is illustrative, rather than exhaustive, and the Postal Service proposed to make explicit in its regulations the possibility that other indicia regarding a package, individually or in combination with other packages, may give rise to reasonable cause. 86 FR at 10219. In the highly circumstantial context of ENDS products, the Postal Service further proposed to elaborate on the burden-shifting principle by calling for affirmative, credible, and verifiable indications of mailability in order to dispel the presumed nonmailability of such products. *Id.* at 10219–10220.

Some anti-ENDS commenters expressed general support for these changes, and no party expressed opposition. Therefore, the Postal Service adopts the proposed changes in this final rule.

State and local attorneys general, a public-health organization, and a law student proposed enumerating additional bases for identifying parties whose association with a package may give rise to reasonable cause:

- Identification of a party in scientific journal articles about ENDS products;
- Involvement of an ENDS manufacturer or distributor in litigation;
- Public statements on social media;
- Other media sources;

[37] Under the Certain Individuals exception, the Postal Service is not itself required to perform the age verification, so long as it duly transfers the items to MPSA. 18 U.S.C. 1716E(b)(4)(B)(ii)(VI). However, the age-verification requirement remains, pursuant to a standalone condition that MPSA would be obliged to fulfill. *Id.* at (b)(4)(B)(ii)(V).

- The presence of markings on a package pursuant to section 2A(b)(1) of the Jenkins Act;
- Lists of entities licensed by a State or local government to engage in tobacco or ENDS industry activities;
- The use of a Post Office Box or CMRA; and
- A mailer's past practice of sending or receiving items made nonmailable under the PACT Act.

The Postal Service finds it unnecessary to incorporate these suggestions into the final rules. Statements in social media and other media are covered by 18 U.S.C. 1716E(a)(2)(A) and existing Publication 52 section 472.1(a). Information on a mailpiece (*e.g.,* Jenkins Act markings and address information) would be among the indicia taken into account under the new provision. So, too, would a mailer's past practices, insofar as the new provision accounts for information about a mailing ''in combination with other packages.''

Because the list of ''reasonable cause'' indicia in Publication 52 section 472.1 is merely illustrative, the other proposed information sources remain potentially available, even if they are not expressly enumerated. To the extent that any relevant information not only exists at large, but is brought to the actual attention of Postal Service personnel authorized to determine how to interpret and act upon that information, then that awareness may reasonably justify the Postal Service's treatment of associated mailings as nonmailable, absent contrary information sufficient to dispel reasonable cause.

One law-student commenter expressed concern that the Noncompliant List may be unreliable, given the purported ease with which listed actors could rebrand or establish a new address. The Postal Service is not responsible for maintaining the Noncompliant List. However, it should be noted that section 2A(e)(1)(C) of the Jenkins Act directs the Attorney General to update and distribute the Noncompliant List at least once every four months, and related provisions require the Attorney General to include entities identified by State, local, and Tribal governments and to maintain the accuracy and completeness of the list. Moreover, no provision bars other parties from identifying inaccuracies or suggesting updates to the Attorney General.

State and local attorneys general requested a point of contact for non-Postal-Service law-enforcement actors, the industry, and the general public to report suspicious mailing behavior. The Postal Inspection Service (*https://www.uspis.gov*) is the law-enforcement component of the Postal Service, and suspicious mailing behavior may be reported through the Postal Inspection Service hotline (1–877–876–2455). Mailing addresses for local Postal Inspection Service division offices can be found at *https://postalpro.usps.com/ppro-tools/inspection-service.*

One law-student commenter encouraged the Postal Service to ensure that relevant personnel are trained and given up-to-date information about the Noncompliant List and market research on ENDS mailers. The Postal Service has internal processes to communicate such information to relevant personnel, and it will take this comment under advisement in administering those internal communications.

Another law-student commenter proposed that a suspected ENDS mailer be required to furnish a sworn certification of mailability, punishable by a fine. The Postal Service finds such a measure to be unnecessary. Under the reasonable cause standard, mailability is based on indicia of suspicion—a collection of facts indicating for and against mailability—weighed in the administrative and law-enforcement discretion of Postal Service personnel. It is difficult to conceive of why facts tending in one direction should require the submission of paperwork when other facts would not. Moreover, the making of materially false statements or representations to the Postal Service is punishable under 18 U.S.C. 1001, regardless of whether the person has made a sworn declaration or received specific notice of potential punishment. As such, the Postal Service does not perceive any practical benefit that would arise from this suggestion.

3. Terminology

In the notice of proposed rulemaking, the Postal Service discussed the semantic difficulties posed by the POSECCA's technical inclusion of ENDS within the relevant statutory definition of ''cigarettes.'' 86 FR at 10219. While this has a pronounced legal effect—generally subjecting ENDS to the same legal treatment as combustible cigarettes—there are clear differences in the two types of products, particularly given the broad scope of POSECCA-covered ENDS products. Hence, using the term ''cigarette'' in Publication 52 to denote ENDS products as well as combustible cigarettes might not offer sufficient clarity to a lay reader. The Postal Service proposed to use ''tobacco products'' as a catch-all term to encompass combustible cigarettes, smokeless tobacco, and ENDS products, due to Congress's use of that term in the PACT Act (and the lack of any amendment to that usage in the POSECCA). In doing so, the Postal Service acknowledged that even ''tobacco products'' is imperfect as applied to ENDS products, many of which do not derive from tobacco, and solicited commenters' suggestions.

Commenters presented various views, often independent of their position on ENDS products generally. Some commenters accepted and even agreed with ''tobacco products'' as a catch-all term, noting that at least some ENDS liquids contain tobacco-derived nicotine and that Congress intended ENDS to be regulated in the same manner as cigarettes and smokeless tobacco. Others supported a slightly disaggregated catch-all term, such as ''tobacco and vapor products,'' ''cigarettes and alternative tobacco products,'' ''nicotine products and delivery devices,'' or ''tobacco and nicotine-related delivery products.'' Still other commenters opposed the use of a catch-all term, but rather proposed a continued serial listing (''cigarettes, ENDS, and smokeless tobacco''). This last group opposed the use of an umbrella term for various reasons: ENDS products might not be thought of as ''tobacco products;'' ''tobacco products'' is a term with special significance but a different scope in other legal contexts; and ENDS products should not be equated with cigarettes due to purported differences in their level of harmfulness.

Upon consideration of these views, the Postal Service agrees that the umbrella term ''tobacco products,'' while consistent with statutory usage, might pose an undue risk of misleading lay readers of the regulations. Notwithstanding the post-POSECCA PACT Act's continued use of ''tobacco products'' as an apparent (albeit undefined) umbrella term, catch-all terms relying on ''tobacco'' or ''nicotine'' do not adequately capture the wide range of ENDS products covered by the POSECCA. Of the proffered options, ''tobacco and vapor products'' best captures the distinction between cigarettes and smokeless tobacco, on the one hand, and potentially non-nicotine-based ENDS products, on the other hand. Yet even it has its shortcomings: It elides the degree of overlap between the two categories, and the level of generality may sacrifice clarity.

The Postal Service has determined that the well-taken semantic concerns can be avoided through use of the more generic, all-encompassing term ''covered products'' to refer collectively to cigarettes, smokeless tobacco, and

ENDS products subject to the PACT Act.[38] At the same time, because certain requirements pertain uniquely to ENDS products, the final rule treats ENDS products as a standalone category of covered products, rather than subsuming them within the definition of ''cigarette'' as the POSECCA does. Although this terminological approach differs formally from the statutory framework, the Postal Service is confident that its regulations yield the same functional result. To the extent of any inadvertent conflict, however, the statute would naturally control.

4. Communications

Three ENDS industry commenters asked the Postal Service to issue an updated Field Information Kit regarding the mailability of ENDS products, similar to the ones that it issued upon implementing the original and earlier amended PACT Act. See Postal Service, Field Information Kit: PACT Act, Postal Bulletin No. 22,287, June 17, 2010, at 3–17, *https://about.usps.com/postal-bulletin/2010/pb22287/pdf/pb22287.pdf;* Postal Service, Field Information Kit: PACT Act, Postal Bulletin No. 22,292, Aug. 26, 2010, at 3–18, *https://about.usps.com/postal-bulletin/2010/pb22292/pdf/pb22292.pdf.* One law student also recommended that the Postal Service set up web pages to educate the public about the new requirements, as well as trainings for employees.

In conjunction with this **Federal Register** notice, the Postal Service is issuing a Field Information Kit. Like its 2010 counterparts, the Field Information Kit contains training materials and job aids to be distributed to Postal Service employees, as well as background information and frequently asked questions for both employees and the public. The Postal Bulletin is available at *https://about.usps.com/postal-bulletin/2021.*

5. Enforcement

A group of State and local attorneys general asked the Postal Service not to return to sender matter made nonmailable under the PACT Act, but to seize and destroy it instead. These commenters adverted to ongoing litigation that some of them have brought on this issue. See generally *City of New York* v. *U.S. Postal Serv.,* No. 1:19–CV–05934 (E.D.N.Y. filed Oct. 22, 2019). Because this matter is the subject of ongoing litigation, the Postal Service declines to address it at this time.

One ENDS consumer expressed skepticism that the POSECCA will be enforceable, to the extent that vendors send products below the supposed weight threshold for Postal Service enforcement without publicly advertising or marking their product. While it is conceivable that some illegal activity will evade detection in any law-enforcement scheme, each of the commenter's premises is false. First, there is no weight threshold for Postal Service enforcement of mailability; the Postal Service can and does enforce mailability laws regardless of weight, shape, or other mailpiece characteristics. Second, a vendor that does not advertise its sales is unlikely to remain a vendor for long. Third, the presence of identifying markings is not a prerequisite for detection of nonmailable matter; indeed, few shippers of the substantial quantities of nonmailable contraband detected by the Postal Inspection Service and its Federal law-enforcement partners transparently indicate the illicit contents that they are shipping.

Finally, a commercial mailing agent asked for clarification of its duty to enforce the POSECCA and PACT Act and its liability for its customers' mailings. As already provided in Postal Service regulations, all mailers, including mail service providers and mailing agents, must comply with applicable Postal Service laws and regulations governing mailability and preparation for mailing, as well as non-postal laws and regulations on the shipment of particular matter. Publication 52 section 212. In other words, a mail service provider or mailing agent, as a mailer on behalf of a third party, is liable for violations of mailing laws in the same manner as any other mailer. Mail service providers and mailing agents may limit their liability risk by taking robust measures to identify attempts to use their services for unlawful purposes.

6. Availability of Rules' Text

Some commenters urged the Postal Service to make the text of the proposed or new rules available as soon as possible. At the time of the notice of proposed rulemaking, Publication 52 was incorporated by reference in 39 CFR 113.2. As such, the Office of the Federal Register did not permit the text of revisions or proposed revisions to Publication 52 to appear in the attendant **Federal Register** notice. In the interest of transparency and facilitating informed public comment, the Postal Service posted the proposed rules' text on its website and directed readers of the **Federal Register** notice of proposed rulemaking to that posting. This afforded commenters a reasonable opportunity to review the proposed revisions, and several of the comments demonstrate that their authors did so. Subsequently, the Postal Service, in consultation with the Office of the Federal Register, amended Title 39, CFR, and the DMM to clarify the status of Publication 52. 86 FR 53220. As a result of those changes, the text of revisions to Publication 52 is now permitted to be published with the attendant **Federal Register** notice, as is the case with this final rule.

Three ENDS industry commenters urged the Postal Service to publish the text of the final rules in advance of formal publication. It is unclear what this suggestion is supposed to mean. The Postal Service is unaware of any rulemaking practice whereby a final rule is published twice, once ''informally'' and once ''formally.'' There is only publication of the final rule, which, in this case, immediately triggers the nonmailability of ENDS products. If the commenters' idea is that the Postal Service should publish the rules first and the response to comments later, then this, too, does not appear to comport with regular Federal rulemaking practices, and it might raise concerns about due process and APA compliance. As such, the Postal Service has opted for consistency with normal practices, while attempting to enhance awareness and clarity through issuance of the April 2021 Guidance.

7. Updates

One law student recommended that the Postal Service periodically review the final rule for potential revisions to account for subsequent research regarding ENDS products. The commenter suggested that the review occur one year after the end of the FDA's period for premarket tobacco product applications and every three years thereafter.

The Postal Service appreciates that research on the public-health risks and benefits arising from ENDS products, as well as the market for ENDS products itself, is in a state of rapid evolution. This final rule itself is likely to have its own effects on the ENDS market and on public health.

As discussed in section III.A, however, this rulemaking is not an

[38] The Postal Service recognizes that the FDA uses the term ''covered tobacco product'' in reference to ENDS products subject to FDA regulation as ''deemed'' tobacco products. See 21 CFR 1140.3. As discussed in section III.C.1, the scope of such FDA-regulated ENDS products differs from the scope of PACT Act-covered products. Given the explicit definitions in each set of regulations and the differing regulatory contexts, the Postal Service is confident that readers of Publication 52 chapter 47 will understand ''covered products'' to mean products covered by that chapter and the PACT Act, and not ''covered tobacco products'' for purposes of 21 CFR part 1140.

instance of policy discretion by the Postal Service, such as the Postal Service might revisit as facts and policy considerations change. The Postal Service is fulfilling a severely circumscribed statutory command to make ENDS products nonmailable except in certain limited circumstances. The decision about the public-health risks and benefits was made by Congress. While further scientific research may alter Congress's policy decision, the Postal Service does not anticipate that it will bear on the limited manner in which it is carrying out Congress's mandate. As such, the Postal Service also does not anticipate a need to revisit this final rule on the basis of further scientific research.

That said, the Postal Service may eventually have other reasons to revisit this final rule, such as further changes in applicable law; evolution in the ENDS market; further guidance from ATF on the scope of covered ENDS products; potential FDA approval of ENDS products for tobacco-cessation or other therapeutic uses; advances in technology that may facilitate alternative methods for administering the Business/Regulatory Purposes exception; and the development of regulatory and enforcement experience regarding ENDS products. Because these (and other, unforeseen) circumstances are not predictable, the Postal Service finds it imprudent to prescribe a schedule of revisions at this time.

IV. Explanation of Changes From Proposed Rule

The final rule includes substantive revisions and additions to Publication 52, as well as non-substantive corrections for consistency and organization, such as extensive renumbering to accommodate substantive revisions.

Material substantive revisions from the proposed rule that are incorporated throughout the final rule include the following:

- ''Covered products,'' defined in section 471.6 as any cigarette, smokeless tobacco, or ENDS, replaces ''tobacco products'' where applicable.
- Marking requirements for mailings under nonmailability exceptions are revised to provide options for distinguishing among covered products and eligible recipients where applicable.
- Application requirements for the Business/Regulatory Purposes, Consumer Testing, and Public Health exceptions are revised to (1) allow for submission of applications by email to a specified Postal Service email address; (2) require submission of specified Postal Service forms and/or worksheets; (3) clarify that copies of licenses may be furnished (in lieu of originals); (4) clarify the timeframe (*i.e.,* at least 15 days) for updating application materials prior to mailings to or from parties to which the updated information relates; and (5) clarify that Postal Service personnel will have access to current lists of authorized senders/recipients under applicable exceptions.
- Application requirements for the Business/Regulatory Purposes and Public Health exceptions are revised to specify that the PCSC Director may suspend, modify, or rescind discretionary waivers for federal or state government agencies of certain application requirements.
- Mailing requirements for the Business/Regulatory Purposes and Consumer Testing exceptions are revised to require that a current PCSC eligibility letter be presented at acceptance, to acknowledge that lists of authorized senders and recipients will be made available to acceptance personnel, and to clarify that such mailings may be tendered at retail or BME locations.
- Mailing requirements for the Business/Regulatory Purposes and Certain Individuals exceptions are revised to reflect current Postal Service offerings by requiring the use of a combination of Priority Mail Express or Priority Mail with Adult Signature Required or Adult Signature Restricted Delivery. Mailing requirements for the Consumer Testing and Public Health exceptions are similarly revised to require the use of a combination of Priority Mail Express or Priority Mail with Adult Signature Restricted Delivery.[39] For all exceptions, the former option of Priority Mail Express with Hold for Pickup is deleted.
- Delivery requirements for the Business/Regulatory Purposes and Consumer Testing exceptions are revised to clarify that mailings lacking the PCSC eligibility number in the return block will not be released to recipients.
- Delivery requirements for the Certain Individuals and Consumer Testing exceptions are revised to clarify that the minimum age of recipients must be confirmed by Postal Service personnel before mailings may be released or delivered to recipients.

Discrete substantive revisions include the following:

- The proposed definition of ''e-liquid'' in proposed section 471.3 is deleted as redundant.
- A consolidated definition of ''minimum age,'' defined as 21 years of age, or older where required by local law for acceptance or delivery, is added in section 471.9.
- General provisions regarding nonmailability and reasonable cause in proposed 472.1 are reorganized as sections 472.1 and .2. The circumstances giving rise to nonmailability are delineated more specifically; the treatment of nonmailable matter found in the mails and not seized is clarified through a cross-reference to general provisions on that topic; and clarification is made that nonmailable covered products must not be accepted, forwarded, or delivered.
- The ''reasonable cause'' standard for Postal Service personnel in proposed section 472.1 is clarified to allow consideration of any potentially relevant circumstances.
- A new section 473.b clarifies that the PACT Act exceptions do not apply to mail from the United States to APO, FPO, or DPO addresses. As explained in section III.J.1, the postal services necessary to reliably fulfill the PACT Act exceptions' verification requirements are not currently available at such locations, and at this time, there does not appear to be any sufficiently reliable alternative means of ensuring that those requirements are fulfilled. In conformance with this change, provisions are removed from the Certain Individuals section that had formerly prescribed how shipments can be made to APO/FPO addresses.
- A new section 473.1.e consolidates the requirement, common to all PACT Act exceptions, that all excepted shipments must be tendered through a face-to-face transaction with a Postal Service employee. For clarity, the requirement is framed here in the negative, as a prohibition on all other entry methods, and enumerates examples of prohibited entry methods.
- Language is added to the preamble of the Business/Regulatory Purposes exception provisions to clarify not only the types of parties eligible to mail under the exception, but the specific sender-addressee pairings permitted by the PACT Act (*i.e.,* business-to-business, business-to-government, or government-to-business, but not government-to-government).
- Application requirements for the Business/Regulatory Purposes exception are further revised to include additional required information relating to (1) the

[39] The PACT Act conditions use of the Consumer Testing and Public Health exceptions on delivery only to the named recipient. See 18 U.S.C. 1716E(b)(5)(A), (b)(5)(C)(ii)(VI)–(VII). This condition can be fulfilled via the use of Adult Signature Restricted Delivery, which restricts delivery to the named addressee, but not Adult Signature Required, which does not.

nature of the relevant business(es); and (2) for ENDS only, brand name(s) and product description(s), including information sufficient to confirm mailability under other applicable provisions (*e.g.,* restrictions related to hazardous materials or controlled substances).

• Delivery requirements for the Business/Regulatory Purposes exception are revised to provide examples of methods for verifying a recipient's employment. Specifically, proof of employment may take the form of an employee identification card or badge containing the name and phone number of the employer/agency along with the name of the employee; a signed letter on employer/agency letterhead; or any form of identification the postmaster deems to be of comparable reliability. Further clarification is made that employee status may be inferred by Postal Service personnel based on observable factors.

• Provisions are added regarding the Certain Individuals exception to emphasize the noncommercial-purpose requirement and to clarify how it applies in the context of returns of damaged or unacceptable merchandise and of used products sent for recycling.

• Application requirements for the Consumer Testing exception are revised to require submission of a copy of the permit issued under 26 U.S.C. 5713. Conversely, language is added to the Public Health exception provision to clarify that a manufacturer's permit is not required for government agencies applying under that exception.

• The additional requirements set out in proposed section 472.27 are relocated to section 472.3 and revised to clarify the applicability of other laws and regulations.

• Mailers' requirements to retain eligibility documentation under applicable nonmailability exceptions are increased from three to six years to align with potentially applicable statutes of limitations and are set out separately in section 472.4.

• Revisions and additions are made to clarify that applicants bear the burden, during initial determinations or appeals, of establishing eligibility for each sender and recipient, and must submit additional documentation as necessary. Further clarification is made that the PCSC Director may approve or deny applications in whole or with respect to certain mailers or recipients, and that eligibility may be suspended, modified, or revoked, in whole or in part, for failure to comply with applicable laws or regulations.

• A new section 474.1 is added to clarify that ATF administers the relevant statutory definition of ENDS and the exclusion of FDA-approved tobacco-cessation and therapeutic products. Persons interested in interpretive guidance concerning these two subjects are advised to contact ATF at the listed address, with a copy to the PCSC.

• The statutory exclusion of FDA-approved tobacco cessation/therapeutic products from the definition of ENDS in proposed section 471.2 is set out separately in section 474.2, and a requirement is added for persons who believe that a product qualifies for this exclusion to submit documentation to ATF, with a copy to the PCSC.

Joshua J. Hofer,

Attorney, Ethics & Legal Compliance.

The Postal Service adopts the following changes to Publication 52, *Hazardous, Restricted, and Perishable Mail,* incorporated by reference into Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM), section 601.8.1, which is further incorporated by reference in the Code of Federal Regulations. 39 CFR 111.1, 111.3. Publication 52 is also a regulation of the Postal Service, changes to which may be published in the **Federal Register**. 39 CFR 211.2(a). Accordingly, for the reasons stated in the preamble, the Postal Service amends Publication 52 as follows:

* * * * *

4 Restricted Matter

* * * * *

[Revise title of 47 to read as follows:]

47 Cigarettes, Smokeless Tobacco, and Electronic Nicotine Delivery Systems

* * * * *

471 Definitions

[Revise the last sentence of 471.1 to read as follows:]

471.1 Cigarette

* * * The term cigarette includes roll-your-own tobacco and excludes cigars.

* * * * *

[Revise the title of 471.4 to read as follows:]

471.4 Roll-Your-Own Tobacco

* * * * *

[Renumber 471.5 through 471.6 as 471.7 through 471.8, respectively, and insert after 471.4 the following:]

471.5 Electronic Nicotine Delivery System (ENDS)

Any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device. ENDS include but are not limited to, electronic cigarettes (e-cigarettes), electronic hookahs (e-hookahs), electronic cigars (e-cigars), vape pens, advanced refillable personal vaporizers, and electronic pipes. Any reference to ENDS also includes any component, liquid, part, or accessory of an ENDS device, regardless of whether the component, liquid, part, or accessory is sold or provided separately from the device.

471.6 Covered Product

For purposes of chapter 47, any cigarette, smokeless tobacco, or ENDS.

* * * * *

[Add after 471.8, as renumbered, the following:]

471.9 Minimum Age

21 years of age (the federal minimum age for the sale or purchase of covered products), or such higher age that a state or municipality may impose for the legal sale or purchase of covered products at the place of acceptance or delivery, as appropriate.

* * * * *

[Revise 472 to read as follows:]

472 Covered Products Generally Nonmailable

472.1 General

The following are nonmailable:

a. Shipments of covered products described in 473.1.a through .e.

b. Shipments of covered products that are not described in 473.1.a through .e and that do not qualify for an exception under 473.2 through .6.

c. Shipments of covered products that are not described in 473.1.a through .e and that would generally qualify for an exception under 473.2 through .6, but for a failure to meet one or more conditions for the applicable exception. For example, a recipient may fail to be verified as being of at least the minimum age (see 473.34.a, .44.a, .54.a), or a Return Receipt may be absent or may lack the mailer's eligibility number (see 473.32.b, .52.c).

472.2 Treatment of Nonmailable Covered Products

472.21 Refusal of Acceptance and Transmission

The Postal Service will not accept, forward, or deliver any package that it knows, or has reasonable cause to believe, contains nonmailable covered products. If the Postal Service reasonably suspects that a mailer is tendering nonmailable covered products, then the mailer bears the burden of proof in establishing eligibility to mail.

472.22 Seizure and Forfeiture

Nonmailable covered products deposited in the mail are subject to seizure and forfeiture. Any nonmailable covered products seized and forfeited shall be destroyed or retained by the federal government for the detection or prosecution of crimes or related investigations and then destroyed.

472.23 Disposition of Nonmailable Covered Products Not Seized and Forfeited

Any nonmailable covered products not seized and forfeited shall be handled in accordance with 216 and 414.

472.24 Penalties

Persons involved in the shipment or attempted shipment of nonmailable covered products may be subject to seizure and forfeiture of assets, criminal fines, imprisonment, and civil penalties.

472.3 Reasonable Cause To Suspect Covered Products

Among any other potentially relevant circumstances, the Postal Service has reasonable cause to suspect the presence of covered products based on:

a. A statement on a publicly available website, or an advertisement, by any person that the person will mail matter which is nonmailable under this section in return for payment;

b. The fact that the mailer or other person on whose behalf a mailing is being made is on the U.S. Attorney General's List of Unregistered or Noncompliant Delivery Sellers; or

c. Any other characteristics of a package or label, individually or in combination with other packages or labels, that reasonably indicate the likely presence of covered products.

472.4 Applicability of Other Laws and Regulations

Shipments permitted under 473 are subject to all other applicable federal, state, and local laws and regulations. For example, ENDS that consist of or contain controlled substances (including cannabis and cannabis derivatives), drug paraphernalia, lithium batteries, liquids, or any toxic or flammable substance (*e.g.,* nicotine, diacetyl (butane-2,3-dione), propanol, and other components of ENDS liquids) may be subject to prohibitions, restrictions, or additional requirements stated elsewhere in this publication. Mailers, recipients, and applicants are solely responsible for complying with all applicable Postal Service regulations and other federal, state, and local laws when mailing covered products.

472.5 Recordkeeping

Mailers, recipients, and applicants must maintain records to establish compliance with the requirements in 473 for a 6-year period and must make such records available to the Postal Service upon request.

* * * * *

[Insert after 472 the following:]

473 Mailability Exceptions

473.1 Scope of Exceptions

Covered products are mailable if one of the conditions in 473.2 through 473.6 is met. These exceptions do not apply to the following:

a. Mail treated as domestic under DMM 608.2.2.

b. Mail sent to Air/Army Post Office (APO), Fleet Post Office (FPO), or Diplomatic Post Office (DPO) addresses.

c. Mail presented at APO, FPO, or DPO installations and destined to addresses in the United States.

d. International mail as defined in DMM 608.2.3.

e. Mail presented outside of a face-to-face transaction with a Postal Service employee at a Postal Service retail or business mail acceptance location. Examples of prohibited entry methods include, but are not limited to, Pickup on Demand; package pickup; an Approved Shipper location or other third-party acceptance location; a Contract Postal Unit; a Village Post Office; and placement in a customer mailbox, collection box, or Postal Service lobby drop.

473.2 Intra-Alaska and Intra-Hawaii Shipments

Intra-Alaska and intra-Hawaii shipments of covered products are mailable, provided that such mailings:

a. Are presented in a face-to-face transaction with a Postal Service employee within the state, and not through any entry method prohibited under 473.1.e;

b. Destinate in the same state of origin;

c. Bear a valid complete return address that is within the state of origin; and,

d. Are marked with the following exterior marking on the address side of the mailpiece, with the relevant type of item selected: ''INTRASTATE SHIPMENT OF [CIGARETTES/SMOKELESS TOBACCO/ENDS].''

473.3 Exception for Business/Regulatory Purposes

Eligibility to mail and to receive mail under the business/regulatory purposes exception is limited to federal and state government agencies and legally operating businesses that have all applicable state and federal government licenses or permits and are engaged in the manufacturing, distribution, wholesale, export, import, testing, investigation, or research of covered products. Mailings under this exception are permitted only for business purposes between eligible businesses or for regulatory purposes between such businesses and eligible government agencies. Mailability is further restricted to mailings that comply with all conditions in 473.31 to 473.34.

473.31 Application

Each customer seeking to mail covered products under the business/regulatory purposes exception must submit a complete application (PS Form 4615 or 4615E, as appropriate) and, for ENDS, complete Worksheets 4615–EM and 4615–ER as appropriate, along with all supporting documentation requested on those forms and worksheets.

a. Along with any other information requested on PS Form 4615 or 4615E and Worksheets 4615–EM and 4615–ER, the applicant must furnish:

1. Information about its legal status, copies of any applicable licenses, and authority under which it operates.

2. Information about the legal status, copies of any applicable licenses, and operational authority for all recipients to which the mailings under this exception will be addressed.

3. All locations where mail containing covered products will be presented.

4. For each business mailer and/or recipient, the nature of the relevant business activities (*e.g.,* manufacturing, wholesale, distribution, testing, investigation, import, export).

5. The brand name and a description of each product intended to be mailed. For ENDS, descriptions must include information about the source of any CBD; the concentration of any THC; and safety data sheets or technical specification documentation for any hazardous materials (*e.g.,* lithium batteries, nicotine, diacetyl (butane-2,3-dione), propanol).

b. The applicant is responsible for establishing the eligibility of each sender and recipient and for the accuracy, completeness, and currency of all information provided in the application.

c. Applications must be submitted as follows:

1. For cigarettes and smokeless tobacco (PS Form 4615): by email to *MDA@usps.gov.*

2. For ENDS (PS Form 4615E and Worksheets 4615–EM and 4615–ER): by email to *MDA@usps.gov.*

d. The Director, PCSC, will make a determination of eligibility to mail under the business/regulatory purposes exception. The mailer bears the burden of establishing eligibility and must furnish any additional supporting documentation requested by the Director, PCSC, upon request as necessary to establish eligibility. The Director, PCSC, may approve or deny an application in its entirety or only with respect to certain mailers and/or recipients. A number is assigned to each letter of eligibility.

e. The applicant must update the information in its application, including any updated documentation, in a timely manner, as necessary, at least 15 days prior to conducting any mailing to or from an entity to which the information pertains.

f. Upon written request by a state or federal agency, the Director, PCSC, may, in his or her discretion, waive certain application requirements for mailings entered by the requesting state or federal agency for regulatory purposes. The Director, PCSC, may suspend, rescind, or modify any waiver at any time.

g. Any determination of eligibility to mail under this exception shall lapse if the authorized mailer does not tender any mail under this exception within any 3-year period. After that time, the affected mailer must apply for and receive new authorization for any mailings under this exception.

473.32 Mailing

All mailings tendered under the business/regulatory purposes exception must:

a. Use one of the following combinations of services:

1. Priority Mail Express with Adult Signature Required or Adult Signature Restricted Delivery service (see DMM 503.8.0).

2. Priority Mail with Adult Signature Required or Adult Signature Restricted Delivery service.

b. Be accompanied by a Domestic Return Receipt (PS Form 3811). The sender's address block must bear the eligibility number issued by the PCSC and be made returnable to the address as shown below:

PCSC, PACT MAILING OFFICE, USPS ELIGIBILITY NO. XX–00–0000, 90 Church St., Ste. 3100, New York, NY 10007–2951.

c. Bear the following marking, with the relevant type of item and recipient selected: ''[CIGARETTE/SMOKELESS TOBACCO/ENDS] MAILING—DELIVER ONLY TO EMPLOYEE OF ADDRESSEE [BUSINESS/AGENCY] UPON AGE VERIFICATION'' on the address side of the mailpiece.

d. Bear the business or government agency name and full mailing addresses of both the sender and recipient, both of which must match exactly those listed on the authorized mailer's application on file with the Postal Service.

e. Be entered at a retail and/or business mail acceptance location specified in the application and authorized by the PCSC.

473.33 Entry and Acceptance

Mailings under the business/regulatory purposes exception must be entered under the following conditions:

a. Covered products must be tendered via a face-to-face transaction with a Postal Service employee. Applicable mailings may not be tendered through any entry method prohibited under 473.1.e.

b. The mailer must present Postal Service acceptance personnel with the following:

1. For shipments of cigarettes and/or smokeless tobacco, a letter from the PCSC showing that the PCSC has authorized the mailer, addressee, and acceptance location.

2. For shipments of ENDS:

i. A letter from the PCSC showing that the PCSC has authorized the mailer and has not withheld authorization as to the addressee;

ii. A PCSC-approved Worksheet 4615–EM showing that the PCSC has authorized the mailer and the acceptance location; and

iii. A PCSC-approved Worksheet 4615–ER showing that the PCSC has authorized the addressee.

473.34 Delivery

Mailings bearing the marking for business/regulatory purposes are eligible for delivery only to a verified employee of the addressee business or government agency under the following conditions:

a. The recipient must be an adult of at least the minimum age (see 471.9) at the place of delivery. The recipient's age must be verified by a postal employee before releasing or delivering the item to the recipient. The recipient must furnish proof of age via a driver's license, passport, or other government-issued photo identification that lists age or date of birth.

b. The recipient must demonstrate status as an employee of the business or government agency identified as the addressee on the mailing label. Proof of employment may take the form of an employee identification badge or card issued by the employer and including the employee's name, the employer's name, and the employer's telephone number; a signed letter on company or agency letterhead from a supervisor or human relations office attesting to the recipient's current employment; or any other form of identification that the postmaster deems to be of comparable reliability. Where delivery is made to a business address, employment status may be inferred from the carrier's observation of such factors as the recipient's uniform and presence at a reception desk or retail counter.

c. Once the recipient's age and identity as an employee of the addressee are established, the recipient must sign for receipt of delivery and in the appropriate signature block of PS Form 3811.

473.4 Exception for Certain Individuals

The exception for certain individuals permits the mailing of small quantities of covered products by individual adults for noncommercial purposes. Mailability is further restricted to mailings that comply with all conditions in 473.41 to 473.44. Eligible shipments may be made to any type of recipient (individual, business, government, or other organization).

473.41 Noncommercial Purposes

Noncommercial purposes may include, but are not limited to, the following:

a. Covered products exchanged as gifts between individual adults. For purposes of this rule, ''gifts'' do not include covered products purchased by one individual for another from a third-party vendor through a mail-order transaction, or the inclusion of covered tobacco products at no additional charge with other matter pursuant to a commercial transaction.

b. Damaged or unacceptable covered products returned by a consumer to the manufacturer or other business. For purposes of the noncommerciality requirement, the manufacturer or other business may provide the consumer with a refund, credit, replacement product, or other form of value in exchange for the damaged or unacceptable covered product, so long as it does not exceed the amount that the consumer paid for the damaged or unacceptable product plus the cost of return shipping for the damaged or unacceptable product.

c. Used covered products sent by a consumer to a manufacturer or other business for recycling. For purposes of this rule, the consumer must not receive anything of value (*e.g.,* a discount, credit, or rebate) in exchange for a returned item.

473.42 Mailing

No customer may send or cause to be sent more than 10 mailings under this exception in any 30-day period. Each mailing under the certain individuals exception must:

a. Weigh no more than 10 ounces.

b. Use one of the following combinations of services:

1. Priority Mail Express with Adult Signature Required or Adult Signature Restricted Delivery service (see DMM 503.8.0).

2. Priority Mail with Adult Signature Required or Adult Signature Restricted Delivery service.

c. Bear the full name and mailing address of the sender and recipient on the Priority Mail Express or Priority Mail label.

d. Bear the following exterior marking on the address side of the mailpiece, with the relevant type of item selected: ''PERMITTED [CIGARETTE/SMOKELESS TOBACCO/ENDS] MAILING—DELIVER ONLY UPON AGE VERIFICATION.''

473.43 Entry and Acceptance

Mailings under the certain individuals exception must be entered under the following conditions:

a. Covered products must be tendered via a face-to-face transaction with a Postal Service employee. Applicable mailings may not be tendered through any entry method prohibited under 473.1.e.

b. The individual presenting the mailing must furnish a driver's license, passport, or other government-issued photo identification that lists age or date of birth. The name on the identification must match the name of the sender appearing in the return address block of the mailpiece. The customer must be an adult of at least the minimum age at the place of acceptance (see 471.9).

c. For mailings addressed to an individual, at the time the mailing is presented, the customer must orally confirm that the addressee is an adult of at least the minimum age at the place of delivery (see 471.9).

473.44 Delivery

Mailings bearing the marking for certain individuals are eligible for delivery only under the following conditions:

a. The recipient receiving or signing for the article must be an adult of at least the minimum age at the place of delivery (see 471.9). This must be confirmed by postal employees before releasing or delivering the item to the recipient. The recipient must furnish proof of age via a driver's license, passport, or other government-issued photo identification that lists age or date of birth.

b. Once age is established, the recipient must sign for receipt of delivery.

473.5 Consumer Testing Exception

The consumer testing exception permits a legally operating cigarette manufacturer or a legally authorized agent of a legally operating cigarette manufacturer to mail cigarettes to verified adult smokers solely for consumer testing purposes. The manufacturer for which mailings are entered under this exception must have a permit, in good standing, issued under 26 U.S.C. 5713. The consumer testing exception applies only to cigarettes and not to smokeless tobacco or ENDS. Mailability is further restricted to mailings that comply with all conditions in 473.51 to 473.54.

473.51 Application

Each person seeking to mail cigarettes under the consumer testing exception must submit a complete application (PS Form 4616), along with all supporting documentation requested on that form, by email to *MDA@usps.gov*. For each application, the following conditions must be met:

a. The applicant must furnish the following information:

1. A copy of the relevant manufacturer's permit issued under 26 U.S.C. 5713.

2. If the applicant is an agent of a manufacturer, complete details about the agency relationship with the manufacturer.

3. All locations where mail containing cigarettes for consumer testing will be presented.

b. As part of its application, the applicant must certify in writing that it will comply with the following requirements:

1. Any recipient of consumer testing samples of cigarettes is an adult established smoker.

2. No recipient has made any payment for the cigarettes.

3. Every recipient will sign a statement indicating that the recipient wishes to receive the mailings.

4. The manufacturer or the legally authorized agent of the manufacturer will offer the opportunity for any recipient to withdraw the recipient's written statement at least once in every 3-month period.

5. Any package mailed under this exception will contain no more than 12 packs of cigarettes (maximum of 240 cigarettes) on which all taxes levied on the cigarettes by the state and locality of delivery have been paid and all related state tax stamps or other tax-payment indicia have been applied.

c. The application must be submitted to the Director, Pricing and Classification Service Center (PCSC) via email to *MDA@usps.gov*. The applicant bears the burden of establishing eligibility.

d. The applicant must provide any requested copies of records establishing compliance to the Director, PCSC, and/or the Director, Product Classification (see 214 for address), upon request, no later than 10 business days after the date of the request.

e. The Director, PCSC, will make a determination of eligibility to mail under the consumer testing exception. The Director, PCSC, may approve or deny an application in its entirety or only with respect to certain mailers and/or recipients. A number is assigned to each letter of eligibility.

f. An applicant or authorized mailer must update the information in its application with the Director, PCSC, as necessary, in a timely manner upon becoming aware of a change in application information, not later than 15 days prior to conducting any mailing, for as long as it continues to mail under the consumer testing exception.

g. Any determination of eligibility to mail under this exception shall lapse if the authorized mailer does not tender any mail under this exception within any 3-year period. After that time, the mailer must apply for and receive new authorization for any further mailings under this exception.

473.52 Mailing

All mailings under the consumer testing exception:

a. Must be limited in tobacco content to no more than 12 packs of cigarettes (maximum 240 cigarettes) on which all taxes levied on the cigarettes by the destination state and locality have been paid and all related state tax stamps or other tax-payment indicia have been applied.

b. Must use one of the following combinations of services:

1. Priority Mail Express with Adult Signature Restricted Delivery service (see DMM 503.8.0).

2. Priority Mail with Adult Signature Restricted Delivery service.

c. Be accompanied by a Domestic Return Receipt (PS Form 3811). The sender's address block must bear the eligibility number issued by the PCSC and be made returnable to the address as shown below:

PCSC, PACT MAILING OFFICE, USPS ELIGIBILITY NO. XX–00–0000, 90

Church St., Ste. 3100, New York, NY 10007–2951.

d. Must bear the following marking: ''PERMITTED CIGARETTE MAILING—DELIVER ONLY TO ADDRESSEE UPON AGE VERIFICATION'' on the address side of the mailpiece.

e. Must bear the name and full mailing addresses of both the mailer and recipient, both of which must match exactly those listed on the authorized mailer's application on file with the Postal Service.

f. May not be addressed to an addressee located in a state that prohibits the delivery or shipment of cigarettes to individuals in the destination state.

g. May be sent only to an addressee who has not made any payment for the cigarettes, is being paid a fee for participation in consumer tests and has agreed to evaluate the cigarettes and furnish feedback to the manufacturer in connection with the consumer test.

h. May not exceed more than one package from any one manufacturer to an adult smoker during any 30-day period.

i. Must be entered at a retail and/or business mail acceptance location specified in the application and authorized by the PCSC.

473.53 Entry and Acceptance

Mailings under the consumer testing exception must be entered under the following conditions:

a. Covered products must be tendered via a face-to-face transaction with a Postal Service employee. Applicable mailings may not be tendered through any entry method prohibited under 473.1.e.

b. The mailer must present Postal Service acceptance personnel with a letter from the PCSC showing that the PCSC has authorized the mailer and acceptance location.

473.54 Delivery

Mailings bearing the marking for consumer testing are eligible for delivery only to the named addressee under the following conditions:

a. The recipient signing for the article must be an adult of at least 21 years of age. The recipient's age must be verified by a postal employee before releasing or delivering the item to the recipient. The recipient must furnish proof of age via a driver's license, passport, or other government-issued photo identification that lists age or date of birth. The name on the identification must match the name of the addressee on the Priority Mail Express or Priority Mail label.

b. Once the recipient's age and identity are established, the recipient must sign for receipt of delivery and in the appropriate signature block of PS Form 3811.

473.6 Public Health Exception

Federal government agencies involved in the consumer testing of tobacco products solely for public health purposes may mail cigarettes (this does not apply to smokeless tobacco or ENDS) under the mailing standards of 473.5, except as follows:

a. The federal agency is not required to have a manufacturer's permit issued under 26 U.S.C. 5713.

b. The recipient is not required to be paid a fee for participation in consumer tests.

c. Upon written request, the Director, PCSC, may waive certain application requirements for mailings entered by the requesting federal agency. The Director, PCSC, may suspend, rescind, or modify any waiver at any time.

473.7 Suspension or Revocation of Eligibility

Eligibility to mail under one or more exceptions in 473.2 through .6 may be suspended or revoked by the Director, PCSC, in the event of failure to comply with any applicable law or regulation. A customer may appeal an adverse initial decision to the Director, Product Classification (see 214 for address). The mailer bears the burden of proof in establishing eligibility in any appeal of a suspension or revocation decision and of furnishing all supporting documentation when requested. Decisions by the Director, Product Classification, to revoke a customer's eligibility under any exception may be appealed to the Judicial Officer under 39 CFR part 953.

* * * * *

474 Additional Guidance

474.1 Interpretative Guidance

The definitions in 471.1 through. 5 and the exclusion in 474.2 are pursuant to section 1 of the Jenkins Act (15 U.S.C. 375), which is administered by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Interpretative guidance regarding these provisions may be requested by contacting ATF at the following address, with a copy to the Pricing and Classification Service Center (PCSC) (see 213 for address): Bureau of Alcohol, Tobacco, Firearms and Explosives, 99 New York Avenue NE, c/o 90 K St. NE, Ste. 250, Washington, DC 20226.

474.2 Exclusion of Products Approved for Tobacco Cessation or Therapeutic Purposes

A product is excluded from the definition of ENDS in 471.5 (15 U.S.C. 375(7)(C)) if:

a. It is approved by the Food and Drug Administration for sale as a tobacco cessation product or any other therapeutic purpose; and

b. Is marketed and sold solely for such purposes.

Any party who believes that a product to be sent through the mails qualifies for this exclusion should provide appropriate documentation to ATF at the address in 474.1, with a copy to the PCSC.

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 219

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Northeast Fisheries Science Center Fisheries and Ecosystem Research; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 219

[Docket No. 210823–0166]

RIN 0648–BK39

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Northeast Fisheries Science Center Fisheries and Ecosystem Research

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; notice of issuance of Letter of Authorization (LOA)

SUMMARY: NMFS' Office of Protected Resources (OPR), upon request from NMFS' Northeast Fisheries Science Center (NEFSC), hereby issues regulations to govern the unintentional taking of marine mammals incidental to fisheries research conducted in multiple specified geographical regions over the course of 5 years. These regulations, which allow for the issuance of Letters of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking. Upon publication of this final rule, NMFS will issue an LOA to NEFSC for the effective period of the final rule.

DATES: Effective from October 21, 2021, through October 21, 2026.

ADDRESSES: A copy of NEFSC's application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *www.fisheries.noaa.gov/action/incidental-take-authorization-noaa-southwest-fisheries-science-center-fisheries-and.* In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Regulatory Action

These regulations establish a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to the NEFSC's fisheries research activities in the Atlantic Ocean.

We received an application from the NEFSC requesting 5-year regulations and authorization to take multiple species of marine mammals. Take would occur by Level B harassment incidental to the use of active acoustic devices, as well as by visual disturbance of pinnipeds in the Antarctic, and by Level A harassment, serious injury, or mortality incidental to the use of fisheries research gear. Please see ''Background'' below for definitions of harassment.

Legal Authority for the Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce 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 for up to 5 years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the ''least practicable adverse impact'' on the affected species or stocks and their habitat (see the discussion below in the Mitigation section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this rule containing 5-year regulations, and for any subsequent LOAs. As directed by this legal authority, this rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Regulations

The following provides a summary the major provisions within this rulemaking for the NEFSC fisheries research activities in the Northwest Atlantic Ocean. They include, but are not limited to:

- Training scientists and vessel crew in marine mammal detection and identification, rule compliance, and marine mammal handling.
- Monitoring of the sampling areas to detect the presence of marine mammals before gear deployment and while gear is in the water.
- Implementing standard tow durations to reduce the likelihood of incidental take of marine mammals.
- Implementing the mitigation strategy known as the ''move-on rule,'' which incorporates best professional judgment, when necessary during fisheries research.
- Removing gear from water if marine mammals are at-risk or interact with gear.
- Complying with applicable vessel speed restrictions and separation distances from marine mammals.
- Complying with applicable and relevant take reduction plans for marine mammals.

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. 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 incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On September 2, 2020, NMFS received an application from NEFSC requesting promulgation of regulations and issuance of a 5-year LOA to take marine mammals incidental to fisheries and ecosystem research in the Atlantic Ocean. NEFSC subsequently submitted revised applications on October 29, 2020; November 19, 2020; and December 3, 2020. The December application was deemed adequate and complete on December 9, 2020. In accordance with the MMPA, we

published a notice of proposed rulemaking in the **Federal Register** on June 4, 2021 (86 FR 30080), and requested comments and information from the public. We did not receive any comments on the proposed rule.

These regulations are the second consecutive 5-year incidental take regulations issued in response to a petition from NEFSC. The initial regulations were finalized in 2016 and are effective through September 9, 2021 (81 FR 53061; August 11, 2016). A 5-year LOA was issued to NEFSC pursuant to those regulations (81 FR 64442, September 20, 2016); that LOA expires September 9, 2021. To date, NEFSC has complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the current LOA and did not exceed authorized take for a species. NEFSC annual monitoring reports can be found at *www.fisheries.noaa.gov/action/incidental-take-authorization-noaa-fisheries-nefsc-fisheries-and-ecosystem-research*.

The LOA issued under this final rule authorizes take of a small number of 10 species of marine mammals by mortality or serious injury incidental to gear interaction and 32 species or stocks by Level B harassment incidental to use of active acoustic devices during fisheries and ecosystem research.

Description of Proposed Activity

Overview

The NEFSC is the research arm of NMFS in the Greater Atlantic Region (Maine to Virginia). The NEFSC plans, develops, and manages a multidisciplinary program of basic and applied research to generate the information necessary for the conservation and management of the region's living marine resources, including the region's marine and anadromous fish and invertebrate populations to ensure they remain at sustainable and healthy levels. The NEFSC collects a wide array of information necessary to evaluate the status of exploited fishery resources and the marine environment from fishery independent (*i.e.,* non-commercial or recreational fishing) platforms. Surveys are conducted from NOAA-owned and operated vessels, NOAA chartered vessels, or research partner-owned or chartered vessels in the state and Federal waters of the Atlantic Ocean from Maine to Florida.

The NEFSC plans to administer, fund, or conduct 59 fisheries and ecosystem research survey programs over the 5-year period the regulations would be effective (Table 1). Of the 59 surveys, only 42 involve gear and equipment with the potential to take marine mammals. Gear types include towed trawl nets fished at various levels in the water column, dredges, gillnets, traps, longline and other hook and line gear. Surveys using any type of seine net (*e.g.,* gillnets), trawl net, or hook and line (*e.g.,* longlines) have the potential for marine mammal interaction (*e.g.,* entanglement, hooking) resulting in mortality or serious injury (M/SI). In addition, the NEFSC conducts hydrographic, oceanographic, and meteorological sampling concurrent with many of these surveys which requires the use of active acoustic devices (*e.g.,* side-scan sonar, echosounders). These active sonars result in elevated sound levels in the water column, potentially causing behavioral disturbance rising to the level of harassment (Level B).

Dates and Duration

NEFSC would conduct research year-round; however, certain surveys would occur seasonally (Table 1). The regulations and associated LOA would be valid for 5 years from date of issuance.

Specified Geographical Region

The NEFSC would conduct fisheries research activities off of the U.S. Atlantic coast within the Northeast U.S. Continental Shelf Large Marine Ecosystem (NE LME), an area defined as the 200 miles (322 km) off the shoreline and reaching from the U.S.-Canada border to Cape Hatteras (Figure 1). The NE LME is divided into four areas: the Gulf of Maine (GOM), Georges Bank (GB), Southern New England (SNE), and the Mid-Atlantic Bight (MAB). A small number of NEFSC surveys into the Southeast U.S. Continental Shelf LME (SE LME) and, rarely, north into the Scotian Shelf LME. Detailed descriptions of the NEFSC's research areas were provided in the notice of proposed rulemaking (86 FR 30080, June 4, 2021). Those descriptions remain accurate and sufficient, and we refer the reader to that notice rather than reprinting the information here.

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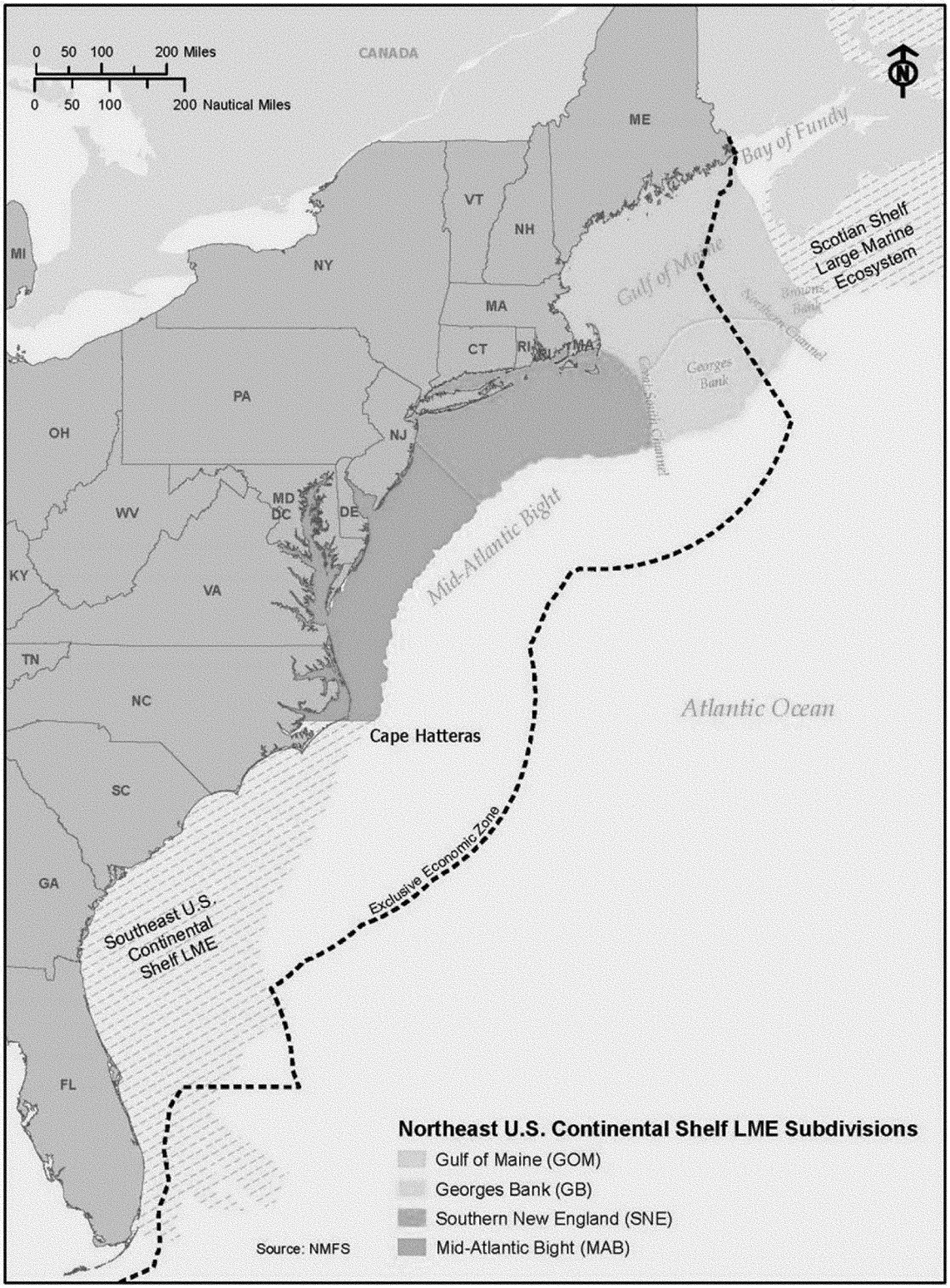

Figure 1. NEFSC Research Area

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Detailed Description of Specific Activity

A detailed description of NEFSC's planned activities was provided in the notice of proposed rulemaking (86 FR 30080, June 4, 2021) and is not repeated here except for the list of surveys provided in Table 1. No changes have been made to the specified activities described therein.

TABLE 1—PROPOSED NEFSC FISHERIES RESEARCH SURVEYS

Project name	Survey description	Gear	Specific gear	Area of operation	Season	Annual days at sea (DAS)	Potential for take (Y/N)
Long-Term Research							
Benthic Habitat Survey	Assess habitat distribution and condition, including disturbance by commercial fishing and changes as the benthic ecosystem recovers from chronic fishing impacts. Also serves to collect data on seasonal migration of benthic species, collect bottom data for mapping, and provide indications of climate change through species shifts.	Bottom Trawl	Conductivity, Temperature, and Depth (CTD), Van Veen, Plankton trap, Beam Trawl, Dredge, Camera, Sonar.	Georges Bank (GB).	Summer or Fall	20	Y
Fish Collection for Laboratory Experiments.	Trawling/hook and line collection operations undertake to capture high quality fish for laboratory experiments.	Bottom Trawl	Net and twine shrimp trawl, fishing poles.	New York Bight, Sandy Hook Bay.	April–November	10	Y
Habitat Mapping Survey	Map shallow reef habitats of fisheries resource species, including warm season habitats of black sea bass, and locate sensitive habitats (*e.g.,* shallow temperate coral habitats) for habitat conservation.	Bottom Trawl	4-seam, 3 bridle bottom trawl, beam trawl, CTD, Van Veen, Plankton trap, dredge, camera, sonar.	Ocean Shelf off MD.	Summer	11	Y
Living Marine Resources Survey.	Determine the distribution, abundance, and recruitment patterns for multiple species.	Bottom Trawl	4-seam, 3 bridle bottom trawl, beam trawl, CTD, Van Veen, sonar.	Cape Hatteras to NJ.	Spring	11	Y
Massachusetts Division of Marine Fisheries Bottom Trawl Surveys.	The objective of this project is to track mature animals and determine juvenile abundance.	Bottom Trawl	Otter trawl	Territorial waters from RI to NH borders.	Spring and Fall	60–72	Y
NEAMAP Near Shore Trawl Program—Northern Segment.	This project provides data collection and analysis in support of single and multi-species stock assessments Gulf of Maine. It includes the Maine/New Hampshire inshore trawl program, conducted by Maine Department of Marine Resources (MDMR) in the northern segment.	Bottom Trawl	Modified GoM shrimp otter trawl.	U.S.-Canada to NH-MA border from shore to 300 ft depth.	Spring and Fall	30–50	Y
NEAMAP Near Shore Trawl Program—Southern Segment.	This project provides data collection and analysis in support of single and multispecies stock assessments in the Mid-Atlantic. It includes the inshore trawl program NEAMAP Mid-Atlantic to Southern New England survey, conducted by Virginia Institute of Marine Science, College of William and Mary (VIMS) in the southern segment.	Bottom Trawl	4-seam, 3-bridle net bottom trawl cookie sweep.	Montauk, NY to Cape Hatteras, NC from 20 to 90 ft depth.	Spring and Fall	30–50	Y
NEFOP Observer Bottom Trawl Training Trips.	Certification training for new NEFOP Observers.	Bottom Trawl	Contracted vessels' trawl gear.	Mid-Atlantic Bight (MAB) and GB.	April–November (as needed), day trips.	18	Y
NEFSC Northern Shrimp Survey.	The objective of this project is to determine the distribution and abundance of northern shrimp and collect related data.	Bottom Trawl	4 seam modified commercial shrimp trawl, positional sensors, mini-log, CTD.	GOM	Summer	22	Y
NEFSC Standard Bottom Trawl Surveys (BTS).	This project monitors abundance and distribution of mature and juvenile fish and invertebrates.	Bottom Trawl	4-seam, 3-bridle bottom trawl.	Cape Hatteras to Western Scotian Shelf.	Spring and Fall	120	Y
NEFSC Bottom Trawl Survey Gear Trials.	Testing and efficiency evaluation of the standardized 4-seam, 3-bridle bottom trawl (doors, sweeps, protocols).	Bottom Trawl	4-seam, 3-bridle bottom trawl, twin trawls.	Cape Hatteras to Western Scotian Shelf.	Fall	14–20	Y

TABLE 1—PROPOSED NEFSC FISHERIES RESEARCH SURVEYS—Continued

Project name	Survey description	Gear	Specific gear	Area of operation	Season	Annual days at sea (DAS)	Potential for take (Y/N)
Atlantic Herring Survey	This operation collects fisheries-independent herring spawning biomass data and also includes survey equipment calibration and performance tests.	Pelagic Trawl	4-seam, 3-bridle net bottom trawl, midwater rope trawl, acoustics.	GOM and Northern GB.	Fall	34	Y
Atlantic Salmon Trawl Survey.	This is a targeted research effort to evaluate the marine ecology of Atlantic salmon.	Pelagic Trawl	Modified mid-water trawl that fishes at the surface via pair trawling.	Inshore and offshore GOM.	Spring	21	Y
Deepwater Biodiversity	This project collects fish, cephalopod and crustacean specimens from 500 to 2,000 m for tissue samples, specimen photos, and documentation of systematic characterization.	Pelagic Trawl	Deep-Sea acoustic/optic/ocean ographic/eDNA system, trawl camera system.	Western North Atlantic.	Summer or Fall	16	Y
Penobscot Estuarine Fish Community and Ecosystem Survey.	The objective of this project is fish and invertebrate sampling for biometric and population analysis of estuarine and coastal species.	Pelagic Trawl	Mamou shrimp trawl modified to fish at surface.	Penobscot Estuary and Bay, ME.	Spring, Summer and Fall.	12	Y
Northeast Integrated Pelagic Survey.	The objective of this project is to assess the pelagic components of the ecosystem including water currents, water properties, phytoplankton, micro-zooplankton, mesozooplankton, pelagic fish and invertebrates, sea turtles, marine mammals, and sea birds.	Pelagic Trawl	Mid-water trawls, bong nets, CTD, Acoustic Doppler Profiler (ADCP), acoustics.	Cape Hatteras to Western Scotian Shelf.	Summer and Fall.	80	Y
NEFOP Observer Mid-Water Trawl Training Trip.	This program provides certification training for NEFOP Observers.	Pelagic Trawl	Various commercial nets.	MAB and GB	April–November as needed (day trips).	5	Y
Apex Predators Pelagic Longline Shark Survey.	The objectives of this survey are to: (1) Monitor the species composition, distribution, and abundance of pelagic sharks in the U.S. Atlantic from Maryland to Canada; (2) tag sharks for migration and age validation studies; (3) collect morphological data and biological samples for age and growth, feeding ecology, and reproductive studies; and (4) provide time-series of abundance from this survey for use in Atlantic pelagic shark assessments.	Longline	Yankee and current commercial pelagic longline gear. Configured according to NMFS HMS Regulations.	MD to Canada	Spring	30	Y
Apex Predators Bottom Longline Coastal Shark Survey.	. The objectives of this survey are to: (1) Monitor the species composition, distribution, and abundance of sharks in coastal Atlantic waters from Florida to Delaware; (2) tag sharks for migration and age validation studies; (3) collect morphometric data and biological samples for age and growth, feeding ecology, and reproductive studies; and (4) provide time-series of abundance from this survey for use in Atlantic coastal shark assessments.	Longline	Florida style bottom longline.	RI to FL within 40 fathoms.	Spring	47	Y

TABLE 1—PROPOSED NEFSC FISHERIES RESEARCH SURVEYS—Continued

Project name	Survey description	Gear	Specific gear	Area of operation	Season	Annual days at sea (DAS)	Potential for take (Y/N)
Apex Predators Pelagic Nursery Grounds Study.	This project uses opportunistic sampling on board a commercial swordfish longline vessel to: (1) Monitor the species composition and distribution of juvenile pelagic sharks on the Grand Banks; (2) tag sharks for migration and age validation studies; and (3) collect morphometric data and biological samples for age and growth, feeding ecology, and reproductive studies. Data from this survey helps determine the location of pelagic shark nurseries for use in updating essential fish habitat designations.	Longline	Standard commercial pelagic longline gear. Configured according to NMFS Highly Migratory Species (HMS) Regulations.	GB to Grand Banks off Newfoundland, Canada.	Fall	21–55	Y
Cooperative Atlantic States Shark Pupping and Nursery (COASTSPAN) Longline and Gillnet Surveys.	This project determines the location of shark nurseries, species composition, relative abundance, distribution, and migration patterns. It is used to identify and refine essential fish habitat and provides standardized indices of abundance by species used in multiple species specific stock assessments. NEFSC conducts surveys in Delaware, New Jersey, and Rhode Island estuarine and coastal waters. Other areas are surveyed by cooperating institutions and agencies. In the NE Large Marine Ecosystem (LME), the Virginia Institute of Marine Science (VIMS) is a cooperating partner. South of Cape Hatteras the South Carolina Department of Natural Resources (SCDNR), University of North Florida (UNF), and Florida Atlantic University (FAU) are partners.	Longline and Gillnet.	Bottom Longline Gear, Anchored Sinking Gillnet.	FL to RI	Summer	25 or 40	Y
Cooperative Research Gulf of Maine Longline Project.	The objective of this project is to conduct commercial cooperative bottom longline sets to characterize demersal species of the Western Gulf of Maine traditionally difficult to capture with traditional or research trawl gear due to the bottom topography.	COOP Western-Central Gulf of Maine hard bottom longline survey.	Longline	Western GOM focused on sea mounts.	Spring and Fall	60 stations/year eastern Maine, 90 stations/year western-central GOM.	Y
NEFOP Observer Bottom Longline Training Trips.	This program provides certification training for NEFOP observers.	Longline	Commercial bottom longline gear.	MAB and GB	April–November as needed (day trips).	5	Y
Annual Assessments of Sea Scallop Abundance and Distribution.	These Atlantic Sea Scallop Research Set-Aside (RSA) rotational area surveys endeavor to monitor scallop biomass and derive estimates of Total Allowable Catch (TAC) for annual scallop catch specifications. Additionally, the surveys monitor recruitment, growth, and other biological parameters such as meat weight, shell height and gonadal somatic indices.	Dredge	Scallop dredges, drop cameras, Other Habitat Camera (HabCam) Versions.	GPM, Georges Bank, Mid-Atlantic.	Dredge surveys Apr–Sept, Camera surveys June–Sept.	50–100	N
NEFOP Observer Scallop Dredge Training Trips.	This program provides certification training for NEFOP observers.	Dredge	Turtle deflector dredge.	MAB and GB	April–November as needed (day trips).	6	N

TABLE 1—PROPOSED NEFSC FISHERIES RESEARCH SURVEYS—Continued

Project name	Survey description	Gear	Specific gear	Area of operation	Season	Annual days at sea (DAS)	Potential for take (Y/N)
Annual Standardized Sea Scallop Survey.	The objective of this project is to determine distribution and abundance of sea scallops and collect related data for Ecosystem Management from concurrent stereo-optic images. It is conducted by the NEFSC.	Dredge	New Bedford dredge, HabCam V4.	NC to GB	Summer	36	N
Surfclam and Ocean Quahog Dredge Survey.	The objective of this project is to determine distribution and abundance of Surfclam/ocean quahog and collect related data.	Dredge	Hydraulic-jet dredge.	Southern VA to GB.	Summer	15	N
Coastal Maine Telemetry Network.	The objective of this project is to monitor tagged animals entering the Penobscot Bay System and exiting the system into the Gulf of Maine.	Other	Fixed position acoustic telemetry array receivers on moorings spaced 250–400 m apart.	Penobscot River estuary and bay, GOM.	Year round in GOM and Apr.–Nov. in nearshore areas.	10	Y
Deep-sea Coral Survey	The objective of this program is to determine the species diversity, community composition, distribution and extent of deep sea coral and sponge habitats.	Other	Remotely Operated Vehicles (ROVs), CTD, towed cameras, ADCP, acoustics.	Continental shelf margin, slope, and submarine canyons and deep basins: GOM to Virginia.	Summer	16	Y
Diving Operations	The objective of this project is to collect growth data on hard clams, oysters and bay scallops.	Other	Wire mesh cages, lantern nets.	Long Island Sound.	Year round	20	N
Gulf of Maine Ocean Observing System Mooring Cruise.	This project services oceanographic moorings operated by the University of Maine.	Other	ADCP on vessel and moorings.	GOM and Northern GB.	Summer	12	N
Hydroacoustics Surveys	This project consists of mobile transects conducted throughout the estuary and bay to study fish biomass and distribution.	Acoustic only	Split-beam and DIDSON.	Penobscot Bay and estuary.	Spring	25	Y
Marine Estuaries Diadromous Survey.	This project is a fish community survey at fixed locations.	Other	1 m and 2 m fyke nets.	Penobscot Bay and estuary.	April–November	100	N
NEFOP Observer Gillnet Training Trips.	This program provides certification training for NEFOP Observers.	Other	gillnet gear	MAB and GB	April–November as needed (day trips).	10	N
Nutrients and Frontal Boundaries.	The objective of this project is to characterize nutrient patterns associated with distinct water masses and their boundaries off of coastal New Jersey and Long Island in association with biological sampling.	Other	ADP, CTD, Hydroacoustics.	MAB	Feb., May–June, Aug, and Nov.	10	N
Ocean Acidification	The objective of this project is to develop baseline pH measurements in the Hudson River water.	Other	CTD, YSI, multi-nutrient analyzer, Kemmerer bottle.	Hudson River Coastal waters.	Spring	10	N
AUV Pilot Studies	This program provides gear and platform testing.	Other	AUV	MA state waters, GB.	June	5	N
Rotary Screw Trap (RSTs) Survey.	This project is designed to collect abundance estimates of Migrating Atlantic salmon smolts and other anadromous species.	Other	RST	Estuaries on coastal Maine rivers.	April 15–June 15.	60	N
Trawling to Support Finfish Aquaculture Research.	The objective of this project is to collect broodstock for laboratory spawning and rearing and experimental studies.	Other	Combination bottom trawl, shrimp trawl, gillnet.	Long Island Sound.	Summer	30	Y
DelMarVa Habitat Characterization.	The objective of this project is to characterize and determine key hard bottom habitats in coastal ocean off the DelMarVa Peninsula as an adjunct to the DelMarVa Reef Survey.	Other	ADCP, CTD, YSI, Plankton net, video sled, Ponar grab, Kemmerer bottle, sonar.	Coastal waters off DE, MD and VA.	August	5	N

TABLE 1—PROPOSED NEFSC FISHERIES RESEARCH SURVEYS—Continued

Project name	Survey description	Gear	Specific gear	Area of operation	Season	Annual days at sea (DAS)	Potential for take (Y/N)
DelMarVa Reefs Survey	The objective of this project is determination of extent and distribution of rock outcrops and coral habitats and their use by black sea bass and other reef Fishes.	Other	HABCAM, CTD	Coastal waters off DE, MD and VA.	August	5	N
Miscellaneous Fish Collections and Experimental Survey Gear Trials.	The James J. Howard Sandy Hook Marine Laboratory occasionally supports short-term research projects requiring small samples of fish for various purposes or to test alterations of survey gear. These small and sometimes opportunistic sampling efforts have used a variety of gear types other than those listed under Status Quo projects. The gears and effort levels listed here are representative of potential requests for future research support.	Other	Bottom trawl, lobster and fish pots, beam trawl, seine net, trammel nets.	New York Bight estuary waters.	Spring and Fall	not stated	Y
Opportunistic Hydrographic Sampling.	This program consists of opportunistic plankton and hydrographic sampling during ship transit.	Other	Plankton net, expendable bathythermograph.	Southeast LME depths <300 m.	Early Summer	not stated	N
Monkfish RSA	Monkfish Research Set-Aside (RSA) surveys endeavor to monitor Monkfish biomass and derive estimates of Total Allowable Catch (TAC) for annual Monkfish catch specifications. Additionally, the surveys monitor recruitment, growth, and other biological parameters.	Other	Commercial gillnets of various sizes, short durations for sets.	Mid-Atlantic and Georges Bank.	April–December (end of fishing year).	100–200 sets/year. Sets left for 2–3 days.	Y
Short-Term Cooperative Projects							
Survey Projects	Cooperative Industry based surveys to enhance data for flatfish utilizing cookie sweep gear on commercial platforms.	Trawl	Bottom Trawl	GOM, GB, SNE, MAB.	Summer and Fall.	550 tows/year	Y
Survey Projects	Cooperative Industry based catchability studies for Monkfish, Longfin squid, other.	Trawl	Pelagic Trawl	GOM, GB, SNE, MAB.	Summer and Fall Summer and Fall.	30 tows/year	Y
Trawl Comparison Research.	Twin trawl and paired vessel comparisons of Standardized Bigelow Trawl to test rockhopper and cookie sweeps and varying trawl doors performance on commercial platforms.	Twin Bottom Trawl.	Trawl nets with two types of sweeps or doors.	GB, SNE, MAB	Summer and Fall.	100 DAS	Y
Survey Projects	Pot and trap catchability studies for Scup and Black Sea bass.	Pot survey	Pots and Traps	SNE, Rhode Island Bight, Nantucket Sound, MAB waters from shore to shelf edge.	Spring and fall for black sea bass. Year round for scup.	2,650 pot sets/year.	Y
Conservation Engineering Projects.	Gear and net conservation Cooperative work.	Trawl	Bottom Trawl	GOM, GB, SNE, MAB.	Spring, Summer and Fall.	~500 tows per year total for all bottom trawl conservation projects.	Y
Conservation Engineering Projects.	Varied gear and efficiency testing of fisheries applications.	Trawl	Bottom Trawl	GOM, GB, SNE, MAB.	Spring, Summer and Fall.		Y
Conservation Engineering Projects.	Cooperative Squid Trawls and studies for squid catchability and selectivity.	Trawl	Bottom Trawl & Beam trawl.	GOM, GB, SNE, MAB.	Spring, Summer and Fall.		Y
Conservation Engineering Projects.	Commercial scallop dredge finfish and turtle excluder research. Scallop dredge finfish and turtle excluder research.	Dredge	Dredge	GB, SNE, MAB	April–December (end of fishing year).	>1,700 dredge tows/year for all dredge conservation projects.	N

TABLE 1—PROPOSED NEFSC FISHERIES RESEARCH SURVEYS—Continued

Project name	Survey description	Gear	Specific gear	Area of operation	Season	Annual days at sea (DAS)	Potential for take (Y/N)
Conservation Engineering Projects.	Commercial hydrodynamic turtle deflector dredge testing.	Dredge	Hydrodynamic dredge.	GB, SNE, MAB	April–December (end of fishing year).		N
Tagging Projects	Winter Flounder tagging projects. Winter flounder migration patterns.	Trawl	Bottom Trawl & Otter trawl.	Coastal waters in GOM New Hampshire to Stonington/ Mt. Desert Island, ME.	Spring and Summer.	up to 650 trawls/year.	Y
Tagging Projects	Spiny dogfish tagging projects. Spiny dogfish tagging north and south of Cape Cod, and Cusk & NE multi-species tagging.	Hook & Line; Gillnet.	Hook & Line and Gillnet.	GOM and GB waters adjacent to Cape Cod, MA.	Spring, Summer and Fall.	Long line: 5 sets/trip, 15 total Gillnet: 5 sets/trip, 15 total.	Y
Tagging Projects	Monkfish tagging projects	Gillnet	Gillnet	GOM, SNE, MAB.	September–December.	18–20 DAS, 10 short-duration sets/day, 180–200 sets total.	Y
Ropeless Lobster Trap Research.	Research to develop ropeless gear/devices to mitigate/eliminate interactions with protected species (whales and turtles) by utilizing commercial lobster gear.	Lobster Pots/ Traps.	Acoustic/mechanical releases for ropeless lobster gear and float lines.	GOM, SNE, MAB (Inshore and Offshore).	Summer and Fall.	50–100 DAS, 500 sets, singles and up to 40 pots per set.	N
Rod and Reel Tagging of Atlantic Salmon.	Use of rod and reel to capture, tag, release Atlantic salmon in international and U.S. waters.	Rod and Reel	Acoustic tags	ME, Greenland	Summer and Fall.	200–500 tags applied total.	N
Continuous Plankton Recorder (CPR) Transect Surveys: GOM.	A towed continuous plankton recording device is deployed from vessels of opportunity in the Gulf of Maine, monthly.	Towed array	CPR	ME to Nova Scotia.	Summer and Fall.	24 DAS	N

Comments and Responses

We published a notice of proposed rulemaking in the **Federal Register** on June 4, 2021 (86 FR 30080), and requested comments and information from the public. During the 30-day comment period, we did not receive any substantive public comments.

Changes From Proposed Rule to Final Rule

There were no substantive changes from proposed rule to final rule; however, we have clarified reporting measures (to whom to report and when) and carried over two measures that were contained in the preamble of the proposed rule that were inadvertently omitted from the proposed regulation section. Overall, the final rule is substantively similar to the proposed rule.

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of NEFSC's LOA application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Species and stock information is also provided in NMFS' 2015 proposed rule associated with the current LOA (80 FR 39542; July 9, 2015), NMFS's 2016 Final Programmatic Environmental Assessment (EA) (available *at https://www.fisheries.noaa.gov/action/incidental-take-authorization-noaa-fisheries-nefsc-fisheries-and-ecosystem-research*) and, where updates are necessary, NMFS 2021 Final supplemental programmatic EA (available at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-noaa-northeast-fisheries-science-center-fisheries-and*). Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 3 lists all species or stocks for which take is expected and authorized for this action, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2020). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Atlantic and Gulf of Mexico SARs (*e.g.,* Hayes et al., 2020). All values presented in Table 3 are the most recent available at the time of publication and are available in the draft 2020 SARs (available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports*).

We provided a detailed description on each marine mammal species in the notice of proposed rulemaking for this action (86 FR 30080, June 4, 2020). Since that time, no new information, other than an update to North Atlantic right whale abundance (which is included in Table 2) is available that impact our analysis and determinations; therefore, that information is not repeated here.

TABLE 2—MARINE MAMMAL PRESENT WITHIN THE NORTHEAST U.S. CONTINENTAL SHELF LARGE MARINE ECOSYSTEM

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR [3]	Total annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenidae (right whales):						
North Atlantic right whale	*Eubalaena glacialis*	Western Atlantic	E/D; Y	368 (0, 356, 2020) [11]	0.8	[4] 18.6
Family Balaenopteridae (rorquals):						
Blue whale [5]	*Balaenoptera musculus*	Western North Atlantic	E/D; Y	Unk (n/a, 402, 1980–2008)	0.8	0
Minke whale	*Balaenoptera acutorostrata acutorostrata.*	Canadian East Coast	–; N	21,968 (0.31, 17,002, 2016)	170	[6 7] 10.6
Sei whale	*B. borealis borealis*	Nova Scotia	E/D; Y	6,292 (1.02, 3,098, 2016)	6.2	[8] 1.2
Fin whale	*B. physalus physalus*	Western North Atlantic	E/D; Y	6,802 (0.24, 5,573, 2016)	11	[9] 2.35
Humpback whale	*Megaptera novaeangliae novaeangliae.*	Gulf of Maine	E/D; Y	1,393 (0.15, 1,375, 2016)	22	[10] 58
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Physeteridae:						
Sperm whale	*Physeter macrocephalus*	Western North Atlantic	E/D; Y	4,349 (0.28, 3,451, 2016)	3.9	0
Family Kogiidae:						
Pygmy sperm whale	*Kogia breviceps*	Western North Atlantic	–; N	7,750 (0.38, 5,689, 2016)	46	0
Dwarf sperm whale	*K. sima*	Western North Atlantic	–; N	7,750 (0.38, 5,689, 2016)	46	0
Family Ziphiidae (beaked whales):						
Northern bottlenose whale	*Hyperoodon ampullatus*	Western North Atlantic	–; N	Unk	Unk	0
Blainville's beaked whale	*Mesplodon densirostris*	Western North Atlantic	–; N	10,107 (0.27, 8,085, 2016) [11]	81	0.2
Sowerby's beaked whale	*M. bidens*	Western North Atlantic	–; N	10,107 (0.27, 8,085, 2016) [11]	81	0
Gervais' beaked whale	*M. europaeus*					
True's beaked whale	*M. mirus*					
Cuvier's beaked whale	*Ziphius cavirostris*	Western North Atlantic	–; N	5,744 (0.36, 4,282, 2016)	43	0.2
Family Delphinidae:						
Short-beaked common dolphin.	*Delphinus delphis delphis*	Western North Atlantic	–; N	172,825 (0.55, 112,531, 2007)	1,125	[7] 289
Pygmy killer whale	*Feresa attenuata*	Western North Atlantic	–; N	Unk	Unk	Unk
Short-finned pilot whale	*Globicephala macrorhynchus*	Western North Atlantic	–; N	28,924 (0.24, 23,637, 2016)	236	160
Long-finned pilot whale	*G. melas*	Western North Atlantic	–; N	39,215 (0.30, 30,627, 2016)	306	21
Risso's dolphin	*Grampus griseus*	Western North Atlantic	–; N	35,493 (0.19, 30,289, 2016)	303	54.3
Fraser's dolphin	*Lagenodelphis hosei*	Western North Atlantic	–; N	Unk	Unk	0
Atlantic white-sided dolphin.	*Lagenorhynchus acutus*	Western North Atlantic	–; N	93,233 (0.71, 54,443, 2016)	544	26
White-beaked dolphin	*L. albirostris*	Western North Atlantic	–; N	536,016 (0.31, 415,344, 2016)	4,153	0
Killer whale	*Orcinus orca*	Western North Atlantic	–; N	Unk	Unk	0
Melon-headed whale	*Peponocephala electra*	Western North Atlantic	–; N	Unk	Unk	0
Pantropical spotted dolphin	*Stenella attenuata*	Western North Atlantic	–; N	6,593 (0.52, 4,367, 2016)	44	0
Clymene dolphin	*S. clymene*	Western North Atlantic	–; N	4,237 (1.03, 2,071, 2016	21	0
Striped dolphin	*S. coeruleoalba*	Western North Atlantic	–; N	67,036 (0.29, 52,939, 2016)	529	0
Atlantic spotted dolphin	*S. frontalis*	Western North Atlantic	–; N	39,921 (0.27, 32,032, 2016)	320	0
Spinner dolphin	*S. longirostris*	Western North Atlantic	–; N	4,102 (0.99, 2,045, 2016)	20	0
Rough-toothed dolphin	*Steno bredanensis*	Western North Atlantic	–; N	136 (1.0, 67, 2016)	0.7	0
Bottlenose dolphin	*Tursiops truncatus truncatus*	Western North Atlantic (WNA) Offshore.	–; N	62,851 (0.23, 51,914, 2016)	519	28
		WNA Northern Migratory Coastal.	–/D; Y	6,639 (0.41, 4,759, 2016)	48	[12] 1.2–21.5
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena phocoena.*	Gulf of Maine/Bay of Fundy Stock.	–; N	95,543 (0.31, 74,034, 2016)	851	[7] 217
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Gray seal	*Halichoerus grypus grypus*	Western North Atlantic	–; N	27,131 (0.19, 23,158, 2016)	1,389	[7] 4,729
Harbor seal	*Phoca vitulina vitulina*	Western North Atlantic	–; N	75,834 (0.15, 66,884, 2012)	2,006	[7] 350

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (–) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. NMFS automatically designates any species or stock listed under the ESA as depleted and as a strategic stock under the MMPA.

[2] NMFS marine mammal stock assessment reports at: *www.nmfs.noaa.gov/pr/sars/.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, abundance and PBR is unknown (Unk) and the CV is not applicable.

[3] These values, found in NMFS' SARs, represent PBR and annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, subsistence hunting, and ship strike). In some cases PBR is unknown (Unk) because the minimum population size cannot be determined. Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or as unknown (Unk).

[4] Total M/SI of 18.6 for this species is model-derived and not broken down by cause. The fishery contribution of 6.85 is observed interactions only.

[5] Given the small proportion of the distribution range that has been sampled and considering the low number of blue whales encountered and photographed, the current data, based on photo-identification, do not allow for an estimate of abundance of this species in the Northwest Atlantic with a minimum degree of certainty (Sears *et al.* 1987; Hammond *et al.* 1990; Sears *et al.* 1990; Sears and Calambokidis 2002; Fisheries and Oceans Canada 2009).

[6] The total estimated human-caused mortality and serious injury to the Canadian East Coast minke whale stock is estimated as 10.6 per year (9.15 attributable to fisheries).

[7] The NEFSC has historically taken this species in NEFSC research surveys (2004–2015) (see Tables 6–8).

[8] The total estimated human-caused mortality and serious injury to the Nova Scotia sei whale stock is estimated as 1.2 per year (0.4 attributable to fisheries).

[9] The total estimated human-caused mortality and serious injury to the Western North Atlantic fin whale stock is estimated as 2.35 per year (1.55 attributable to fisheiries).

[10] Total M/SI of 58 for this species is model-derived and not broken down by cause. The fishery contribution of 9.5 is observed interactions obly.

[11] Pace *et al.,* 2021. The total number of this species of beaked whale off the eastern U.S. and Canadian Atlantic coast is unknown, and seasonal abundance estimates are not available for this stock. However, several estimates of the undifferentiated complex of beaked whales (*Ziphius* and *Mesoplodon spp.*) from selected regions are available for select time periods (Barlow *et al.* 2006) as well as two estimates of *Mesoplodon spp.* beaked whales alone (Waring *et al.,* 2015).

[12] The Northern migratory stock of common bottlenose dolphins may interact with unobserved fisheries. Therefore, a range of human-caused mortality and serious injury for this stock is presented.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

Detailed descriptions of the potential effects of the various elements of the NEFSC's specified activity on marine mammals and their habitat were provided in the proposed rule (86 FR 30080, June 4, 2021) as well as the 2016 Programmatic EA. Additionally, detailed descriptions of the potential effects of similar specified activities have also been provided in other **Federal Register** notices (*e.g.,* 81 FR 38516, June 13, 2016; 83 FR 37638; August 1, 2018; 84 FR 6576, February 27, 2019), and section 7 of NEFSC's application provides a discussion of the potential effects of their specified activity, which we have reviewed for accuracy and completeness. No significant new information is available, and these discussions provide the necessary, adequate and relevant information regarding the potential effects of NEFSC's specified activity on marine mammals and their habitat. Therefore, we refer the reader to these documents rather than repeating the information here. The referenced information includes a summary and discussion of the ways that components of the specified activity (*e.g.,* gear deployment, use of active acoustic sources, visual disturbance) may impact marine mammals and their habitat.

As stated previously, the use of certain research gears, including trawl nets, gillnets, longline gear, and fyke nets, has the potential to result in interaction with marine mammals. In the event of a marine mammal interaction with research gear, injury, serious injury, or mortality may result from entanglement or hooking. Exposure to sound through the use of active acoustic systems for research purposes may result in Level B harassment. However, as detailed in the previously referenced discussions, Level A harassment in the form of permanent threshold shift (PTS) is extremely unlikely to occur, and we consider such effects discountable. Finally, it is expected that hauled pinnipeds may be disturbed by approaching researchers such that Level B harassment could occur. Ship strike is not a reasonably anticipated outcome of NEFSC research activities, given the small amount of distance covered by research vessels, use of observers, and their relatively slow speed in comparison to commercial shipping traffic (*i.e.,* the primary cause of marine mammal vessel strikes).

With specific reference to Level B harassment that may occur as a result of acoustic exposure, we note that the analytical methods from the original 2016 analysis are retained here. However, the state of science with regard to our understanding of the likely potential effects of the use of systems like those used by NEFSC has advanced in the preceding 5 years, as have readily available approaches to estimating the acoustic footprints of such sources, with the result that we view this analysis as highly conservative. Although more recent literature provides documentation of marine mammal responses to the use of these and similar acoustic systems (*e.g.,* Cholewiak *et al.,* 2017; Quick *et al.,* 2017; Varghese *et al.,* 2020), the described responses do not generally comport with the degree of severity that should be associated with Level B harassment, as defined by the MMPA. We retain the 2016 analytical approach for consistency with existing analyses and for purposes of efficiency here, and consider this acceptable because the approach provides a conservative estimate of potential incidents of Level B harassment. In summary, while we authorize the amount of take by Level B harassment indicated in the Estimated Take section, and consider these potential takings at face value in our negligible impact analysis, it is uncertain whether use of these acoustic systems are likely to cause take at all, much less at the estimated levels.

The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determinations section considers the potential effects of the specified activity, the Estimated Take section, and the Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Estimated Take

This section provides an estimate of the number of incidental takes to be authorized through a LOA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Except with respect to certain activities not pertinent here, section 3(18) of 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).

Take of marine mammals incidental to NEFSC research activities could occur as a result of (1) injury or mortality due to gear interaction (Level A harassment, serious injury, or mortality); (2) behavioral disturbance resulting from the use of active acoustic sources (Level B harassment only); or (3) behavioral disturbance of pinnipeds resulting from incidental approach of researchers and research vessels (Level B harassment only). Below we describe how the potential take is estimated.

Estimated Take Due to Gear Interaction

To estimate the number of potential takes that could occur by M/SI and Level A through gear interaction, consideration of past interactions between gear (*i.e.,* trawl, gillnet, and fyke gear) used by NEFSC and specific marine mammal species provides important context. We also considered other species that have not been taken by NEFSC but are similar enough in

nature and behavioral patterns as to consider them having the potential to be entangled. As described in the Potential Effects of Marine Mammals and their Habitat section, NEFSC has a history of taking marine mammals in fishing gear, albeit a very small amount compared to the amount of fishing effort. From 2004–2015, eight marine mammals were killed in interactions with trawl gear (common dolphin, gray seal), six were killed due to capture in gillnets (Common bottlenose, Northern South Carolina estuarine stock, gray seal, harbor porpoise and bottlenose dolphin), and one suffered mortality in a fyke net (harbor seal). Also over that time period, one minke whale was caught in trawl gear and released alive. We note these interactions occurred prior to implementation of the existing regulations which heightened mitigation and monitoring efforts. From 2016–2018, no marine mammals were taken incidental to fishing. A lethal take of a common dolphin during a Cooperative Research NTAP cruise sponsored by the Center occurred in late September 2019. The gear was a 4 seam 3 bridle Bigelow net with a spread restrictor cable. In 2020, no takes occurred.

Historical Interactions—In order to estimate the number of potential incidents of take that could occur by M/SI through gear interaction, we first consider the NEFSC's past record of such incidents, and then consider in addition other species that may have similar vulnerabilities to the NEFSC's trawl, gillnet, and fyke net gear for which we have historical interaction records. We describe historical interactions with NEFSC research gear in Tables 6, 7, and 8. Available records are for the years 2004 through the present. Please see Figure 4.2–2 in the NEFSC EA for specific locations of these incidents up through 2020.

TABLE 6—HISTORICAL INTERACTIONS WITH TRAWL GEAR

Gear	Survey	Date	Species	Number killed	Number released alive	Total
Gourock high speed midwater rope trawl.	Atlantic Herring Survey	10/8/2004	Short-beaked common dolphin (Western NA stock).	2	0	2
Bottom trawl (4-seam, 3 bridle).	NEFSC Standard Bottom Trawl Survey.	11/11/2007	Short-beaked common dolphin (Western NA stock).	1	0	1
Gourock high speed midwater rope trawl.	Atlantic Herring Survey	10/11/2009	Minke whale	0	[1] 1	1
Bottom trawl (4-seam, 3 bridle).	Spring Bottom Trawl Survey	4/4/15	Gray seal	[2] 1	0	1
Bottom trawl (4-seam, 3 bridle).	Cooperative NTAP	9/24/19	Short-beaked common dolphin (Western NA stock).	1	0	1
Total individuals captured (total number of interactions given in parentheses).			Short-beaked common dolphin (4).	4	0	4
			Minke whale (1)	0	1	1
			Gray seal (1)	1	0	1

[1] According to the incident report, "The net's cod end and whale were brought aboard just enough to undo the cod end and free the whale. It was on deck for about 5 minutes. While on deck, it was vocalizing and moving its tail up and down. The whale swam away upon release and appeared to be fine. Estimated length was 19 feet." The NEFSC later classified this incidental take as a serious injury using NMFS criteria for such determinations published in January 2012 (Cole and Henry, 2013).

[2] The NEFSC filed an incident report for this incidental take on April 4, 2015.

TABLE 7—HISTORICAL INTERACTIONS WITH GILLNET GEAR

Gear	Survey	Date	Species	Number killed	Number released alive	Total
Gillnet	COASTSPAN	11/29/2008	Common Bottlenose dolphin (Northern South Carolina Estuarine System stock) [1].	1	0	1
Gillnet	NEFOP Observer Gillnet Training Trips.	5/4/2009	Gray seal	1	0	1
Gillnet	NEFOP Observer Gillnet Training Trips.	5/4/2009	Harbor porpoise	1	0	1
Total individuals captured (total number of interactions given in parentheses).			Bottlenose dolphin (1)	1	0	1
			Gray seal (1)	1	0	1
			Harbor porpoise (1)	1	0	1

[1] In 2008, the COASTSPAN gillnet survey caught and killed one common bottlenose dolphin in 2008 while a cooperating institution was conducting the survey in South Carolina. This was the only occurrence of incidental take in these surveys. Although no genetic information is available from this dolphin, based on the location of the event, NMFS retrospectively assigned this mortality to the Northern South Carolina Estuarine System stock in 2015 from the previous classification as the western North Atlantic stock (Waring *et al.,* 2014).

TABLE 8—HISTORICAL INTERACTIONS WITH FYKE NET GEAR

Gear	Survey	Date	Species	Number killed	Number released alive	Total
Fyke Net	Maine Estuaries Diadromous Survey.	10/25/2010	Harbor seal	1	0	1
Total				1	0	1

The NEFSC has no recorded interactions with any gear other than midwater and bottom trawl, gillnet, and fyke net gears. As noted previously in Potential Effects of the Specified Activity on Marine Mammals, we anticipate future interactions with the same gear types.

In order to use these historical interaction records in a precautionary manner as the basis for the take estimation process, and because we have no specific information to indicate whether any given future interaction might result in M/SI versus Level A harassment, we conservatively assume that all interactions equate to mortality.

In order to estimate the potential number of incidents of M/SI take that could occur incidental to the NEFSC's use of midwater and bottom trawl, gillnet, fyke net, and longline gear in the Atlantic coast region over the 5-year period the rule would be effective (2021–2026), we first look at the six species described that have been taken historically and then evaluate the potential vulnerability of additional species to these gears.

Table 9 shows the average annual captures rate of these six species and the projected 5-year totals for this rule, for trawl, gillnet, and fyke net gear. Below we describe how these data were used to estimate future take for these and proxy species which also have the potential to be taken.

TABLE 9—AVERAGE RATE OF ANIMAL GEAR INTERACTION FROM 2004–2020

Gear	Species	Average rate per year (2004–2020)
Trawl	Short-beaked common dolphin	0.27
	Minke whale	0.06
	Gray seal	0.06
Gillnet	Common bottlenose dolphin	0.06
	Harbor porpoise	0.06
	Gray seal	0.06
Fyke net	Harbor seal	0.06

The NEFSC estimated takes for NEFSC gear that: (1) Had a prior take in the historical record, or (2) by analogy to commercial fishing gear. Further, given the rare events of M/SI in NEFSC fishery research, the NEFSC binned gear into categories (*e.g.,* trawls) rather than partitioning take by gear, as it would result in estimated takes that far exceed the recorded take history.

Vulnerability of analogous species to different gear types is informed by the record of interactions by the analogous and reference species with commercial fisheries using gear types similar to those used in research. Furthermore, when determining the amount of take requested, we make a distinction between analogous species thought to have the same vulnerability for incidental take as the reference species and those analogous species that may have a similar vulnerability. In those cases thought to have the same vulnerability, the request is for the same number per year as the reference species. In those cases thought to have similar vulnerability, the request is less than the reference species. For example, the NEFSC believes the vulnerability of harbor seals to be taken in gillnets is the same as for gray seals (one per year) and thus requests one harbor seal per year (total of 5 over the authorization period). Alternatively, the potential for take of Atlantic white-sided dolphins in gillnets is expected to be similar to harbor porpoise (one per year), and the reduced request relative to this reference species is one Atlantic white sided dolphin over the entire 5-year authorization period.

The approach outlined here reflects: (1) Concern that some species with which we have not had historical interactions may interact with these gears, (2) acknowledgment of variation between sets, and (3) understanding that many marine mammals are not solitary so if a set results in take, the take could be greater than one animal. In these particular instances, the NEFSC estimates the take of these species to be equal to the maximum interactions per any given set of a reference species historically taken during 2004–2019.

Trawls—To estimate the requested taking of analogous species, the NEFSC identified several species in the western North Atlantic Ocean which may have similar vulnerability to research-based trawls as the short-beaked common dolphin. Short-beaked common dolphins were taken in 2004 (two individuals in one trawl set) and in 2019 (one dolphin during a bottom trawl). The NEFSC therefore, estimates one take of a short-beaked common dolphin per year over the 5-year period to be precautionary (*i.e.,* 5 total). On the basis of similar vulnerability of other dolphin species, the NEFSC estimates two potential takes over the 5-year authorization period for each of the following species in trawls: Risso's dolphin, common bottlenose dolphin (offshore and northern coastal migratory stock), Atlantic-white-sided dolphin, white-beaked dolphin, Atlantic spotted dolphin, and harbor porpoise. For these species, we propose to authorize a total taking by M/SI of two individuals over the 5-year timespan (Table 10).

In light of the low level of interaction and the mitigation measures to specifically reduce interactions with dolphins during COASTSPAN surveys

such as hand-checking the gill net every 20 minutes, no takes are requested from the Southern Migratory, Coastal or Estuarine stocks of common bottlenose dolphin. Other dolphin species may have similar vulnerabilities as those listed above but because of the timing and location of NEFSC research activities, the NEFSC concluded that the likelihood for take of these species was low and therefore is not requesting, nor it NMFS proposing to authorize, take for the following species: Pantropical spotted dolphin, striped dolphin, Fraser's dolphin, rough-toothed dolphin, Clymene dolphin, and spinner dolphin.

In 2015, one gray seal was killed during a trawl survey. Similar to other gear, the NEFSC believes that harbor seals have a similar vulnerability for incidental take as gray seals in this type of gear. To be conservative, for the period of this authorization, the NEFSC has requested one take by trawl for harbor seals each year over the 5-year authorization period. Thus, for harbor and gray seals, we propose to authorize a total taking by M/SI of 5 individuals over the 5-year timespan for trawl gear (Table 10).

Gillnets—To estimate the requested take of analogous species for gillnets, the NEFSC identified several species in the western North Atlantic Ocean which may have similar vulnerability to research-based gillnet surveys as the short-beaked common dolphin—due to similar behaviors and distributions in the survey areas.

Gillnet surveys typically occur nearshore in bays and estuaries. One gray seal and one harbor porpoise were caught during a Northeast Fisheries Observer Program training gillnet survey. The NEFSC believes that harbor seals have the same vulnerability to be taken in gillnets as gray seals and therefore estimates 5 takes of harbor seals in gillnets over the 5-year authorization period. For this species, we propose to authorize a total taking by M/SI of 5 individuals over the 5-year timespan (see Table 10).

Likewise, the NEFSC believes that Atlantic white-sided dolphins and short-beaked common dolphins have a similar vulnerability to be taken in gillnets as harbor porpoise and bottlenose dolphins (Waring *et al.,* 2014) and estimates one take each of Atlantic white-sided dolphin and short-beaked common dolphin in gillnet gear over the 5-year authorization period. For these species, we propose to authorize a total taking by M/SI of one individual (per species) over the 5-year timespan (Table 10).

In 2008, a cooperating institution conducting the COASTSPAN gillnet survey in South Carolina caught and killed one bottlenose dolphin. Despite years of effort since that time, this was the only occurrence of incidental take in these surveys. The survey now imposes strict monitoring and mitigation measures (see sections below on Mitigation and Monitoring and Reporting). With regard to common bottlenose dolphins, M/SI takes are only requested for offshore and Northern migratory stocks (10 total over the 5-year period). Given the lack of recent take and the implementation of additional monitoring and mitigation measures, the NEFSC is not requesting, and NMFS is not proposing to authorize, take of bottlenose dolphins belonging to the Southern Coastal Migratory or Estuarine stocks as the NEFSC considers there to be a remote chance of incidentally taking a bottlenose dolphin from the estuarine stocks. However, in the future, if there is a bottlenose dolphin take from the estuarine stocks as confirmed by genetic sampling, the NEFSC will reconsider its take request in consultation and coordination with OPR and the Atlantic Bottlenose Dolphin Take Reduction Team.

In 2009, one gray seal was killed during a gillnet survey. Similar to other gear, the NEFSC believes that harbor seals have a similar vulnerability for incidental take as gray seals in this type of gear. To be conservative, for the period of this authorization, the NEFSC has requested one take by gillnet for harbor seals each year over the 5-year authorization period. Thus, for harbor and gray seals, we propose to authorize a total taking by M/SI of 5 individual over the 5-year timespan (Table 10).

Fyke nets—For fyke nets, the NEFSC believes that gray seals have a similar vulnerability for incidental take as harbor seals which interacted once in a single fyke net set during the past 11 years. However, to be conservative, for the period of this authorization, the NEFSC has requested one take by fyke net for gray seals each year over the 5-year authorization period. Thus, for gray seals, we propose to authorize a total taking by M/SI of 5 individual over the 5-year timespan (Table 10).

Longlines—While the NEFSC has not historically interacted with large whales or other cetaceans in its longline gear, it is well documented that some of these species are taken in commercial longline fisheries. The 2020 List of Fisheries classifies commercial fisheries based on prior interactions with marine mammals. Although the NEFSC used this information to help make an informed decision on the probability of specific cetacean and large whale interactions with longline gear, many other factors were also taken into account (*e.g.,* relative survey effort, survey location, similarity in gear type, animal behavior, prior history of NEFSC interactions with longline gear, *etc.*). Therefore, there are several species that have been shown to interact with commercial longline fisheries but for which the NEFSC is not requesting take. For example, the NEFSC is not requesting take of large whales, long-finned pilot whales, and short-finned pilot whales in longline gear. Although these species could become entangled in longline gear, the probability of interaction with NEFSC longline gear is extremely low considering a low level of survey effort relative to that of commercial fisheries, the short length of the mainline, and low numbers of hooks used. Based on the amount of fish caught by commercial fisheries versus NEFSC fisheries research, the ''footprint'' of research effort compared to commercial fisheries is very small. For example, NEFSC uses a shorter mainline length and lower number of hooks relative to that of commercial fisheries. The NEFSC considered previously caught species in analogous commercial fisheries to have a higher probability of take; however, all were not included for potential take by the NEFSC. Additionally, marine mammals have never been caught or entangled in NEFSC longline gear; if interactions occur marine mammals depredate caught fish from the gear but leave the hooks attached and unaltered. They have never been hooked nor had hooks taken off gear during depredation. However, such gear could be considered analogous to potential commercial longline surveys that may be conducted elsewhere (*e.g.,* Garrison, 2007; Roche *et al.* 2007; Straley *et al.,* 2014). Given that the NEFSC experienced a single interaction of a common dolphin during the effective period of the current LOA to date, the issuance of this amount of take, by species, is reasonably conservative.

The amount of take authorized, by M/SI, is identical to that authorized to the NEFSC for the 2016–2020 LOA except for take pertaining to the southern migratory coastal stock of bottlenose dolphins. The 2016–2021 LOA authorizes 8 takes from this stock. According to the SAR, during the warm water months of July–August, the stock is presumed to occupy coastal waters north of Cape Lookout, North Carolina, to Assateague, Virginia. North of Cape Hatteras during summer months, there

is strong separation between the coastal and offshore morphotypes (Kenney 1990; Garrison et al. 2017a), and the coastal morphotype is nearly completely absent in waters >20 m. However, the NEFSC has determined that because research effort is low in the habitat range of this stock and NEFSC has no documented takes of dolphins belonging to the southern migratory coastal stock, they are not requesting, and NMFS is not proposing to authorize take.

TABLE 10—TOTAL ESTIMATED M/SI DUE TO GEAR INTERACTION IN THE ATLANTIC COAST REGION

Species	5-Year total, trawl [1]	5-Year total, gillnet [1]	5-Year total, longline [1]	5-Year total, fyke net [1]	5-Year total, all gears
Minke whale	5	0	0	0	5
Risso's dolphin	2	0	1	0	3
Atlantic white-sided dolphin	2	1	0	0	3
White-beaked dolphin	2	0	0	0	2
Short-beaked common dolphin	5	1	1	0	7
Atlantic spotted dolphin	2	0	0	0	2
Common bottlenose dolphin (WNA offshore stock) [1]	2	5	1	0	8
Common bottlenose dolphin (WNA N. Migratory stock) [1]	2	5	1	0	8
Harbor porpoise	2	5	0	0	7
Harbor seal	5	5	0	5	15
Gray seal	5	5	0	5	15

[1] The NEFSC re-evaluated sampling locations and effort after submission of their LOA application and is not requesting takes for the southern migratory stock of bottlenose dolphins as fishing effort is very low.

Estimated Take From Scientific Sonar

As described previously, we believe it unlikely that NEFSC use of active acoustic sources is realistically likely to cause Level B harassment of marine mammals. However, per NEFSC request, we conservatively assume that, at worst, Level B harassment may result from exposure to noise from these sources, and we carry forward the analytical approach developed in support of the 2015 rule. At that time, in order to quantify the potential for Level B harassment to occur, NMFS developed an analytical framework considering characteristics of the active acoustic systems, their expected patterns of use, and characteristics of the marine mammal species that may interact with them. The framework incorporated a number of deliberately precautionary, simplifying assumptions, and the resulting exposure estimates, which are presumed here to equate to take by Level B harassment (as defined by the MMPA), may be seen as an overestimate of the potential for such effects to occur as a result of the operation of these systems.

Regarding the potential for Level A harassment in the form of permanent threshold shift to occur, the very short duration sounds emitted by these sources reduces the likely level of accumulated energy an animal is exposed to. An individual would have to remain exceptionally close to a sound source for unrealistic lengths of time, suggesting the likelihood of injury occurring is exceedingly small. Potential Level A harassment is therefore not considered further in this analysis.

Authorized takes from the use of active acoustic scientific sonar sources (*e.g.,* echosounders) would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to the use of active acoustic sources. Based on the nature of the activity, Level A harassment is neither anticipated nor authorized.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimate.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment). As described in detail for NEFSC and other science centers in previously issued **Federal Register** notices (*e.g.,* 85 FR 53606, August 28, 2020; 88 FR 27028, May 6, 2020), the use of the sources used by NMFS Science Centers, including NEFSC, do not have the potential to cause Level A harassment; therefore, our discussion is limited to behavioral harassment (Level B harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 decibels (dB) re 1 microPascal (μPa) root mean square (rms) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 μPa (rms) for intermittent (*e.g.,* scientific sonar) sources. NEFSC surveys include the use of non-impulsive, intermittent sources and therefore the 160 dB re 1 μPa (rms) threshold is applicable.

The operating frequencies of active acoustic systems used by the NEFSC range from 30–333 kilohertz (kHz) (see Table 2). Examination of these sources considers operational patterns of use

relative to each other, and which sources would have the largest potential impact zone when used simultaneously. NEFSC determined that the EK60, ME70, and DSM 300 sources comprise the total effective exposures relative to line-kilometers surveyed (see Section 6.5 of the Application). Acoustic disturbance takes are calculated for these three dominant sources. Of these dominant acoustic sources, only the EK60 can use a frequency within the hearing range of baleen whales (18 kHz). Therefore, for North Atlantic right whales and all other baleen whales, Level B harassment is only expected for exposure to the EK60. The other two dominant sources are outside of their hearing range. The ADCP Ocean Surveyor operates at 75 kHz, which is outside of baleen whale hearing capabilities. Therefore, we would not expect any exposures to these signals to result in behavioral harassment in baleen whales.

The assessment paradigm for active acoustic sources used in NEFSC fisheries research is relatively straightforward and has a number of key simple and conservative assumptions. NMFS' current acoustic guidance requires in most cases that we assume Level B harassment occurs when a marine mammal receives an acoustic signal at or above a simple step-function threshold. Estimating the number of exposures at the specified received level requires several determinations, each of which is described sequentially below:

(1) A detailed characterization of the acoustic characteristics of the effective sound source or sources in operation;

(2) The operational areas exposed to levels at or above those associated with Level B harassment when these sources are in operation;

(3) A method for quantifying the resulting sound fields around these sources; and

(4) An estimate of the average density for marine mammal species in each area of operation.

Quantifying the spatial and temporal dimension of the sound exposure footprint (or ''swath width'') of the active acoustic devices in operation on moving vessels and their relationship to the average density of marine mammals enables a quantitative estimate of the number of individuals for which sound levels exceed the relevant threshold for each area. The number of potential incidents of Level B harassment is ultimately estimated as the product of the volume of water ensonified at 160 dB rms or higher and the volumetric density of animals determined from simple assumptions about their vertical stratification in the water column. Specifically, reasonable assumptions based on what is known about diving behavior across different marine mammal species were made to segregate those that predominately remain in the upper 200 m of the water column versus those that regularly dive deeper during foraging and transit. Methods for estimating each of these calculations are described in greater detail in the following sections, along with the simplifying assumptions made, and followed by the take estimates.

Sound source characteristics—An initial characterization of the general source parameters for the primary active acoustic sources operated by the NEFSC was conducted, enabling a full assessment of all sound sources used by the NEFSC. This auditing of the active acoustic sources also enabled a determination of the predominant sources that, when operated, would have sound footprints exceeding those from any other simultaneously used sources. These sources were effectively those used directly in acoustic propagation modeling to estimate the zones within which the 160 dB rms received level would occur.

Many of these sources can be operated in different modes and with different output parameters. In modeling their potential impact areas, those features among the sources identified in Table 2 (*e.g.,* lowest operating frequency) that would lead to the most precautionary estimate of maximum received level ranges (*i.e.,* largest ensonified area) were used. The effective beam patterns took into account the normal modes in which these sources are typically operated. While these signals are brief and intermittent, a conservative assumption was taken in ignoring the temporal pattern of transmitted pulses in calculating Level B harassment events. Operating characteristics of each of the predominant sound sources were used in the calculation of effective line-kilometers and area of exposure for each source in each survey.

Calculating effective line-kilometers—As described below, based on the operating parameters for each source type, an estimated volume of water ensonified at or above the 160 dB rms threshold was calculated. In all cases where multiple sources are operated simultaneously, the one with the largest estimated acoustic footprint was considered to be the effective source. Two depth zones were defined for each of the four research areas: 0–200 m and > 200 m. Effective line distance and volume ensonified was calculated for each depth strata (0–200 m and > 200 m), where appropriate. In some cases, this resulted in different sources being predominant in each depth stratum for all line km (*i.e.,* the total linear distance traveled during acoustic survey operations) when multiple sources were in operation. This was accounted for in estimating overall exposures for species that utilize both depth strata (deep divers). For each ecosystem area, the total number of line km that would be surveyed was determined, as was the relative percentage of surveyed line km associated with each source. The total line-kilometers for each survey, the dominant source, the effective percentages associated with each depth, and the effective total volume ensonified are given below (Table 12).

From the sources identified in Table 2, the NEFSC identified six of the eight as having the largest potential impact zones during operations based on their relatively lower output frequency, higher output power, and operational pattern of use: EK60, ME70, DSM 300, ADCP Ocean Surveyor, Simrad EQ50, and Netmind (80 FR 39542, July 9, 2015). Further examination of these six sources considers operational patterns of use relative to each other, and which sources would have the largest potential impact zone when used simultaneously. NEFSC determined that the EK60, ME 70, and DSM 300 sources comprise the total effective exposures relative to line-kilometers surveyed acoustic disturbance takes are calculated for these three dominant sources. Of these dominant acoustic sources, only the EK 60 can use a frequency within the hearing range of baleen whales (18k Hz). Therefore, for NARW and all other baleen whales, Level B harassment is only expected for exposure to the EK60. The other two dominant sources are outside of their hearing range.

Calculating volume of water ensonified—The cross-sectional area of water ensonified to a 160 dB rms received level was calculated using a simple spherical spreading model of sound propagation loss (20 log R) such that there would be 60 dB of attenuation over 1,000 m. Spherical spreading is a reasonable assumption even in relatively shallow waters since, taking into account the beam angle, the reflected energy from the seafloor will be much weaker than the direct source and the volume influenced by the reflected acoustic energy would be much smaller over the relatively short ranges involved. We also accounted for the frequency-dependent absorption coefficient and beam pattern of these sound sources, which is generally highly directional. The lowest frequency was used for systems that are operated over a range of frequencies. The vertical

extent of this area is calculated for two depth strata.

Following the determination of effective sound exposure area for transmissions considered in two dimensions (Table 11), the next step was to determine the effective volume of water ensonified at or above 160 dB rms for the entirety of each survey. For each of the three predominant sound sources, the volume of water ensonified is estimated as the athwartship cross-sectional area (in square kilometers) of sound at or above 160 dB rms multiplied by the total distance traveled by the ship. Where different sources operating simultaneously would be predominant in each different depth strata, the resulting cross-sectional area calculated took this into account. Specifically, for shallow-diving species this cross-sectional area was determined for whichever was predominant in the shallow stratum, whereas for deeper-diving species this area was calculated from the combined effects of the predominant source in the shallow stratum and the (sometimes different) source predominating in the deep stratum. This creates an effective total volume characterizing the area ensonified when each predominant source is operated and accounts for the fact that deeper-diving species may encounter a complex sound field in different portions of the water column. Volumetric densities are presented in Table 12.

TABLE 11—EFFECTIVE EXPOSURE AREAS FOR PREDOMINANT ACOUSTIC SOURCES ACROSS TWO DEPTH STRATA

Active acoustic system	Effective exposure area: sea surface to 200 m depth (km^2)	Effective exposure area: sea surface to depth >200 m (km^2)
EK60	0.0142	0.1411
ME70	0.0201	0.0201
DSM300	0.0004	0.0004

Marine Mammal Density

As described in the 2015 proposed rule (80 FR 39542, July 9, 2015), marine mammals were categorized into two generalized depth strata: surface-associated (0–200 m) or deep-diving (0 to >200 m). These depth strata are based on reasonable assumptions of behavior (Reynolds III and Rommell 1999). Animals in the shallow-diving strata were assumed to spend a majority of their lives (>75 percent) at depths of 200 m or shallower. For shallow-diving species, the volumetric density is the area density divided by 0.2 km (*i.e.,* 200 m). The animal's volumetric density and exposure to sound is limited by this depth boundary.

Species in the deeper diving strata were assumed to regularly dive deeper than 200 m and spend significant time at depth. For deeper diving species, the volumetric density is calculated as the area density divided by a nominal value of 0.5 km (*i.e.,* 500 m), consistent with the approach used in the 2016 Final Rule (81 FR 53061, August 11, 2016). Where applicable, both LME and offshore volumetric densities are provided. As described in Section 6.5 of NEFSC's application, level of effort and acoustic gear types used by NEFSC differ in these areas and takes are calculated for each area (LME and offshore).

TABLE 12—MARINE MAMMAL AND VOLUMETRIC DENSITY IN THE ENSONFIED AREAS

Common name	Dive profile/vertical habitat		LME area density (per km^2) [1 2]	LME volumetric density (per km^3) [3]	Offshore density (per km^2) [2 4]	Offshore Volumetric density (per km^3) [5]
	0–200 m	>200 m				
Cetaceans						
NARW [6]	X	.....	0.0030	0.0150	0	0
Humpback whale	X	.....	0.0016	0.00800	0	0
Fin whale	X	.....	0.0048	0.02400	0.00005	0.00025
Sei whale	X	.....	0.0008	0.00400	0	0
Minke whale	X	.....	0.002	0.01000	0	0
Blue whale	X	.....	0.000009	0.00005	0.000009	0.00005
Sperm whale	.....	X	0	0	0.0056	0.01120
Dwarf sperm whale	.....	X	0	0	0.005	0.01000
Pygmy sperm whale	.....	X	0	0	0.005	0.01000
Killer Whale	X	.....	0.000009	0.00005	0.000009	0.00005
Pygmy killer whale	X	.....	0.000009	0.00005	0.000009	0.00005
Northern bottlenose whale	.....	X	0	0	0.00009	0.00018
Cuvier's beaked whale	.....	X	0	0	0.0062	0.01240
Mesoplodon beaked whales	.....	X	0	0	0.0046	0.00920
Melon-headed whale	X	.....	0	0	0.0010	0.00500
Risso's dolphin	X	.....	0.0020	0.01000	0.0128	0.06400
Long-finned pilot whale	.....	X	0.0220	0.11000	0.0220	0.04400
Short-finned pilot whale	.....	X	0.0220	0.11000	0.0220	0.04400
Atlantic white-sided dolphin	X	.....	0.0453	0.22650	0	0
White-beaked dolphin	X	.....	0.00003	0.00015	0	0
Short-beaked common dolphin	X	.....	0.0891	0.44550	0	0
Atlantic spotted dolphin	X	.....	0.0013	0.00650	0.0241	0.12050
Pantropical spotted dolphin	X	.....	0	0	0.0015	0.00750
Striped dolphin	X	.....	0	0	0.0614	0.30700
Fraser's dolphin	X	.....	0	0	0.0004	0.000200
Rough toothed dolphin	X	.....	0.0005	0.00250	0.0010	0.000200

TABLE 12—MARINE MAMMAL AND VOLUMETRIC DENSITY IN THE ENSONFIED AREAS—Continued

Common name	Dive profile/vertical habitat		LME area density (per km^2) [1 2]	LME volumetric density (per km^3) [3]	Offshore density (per km^2) [2 4]	Offshore Volumetric density (per km^3) [5]
	0–200 m	>200 m				
Clymene dolphin	X	.....	0.0032	0.01600	0	0
Spinner dolphin	X	.....	0	0	0.0002	0.00100
Common bottlenose dolphin offshore stock	X	.....	0	0	0.1615	0.3230
Common bottlenose dolphin coastal stocks	X	.....	0.1359	0.6795	0	0
Harbor porpoise	X	.....	0.0403	0.20150	0	0
Pinnipeds						
Harbor Seal	X	.....	0.2844	1.4220	0	0
Gray Seal	X	.....	0.0939	0.4695	0	0

[1] LME is the area in shore of the 200 m depth contour.
[2] Source: Unless otherwise stated Roberts, Best et al. (2016).
[3] LME volumetric density is the LME area density divided by 0.2 km.
[4] Offshore is the area offshore of the 200 m depth contour.
[5] Offshore volumetric density is the offshore area density divided by 0.2 km or 0.5 km for shallow or deep diving species or 0.5 km for deep diving species.
[6] Density from Roberts, Schick et al. (2020).

Using Area of Ensonification and Volumetric Density to Estimate Exposures

Estimates of potential incidents of Level B harassment (*i.e.,* potential exposure to levels of sound at or exceeding the 160 dB rms threshold) are then calculated by using (1) the combined results from output characteristics of each source and identification of the predominant sources in terms of acoustic output; (2) their relative annual usage patterns for each operational area; (3) a source-specific determination made of the area of water associated with received sounds at the extent of a depth boundary; and (4) determination of a biologically-relevant volumetric density of marine mammal species in each area. Estimates of Level B harassment by acoustic sources are the product of the volume of water ensonified at 160 dB rms or higher for the predominant sound source for each relevant survey and the volumetric density of animals for each species. Source- and stratum-specific exposure estimates are the product of these ensonified volumes and the species-specific volumetric densities (Table 12). The general take estimate equation for each source in each depth statrum is density * (ensonified volume * line kms). The humpback whale and exposure to sound from the EK 60 can be used to demonstrate the calculation:

1. EK60 ensonified volume; 0–200 m: 0.0142 km^2 * 16058.8 km = 228.03 km^3

2. Estimated exposures to sound ≥160 dB rms; humpback whale; EK60, LME region: (0.008 humpback whales/km^3 * 228.03 km^3 = 1.8 estimated humpback exposures to SPLs ≥160 dB rms resulting from use of the EK60 in the 0–200 m depth stratum.

Similar calculations were conducted for the ME 70 and DSM300 for each animal in the LME region, with the exception of baleen whales, as these sound sources are outside of their hearing range. Totals in Tables 13 and 14 represent the total take of marine mammals, by species, across all relevant surveys and sources rounded up to the nearest whole number.

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Table 13. Marine Mammal Level B Harassment Take Estimates – LME.

Common Name	Volumetric density (#/km^3)	Vertical Habitat (shallow vs. deep divers)		Estimated Acoustic Takes in 0-200 m depth stratum				Total Takes per species per year in LME	Total takes requested over the 5-year period
		0-200 m	>200 m	EK60	ME70	DSM300	Total		
Cetaceans									
NARW	0.015	X		3.4	0	0	3.4	4	**20**
Humpback whale	0.008	X		1.8	0	0	1.8	2	**10**
Fin whale	0.024	X		5.5	0	0	5.5	6	**30**
Sei whale	0.004	X		0.9	0	0	0.9	1	**5**
Minke whale	0.010	X		2.3	0	0	2.3	3	**15**
Blue whale	0.00005	X		0.01	0	0	0.01	1	**5**
Killer Whale	0.00005	X		0.01	0.033	0.009	0.053	1	**5**
Pygmy killer whale	0.00005	X		0.01	0.033	0.009	0.053	1	**5**
Risso's dolphin	0.010	X		2.3	7.4	2.0	11.7	12	**60**
Long-finned pilot whale	0.110	X	X	25.1	81.1	22.2	128.4	129	**645**
Short-finned pilot whale	0.110	X	X	25.1	81.1	22.2	128.4	129	**645**
Atlantic white-sided dolphin	0.227	X		51.6	167.1	45.7	264.4	265	**1,325**
White-beaked dolphin[1]	0.00015	X		0.034	0.111	0.030	0.175	58	**290**
Short-beaked common dolphin	0.446	X		101.6	328.6	89.8	520	520	**2,600**
Atlantic spotted dolphin	0.007	X		1.5	4.8	1.3	7.6	8	**40**
Rough toothed dolphin	0.003	X		0.6	1.8	0.5	2.9	**3**	**15**
Clymene dolphin	0.016	X		3.6	11.8	3.2	18.7	**19**	**95**
Common bottlenose dolphin[2]	0.679	X		154.9	501.2	137	793.1	**794**	**3,970**
Harbor Porpoise	0.2015	X		45.9	148.6	40.6	235.2	**236**	**1,180**
Pinnipeds									
Harbor Seal	1.422	X		324.3	1048.9	286.7	1659.8	**1660**	**8,300**
Gray Seal	0.469	X		107.1	346.3	94.7	548.02	**549**	**2,745**

[1] For the period 2016 – 2019, Level B takes for this species were reported as 29, 23, and 37 for each year, respectively. Therefore, the take request has been adjusted to account for potential groups that may occur.

[2] The NEFSC re-evaluated active acoustic survey effort after submission of their LOA application and is not requesting takes for the southern migratory stock of bottlenose dolphins as no active acoustic sources would be used in habitat overlapping with this stock.

Table 14. Marine Mammal Level B Harassment Take Estimates – Offshore.

Common Name	Volumetric density (#/km^3)	Vertical Habitat (shallow vs. deep divers)		Estimated Acoustic Takes in 0-200m depth stratum[1]			Estimated Acoustic Takes >200m depth stratum[2]	Total Takes per species Offshore	Total Takes Requested over the 5-year period
		>200 m	>200 m	EK60	ME70	Total	EK60		
Fin whale	0.00025	X		0	0.026	0.026	0	1	**5**
Blue whale	0.00005	X		0	0.005	0.005	0	1	**5**
Sperm whale	0.0112		X	0.3	1.2	1.5	2.8	5	**25**
Dwarf sperm whale	0.01		X	0.3	1.0	1.3	2.5	4	**20**
Pygmy sperm whale	0.01		X	0.3	1.0	1.3	2.5	4	**20**
Killer Whale	0.00005	X		0.001	0.005	0.006	0	1	**5**
Pygmy killer whale	0.00005	X		0.001	0.005	0.006	0	1	**5**
Northern bottlenose whale	0.00018		X	0.01	0.02	0.02	0.05	1	**5**
Cuvier's beaked whale	0.0124		X	0.3	1.3	1.6	3.1	5	**25**
Mesoplodon beaked whales	0.0092		X	0.3	1.0	1.2	2.3	4	**20**
Melon-headed whale	0.005	X		0.1	0.5	0.7	0	1	**5**
Risso's dolphin	0.064	X		1.8	6.6	8.4	0	9	**45**
Long-finned pilot whale	0.044		X	1.2	4.6	5.8	11.1	17	**85**
Short-finned pilot whale	0.044		X	1.2	4.6	5.8	11.1	17	**85**
Atlantic spotted dolphin	0.1205	X		3.4	12.5	15.9	0	16	**80**
Pantropical spotted dolphin	0.0075	X		0.2	0.8	1.0	0	1	**5**
Striped dolphin	0.307	X		8.7	31.8	40.4	0	41	**205**
Fraser's dolphin	0.002	X		0.1	0.2	0.3	0	1	**5**
Rough toothed dolphin	0.005	X		0.14	0.52	0.66	0	1	**5**
Spinner dolphin	0.001	X		0.0	0.1	0.1	0	1	**5**
Common bottlenose dolphin[3]	0.3230	X		9.1	33.4	42.5	0	43	**215**

[1]DSM300 not used in offshore surveys.
[2]Only EK60 used for the >200 m depth stratum.
[3]Offshore stock.

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Estimated Take Due to Physical Disturbance

Estimated take due to physical disturbance could potentially occur in the Penobscot River Estuary as a result of the unintentional approach of NEFSC vessels to pinnipeds hauled out on ledges.

The NEFSC uses three gear types (fyke nets, rotary screw traps, and Mamou shrimp trawl) to monitor fish communities in the Penobscot River Estuary. The NEFSC conducts the annual surveys over specific sampling periods which could use any gear type: Mamou trawling is conducted year-round; fyke net surveys are conducted April–November; and rotary screw trap surveys from April-June.

We anticipate that trawl and fyke net surveys may disturb harbor seals and gray seals hauled out on tidal ledges through physical presence of researchers. The NEFSC conducts these surveys in upper Penobscot Bay above Fort Point Ledge where there is only one minor seal ledge (Odum Ledge) used by approximately 50 harbor seals (*i.e.,* based on a June 2001 survey). In 2017, only 20 seals were observed in the water during the Penobscot Bay surveys (NEFSC 2018) as described below. Although one cannot assume that the number of seals using this region is stable over the April–November survey period; use of this area by seals likely lower in spring and autumn.

There were no observations of gray seals in the 2001 survey, but recent anecdotal information suggests that a few gray seals may share the haulout site. These fisheries research activities do not entail intentional approaches to seals on ledges (*i.e.,* boats avoid close approach to tidal ledges and no gear is deployed near the tidal ledges); only behavioral disturbance incidental to small boat activities is anticipated. It is likely that some pinnipeds on the ledges would move or flush from the haulout into the water in response to the presence or sound of NEFSC survey vessels. Behavioral responses may be considered according to the scale shown in Table 15. We consider responses corresponding to Levels 2–3 to constitute Level B harassment.

TABLE 15—SEAL RESPONSE TO DISTURBANCE

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length.
2	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3	Flush	All retreats (flushes) to the water.

Only two research projects would involve the physical presence of researchers that may result in Level B incidental harassment of pinnipeds on haulouts. These surveys would occur in Penobscot Bay. Seals observed by NEFSC researchers on haulouts and in adjacent waters from 2017 through 2020 are presented in Table 16. The 2016 final rule (81 FR 53061, August 11, 2016) estimated that all hauled out seals could be disturbed by passing research skiffs. This was a conservative assumption given that only 20 seals were observed in the water during the actual 2017 Penobscot Bay surveys (NEFSC 2018b), and researchers have estimated that only about 10 percent of hauled out seals had been visibly disturbed in the past (NMFS 2016). Thus, for this rule, it is assumed that 10 percent of the animals hauled out could be flushed into the water and taken. The resulting requested take is estimated based on the number of days per year the activity might take place, times the number of seals potentially affected (10 percent of the number hauled). Table 17 provides the estimated annual and 5-year takes of harbor and gray seals due to behavioral harassment during surveys in the lower estuary of the Penobscot River.

TABLE 16—SEALS OBSERVED IN PENOBSCOT BAY DURING HYDROACOUSTIC SURVEYS FROM 2017–2020

Species	2017		2018		2019	
	Count on haulout	Count in water	Count on haulout	Count in water	Count on haulout	Count in water
Harbor seals	242	65	401	52	330	50
Gray seals	2	17	11	2	33	29

TABLE 17—ESTIMATED TAKE, BY LEVEL B HARASSMENT, OF PINNIPEDS DURING PENOBSCOT RIVER SURVEY

Common name	Estimated number of seals hauled out 1	Estimated number of seals potentially disturbed per day 2	Estimated annual instances of harassment			5-Year total harassment takes requested all gears
			Fyke net 100 DAS	Mamou Shrimp Trawl 12 DAS	Total	
Harbor seals	400	40	4,000	480	4,480	22,400
Gray seals	30	3	300	36	336	1,680

Summary of Estimated Incidental Take

Here we provide summary tables detailing the total incidental take authorized on an annual basis for the NEFSC in the Atlantic coast region, as well as other information relevant to the negligible impact analyses.

TABLE 18—TOTAL TAKE AUTHORIZED, BY M/SI AND LEVEL B HARASSMENT, OVER 5 YEARS
[2021–2026]

Common name	5-Year total M/SI take authorization	Annual level B take			Total 5-yr level B take 2021–2026
		LME	Offshore	Total (percent of population)	
NARW	0	4	0	4 (<1)	20
Humpback whale	0	2	0	2 (<1)	10
Fin whale	0	6	1	7 (<1)	35
Sei whale	0	1	0	1 (<1)	5
Minke whale	5	3	0	3 (<1)	15
Blue whale	0	1	1	2 (<1)	10
Sperm whale	0	0	5	5 (<1)	25
Dwarf sperm whale	0	0	4	4 (<1)	20
Pygmy sperm whale	0	0	4	4 (<1)	20
Killer Whale	0	1	1	2 (<1)	10
Pygmy killer whale	0	1	1	2 (<1)	10
Northern bottlenose whale	0	0	1	1 (<1)	5
Cuvier's beaked whale	0	0	5	5 (<1)	25
Mesoplodon beaked whale	0	0	4	4 (<1)	20
Melon-headed whale	0	0	1	1 (<1)	5
Risso's dolphin	3	12	9	21 (<1)	105
Long-finned pilot whale	0	129	17	146 (<1)	730
Short-finned pilot whale	0	129	17	146 (<1)	730
Atlantic white-sided dolphin	3	265	0	281 (<1)	1,325
White-beaked common dolphin	2	1	0	1 (<1)	5
Short-beaked common dolphin	7	520	0	520 (<1)	2,600
Atlantic spotted dolphin	2	8	16	24 (<1)	120
Pantropical spotted dolphin	0	0	1	1 (<1)	5
Striped dolphin	0	0	41	41 (<1)	205
Fraser's dolphin	0	0	1	1 (<1)	5
Rough toothed dolphin	0	3	1	4 (3)	20
Clymene dolphin	0	19	0	19 (<1)	95
Spinner dolphin	0	0	5	5 (<1)	25
Bottlenose dolphin [1]	[1] 16	794	43	837 (12)	4,185
Harbor Porpoise	7	236	0	236 (<1)	1,180
Harbor seals [2]	15	1,660 4,480	0	6,140 (8.1)	30,700
Gray seals [2]	15	549 336	0	885 (3.2)	4,425

[1] Eight M/SI takes each from the offshore and northern migratory coastal stocks, over the 5-year period.
[2] For Level B takes, the first number is disturbance due to acoustic sources, the second is physical disturbance due to surveys in Penobscot Bay.

Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Mitigation for Marine Mammals and Their Habitat

The NEFSC has invested significant time and effort in identifying technologies, practices, and equipment to minimize the impact of the proposed activities on marine mammal species and stocks and their habitat. The mitigation measures discussed here have been determined to be both effective and practicable and, in some cases, have already been implemented by the NEFSC. In addition, while not currently being investigated, any future

potentially effective and practicable gear modification mitigation measures are part of the adaptive management strategy included in this rule.

General Measures

Visual Monitoring—Effective monitoring is a key step in implementing mitigation measures and is achieved through regular marine mammal watches. Marine mammal watches are a standard part of conducting NEFSC fisheries research activities, particularly those activities that use gears that are known to or potentially interact with marine mammals. Marine mammal watches and monitoring occur during daylight hours prior to deployment of gear (*e.g.,* trawls, longline gear), and they continue until gear is brought back on board. If marine mammals are sighted in the area within 15 minutes prior to deployment of gear and are considered to be at risk of interaction with the research gear, then the sampling station is either moved or canceled or the activity is suspended until there are no sightings for 15 minutes within 1nm of sampling location. On smaller vessels, the Chief Scientist (CS) and the vessel operator are typically those looking for marine mammals and other protected species. When marine mammal researchers are on board (distinct from marine mammal observers dedicated to monitoring for potential gear interactions), they will record the estimated species and numbers of animals present and their behavior. If marine mammal researchers are not on board or available, then the CS in cooperation with the vessel operator will monitor for marine mammals and provide training as practical to bridge crew and other crew to observe and record such information.

Coordination and Communication—When NEFSC survey effort is conducted aboard NOAA-owned vessels, there are both vessel officers and crew and a scientific party. Vessel officers and crew are not composed of NEFSC staff but are employees of NOAA's Office of Marine and Aviation Operations (OMAO), which is responsible for the management and operation of NOAA fleet ships and aircraft and is composed of uniformed officers of the NOAA Commissioned Corps as well as civilians. The ship's officers and crew provide mission support and assistance to embarked scientists, and the vessel's Commanding Officer (CO) has ultimate responsibility for vessel and passenger safety and, therefore, decision authority regarding the implementation of mitigation measures. When NEFSC survey effort is conducted aboard cooperative platforms (*i.e.,* non-NOAA vessels), ultimate responsibility and decision authority again rests with non-NEFSC personnel (*i.e.,* vessel's master or captain). Although the discussion throughout this Rule does not always explicitly reference those with decision-making authority from cooperative platforms, all mitigation measures apply with equal force to non-NOAA vessels and personnel as they do to NOAA vessels and personnel. Decision authority includes the implementation of mitigation measures (*e.g.,* whether to stop deployment of trawl gear upon observation of marine mammals). The scientific party involved in any NEFSC survey effort is composed, in part or whole, of NEFSC staff and is led by a CS. Therefore, because the NEFSC—not OMAO or any other entity that may have authority over survey platforms used by NEFSC—is the applicant to whom any incidental take authorization issued under the authority of these regulations would be issued, we require that the NEFSC take all necessary measures to coordinate and communicate in advance of each specific survey with OMAO, or other relevant parties, to ensure that all mitigation measures and monitoring requirements described herein, as well as the specific manner of implementation and relevant event-contingent decision-making processes, are clearly understood and agreed-upon. This may involve description of all required measures when submitting cruise instructions to OMAO or when completing contracts with external entities. NEFSC will coordinate and conduct briefings at the outset of each survey and as necessary between the ship's crew (CO/master or designee(s), as appropriate) and scientific party in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures. The CS will be responsible for coordination with the Officer on Deck (OOD; or equivalent on non-NOAA platforms) to ensure that requirements, procedures, and decision-making processes are understood and properly implemented.

The NEFSC will coordinate with the local Northeast Regional Stranding Coordinator and the NMFS Stranding Coordinator for any unusual protected species behavior and any stranding, beached live/dead, or floating protected species that are encountered during field research activities. If a large whale is alive and entangled in fishing gear, the vessel will immediately call the U.S. Coast Guard at VHF Ch. 16 and/or the appropriate Marine Mammal Health and Stranding Response Network for instructions. All entanglements (live or dead) and vessel strikes must be reported immediately to the NOAA Fisheries Marine Mammal Stranding Hotline at 888–755–6622. In addition, any entanglement or vessel strike must be reported to the NMFS Protected Species Incidental Take database (PSIT) within 48 hours of the event happening (see Monitoring and Reporting).

Vessel Speed Limits and Course Alteration

When NEFSC research vessels are actively sampling, cruise speeds are less than 5 knots (kts), typically 2–4 kts, a speed at which the probability of collision and serious injury of large whales is de minimus. However, transit speed between active sampling stations will range from 10–12 kts, except in areas where vessel speeds are regulated to lower speeds.

On 9 December 2013, NMFS published a ''Final rule to remove sunset provision of the Final Rule Implementing Vessel Speed Restrictions to Reduce the Threat of Ship Collisions with NARWs'' (78 FR 73726). The 2013 final rule continued the vessel speed restrictions to reduce the threat of ship collisions with NARWs that were originally published in a final rule on October 10, 2008 (73 FR 60173). The rule requires that vessels 65 feet and greater in length travel at 10 knots or less near key port entrances and in certain areas of right whale aggregation along the U.S. eastern seaboard, known as ''Seasonal Management Areas''. The spatial and temporal locations of SMAs from Maine to Florida can be found at: *https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales#vessel-speed-restrictions.* In addition, Right Whale Slow Zones is a program that notifies vessel operators of areas where maintaining speeds of 10 knots or less can help protect right whales from vessel collisions. Under this program, NOAA Fisheries provides maps and coordinates to vessel operators indicating areas where right whales have been detected. Mariners are encouraged to avoid these areas or reduce speeds to 10 knots or less while transiting through these areas for 15 days. Right Whale Slow Zones are established around areas where right whales have been recently seen or heard. These areas are identical to Dynamic Management Areas (DMA) when triggered by right whale visual sightings, but they will also be established when right whale detections are confirmed from acoustic receivers. All NEFSC vessels over 65 ft (19.8 m)

will abide by all speed and course restrictions in SMAs and DMAs. Prior to and during research surveys, NEFSC will maintain awareness if right whales have been detected in transit or fishing areas.

Handling Procedures

Handling procedures are those taken to return a live animal to the sea or process a dead animal. The NEFSC will implement a number of handling protocols to minimize potential harm to marine mammals that are incidentally taken during the course of fisheries research activities. In general, protocols have already been prepared for use on commercial fishing vessels. Although commercial fisheries take larger quantities of marine mammals than fisheries research, the nature of such takes by entanglement or capture are similar. Therefore, the NEFSC would adopt commercial fishery disentanglement and release protocols (summarized below), which should increase post-release survival. Handling or disentangling marine mammals carries inherent safety risks, and using best professional judgment and ensuring human safety is paramount.

Captured or entangled live or injured marine mammals are released from research gear and returned to the water as soon as possible with no gear or as little gear remaining on the animal as possible. Animals are released without removing them from the water if possible, and data collection is conducted in such a manner as not to delay release of the animal(s) or endanger the crew. NEFSC is responsible for training NEFSC and partner affiliates on how to identify different species; handle and bring marine mammals aboard a vessel; assess the level of consciousness; remove fishing gear; and return marine mammals to water. Human safety is always the paramount concern.

Move-On Rule

For all research surveys using gear that has the potential to hook or entangle a marine mammal, the NEFSC must implement move-on rule mitigation protocol upon observation of any marine mammal other than dolphins and porpoises attracted to the vessel (see specific gear types below for marine mammal monitoring details). Specifically, if one or more marine mammals (other than dolphins and porpoises) are observed near the sampling area 15 minutes prior to setting gear and are considered at risk of interacting with the vessel or research gear, or appear to be approaching the vessel and are considered at risk of interaction, NEFSC must either remain onsite or move on to another sampling location. If remaining onsite, the set must be delayed until the animal(s) depart or appear to no longer be at risk of interacting with the vessel or gear. If gear deployment or retrieval is suspended due to protected species presence, resume only after there are no sightings for 15 minutes within 1nm of sampling location. At such time, the NEFSC may deploy gear. The NEFSC must use best professional judgment, in making decisions related to deploying gear.

Trawl Surveys (Beam, Mid-Water, and Bottom Trawls)

The NEFSC deploys trawl nets in all layers of the water column. For all beam, mid-water, and bottom trawl, the NEFSC will initiate visual observation for protected species no less than 15 minutes prior to gear deployment. NEFSC will scan the surrounding waters with the naked eye and rangefinding binoculars and will continue visual monitoring while gear is deployed. During nighttime operations, NEFSC will observe with the naked eye and any available vessel lighting. If protected species are sighted within 15 minutes before setting gear, the OOD may determine whether to implement the ''move-on'' rule and transit to a different section of the sampling area. Trawl gear will not be deployed if protected species are sighted near the ship unless there is no risk of interaction as determined by the OOD or CS. If, after moving on, protected species are still visible from the vessel and appear at risk, the OOD may decide to move again, skip the station, or wait until the marine mammal(s) leave the area and/or are considered no longer at risk. If gear deployment or retrieval is suspended due to protected species presence, fishing may commence after there are no sightings for 15 minutes within 1nm of sampling location. If deploying bongo plankton or other small net prior to trawl gear, NEFSC will continue visual observations until trawl gear is ready to be deployed.

NEFSC trawl surveys will follow the standard tow durations of no more than 30 minutes at target depth for distances less than 3 nautical miles (nm). The exceptions to the 30-minute tow duration are the Atlantic Herring Acoustic Pelagic Trawl Survey and the Deepwater Biodiversity Survey where total time in the water (deployment, fishing, and haul-back) is 40 to 60 minutes and 180 minutes, respectively. Trawl tow distances will be not more than 3 nmi to reduce the likelihood of incidentally taking marine mammals. Typical tow distances are 1–2 nmi, depending on the survey and trawl speed. Bottom trawl tows will be made in either straight lines or following depth contours, whereas other tows targeting fish aggregations and deep-water biodiversity tows may be made along oceanographic or bathymetric features. In all cases, sharp course changes will be avoided in all surveys.

In many cases, trawl operations will be the first activity undertaken upon arrival at a new station, in order to reduce the opportunity to attract marine mammals to the vessel. However, in some cases it will be necessary to conduct plankton tows prior to deploying trawl gear in order to avoid trawling through extremely high densities of jellies and similar taxa that are numerous enough to severely damage trawl gear.

Once the trawl net is in the water, observations will continue around the vessel to maintain a lookout for the presence of marine mammals. If marine mammals are sighted before the gear is fully retrieved, resume only after there are no sightings for 15 minutes within 1 nmi of the sampling location. The OOD may also use the most appropriate response to avoid incidental take in consultation with the CS and other experienced crew as necessary. This judgment will be based on his/her past experience operating gears around marine mammals and NEFSC training sessions that will facilitate dissemination of CS. Captain expertise operating in these situations (*e.g.,* factors that contribute to marine mammal gear interactions and those that aid in successfully avoiding these events). These judgments take into consideration the species, numbers, and behavior of the animals, the status of the trawl net operation (net opening, depth, and distance from the stern), the time it would take to retrieve the net, and safety considerations for changing speed or course. For instance, a whale transiting through the area off in the distance might only require a short move from the designated station while a pod of dolphins gathered around the vessel may require a longer move from the station or possibly cancellation if they follow the vessel. It may sometimes be safer to continue trawling until the marine mammals have lost interest or transited through the area before beginning haulback operations. In other situations, swift retrieval of the net may be the best course of action. If trawling is delayed because of protected species presence, trawl operations only resume when the animals have no longer been sighted or are no longer at risk. In any case, no gear will be deployed if marine

mammals or other protected species have been sighted that may be a risk of interaction with gear. Gear will be retrieved immediately if marine mammals are believed to be at risk of entanglement or observed as being entangled.

The acoustical cues generated during haulback may attract marine mammals. The NEFSC will continue monitoring for the presence of marine mammals during haulback. Care will be taken when emptying the trawl to avoid damage to any marine mammals that may be caught in the gear but are not visible upon retrieval. NEFSC will open the codend of the net close to the deck/sorting area to avoid damage to animals that may be caught in gear. The gear will be emptied as close to the deck/sorting area and as quickly as possible after retrieval in order to determine whether or not marine mammals, or any other protected species, are present.

Gillnet Surveys

The NEFSC will limit gillnet soak times to the least amount of time required to conduct sampling. Gillnet research will only be conducted during daylight hours. NEFSC will conduct marine mammal monitoring beginning 15 minutes prior to deploying the gear and continue until gear is back on deck. For the COASTSPAN gillnet surveys, NEFSC must actively monitor for potential bottlenose dolphin entanglements by hand-checking the gillnet every 30 minutes or if a disturbance in the net is observed (even if marine mammals are not observed).

NEFSC will pull gear immediately if disturbance in the nets is observed. All gillnets will be designed with minimal net slack and excess floating and trailing lines will be removed. NEFSC will set only new of fully repaired gill nets thereby eliminating holes, and modify nets to avoid large vertical gaps between float line and net as well as lead line and net when set. If a marine mammal is sighted during approach to a station or prior to deploying gear, nets would not be deployed until the animal has left the area, is on a path away from where the net would be set, or has not been re-sighted within 15 minutes. Alternatively, the research team may move the vessel to an area clear of marine mammals. If the vessel moves, the 15-minute observation period is repeated. Monitoring by all available crew would continue while the net is being deployed, during the soak, and during haulback.

If protected species are not sighted during the 15-minute observation period, the gear may be set. Waters surrounding the net and the net itself would be continuously monitored during the soak. If protected species are sighted during the soak and appear to be at risk of interaction with the gear, then the gear is pulled immediately. If fishing operations are halted, operations resume when animal(s) have not been sighted within 15 minutes or are determined to no longer be at risk. In other instances, the station is moved or cancelled. If any disturbance in the gear is observed in the gear, the net will be immediately checked or pulled.

The NEFSC will clean gear prior and during deployment. The catch will be emptied as quickly as possible. On Observer Training cruises, acoustic pingers and weak links are used on all gillnets consistent with the regulations and TRPs for commercial fisheries. All NEFOP protocols are followed as per current NEFOP Observer Manual. NEFSC must ensure that surveys deploy acoustic deterrent devices on gillnets in areas where required for commercial fisheries. NEFSC must ensure that the devices are operating properly before deploying the net.

Longline Surveys

Similar to other surveys, NEFSC will deploy longline gear as soon as practicable upon arrival on station. They will initiate visual observations for marine mammals no less than 15 minutes prior to deployment and continue until gear is back on deck. Observers will scan surrounding waters with the naked eye and binoculars (or monocular). Monitoring, albeit limited visibility, will occur during nighttime surveys using the naked eye and available vessel lighting. If marine mammals are sighted within 1nmi of the station within 15 minutes before setting gear, NEFSC will suspend gear deployment until the animals have moved on a path away from the station or implement the move-on rule. If gear deployment or retrieval is suspended due to presence of marine mammals, resume operations only after there are no sightings for at least 15 minutes within 1nmi of sampling location. In no case will longlines be deployed if animals are considered at-risk of interaction. When visibility allows, the OOD, CS, and crew standing watch will conduct set checks every 15 minutes to look for hooked, trapped, or entangled marine mammals. In addition, chumming is prohibited.

Fyke Net Surveys

NEFSC will conduct monitoring of marine mammals 15 minutes prior to setting gear. If marine mammals are observed within 100 m of the station, NEFSC will delay setting the gear until the marine mammal(s) has moved past and on a path away from the station or implement the move-on rule. Similar to other gear measures, fyke nets will not be deployed in the animal(s) is deemed at-risk of interaction. If marine mammals are observed during sampling, gear will be pulled if the marine mammals is deemed at-risk of interacting with the gear. NEFSC will conduct monitoring and retrieval of gear every 12 to 24 hour soak period.

Fyke nets equal or greater to 2 m will be fitted with a marine mammal excluder device. The exclusion device consists of a grate the dimensions of which were based on exclusion devices on Penobscot Hydroelectric fishway facilities that are four to six inches and allow for passage of numerous target species including river herring, eels, striped bass, and adult salmon. The 1-m fyke net does not require an excluder device as the opening is 12 cm. These small openings will prevent marine mammals from entering the nets.

Pot/Trap Surveys

All pot/trap surveys will implement that same mitigation as described for longline surveys.

Dredge Surveys

For all scallop and hydraulic clam dredges, the OOD, CS or others will scan for marine mammals for 15 minutes prior to deploying gear. If marine mammals are observed within 1 nm of the station, NEFSC will delay setting the gear until the marine mammal(s) has moved past and on a path away from the station or implement the move-on rule or the OOD or CS may implement the move-on rule. Dredge gear will not be deployed in the marine mammal is considered at-risk of interaction.

Sampling will be conducted upon arrival at the station and continue until gear is back on deck. Similar to trawl gear, care will be taken when emptying the nets to avoid damage to any marine mammals that may be caught in the gear but are not visible upon retrieval. NEFSC will empty the net close to the deck/sorting area to avoid damage to marine mammals that may be caught in gear. The gear will be emptied as quickly as possible after retrieval in order to determine whether or not marine mammals are present.

Based on our evaluation of these measures, NMFS has determined that the mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the specified geographic region. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

NEFSC must designate a compliance coordinator who must be responsible for ensuring compliance with all requirements of any LOA issued pursuant to these regulations and for preparing for any subsequent request(s) for incidental take authorization.

Since the 2016 final rule, NEFSC has made its training, operations, data collection, animal handling, and sampling protocols more systematic in order to improve its ability to understand how mitigation measures influence interaction rates and ensure its research operations are conducted in an informed manner and consistent with lessons learned from those with experience operating these gears in close proximity to marine mammals. In addition, NMFS has established a formal incidental take reporting system, the PSIT database, requiring that incidental takes of protected species be reported within 48 hours of the occurrence. The PSIT generates automated messages to agency leadership and other relevant staff and alerts them to the event and that updated information describing the circumstances of the event have been inputted into the database. It is in this spirit that we propose the monitoring requirements described below.

Visual Monitoring

Marine mammal watches are a standard part of conducting fisheries research activities and are implemented as described previously in the Mitigation section. Dedicated marine mammal visual monitoring occurs as described (1) for some period prior to deployment of most research gear; (2) throughout deployment and active fishing of all research gears; (3) for some period prior to retrieval of longline gear; and (4) throughout retrieval of all research gear. This visual monitoring is performed by trained NEFSC personnel or other trained crew during the monitoring period. Observers record the species and estimated number of animals present and their behaviors. This may provide valuable information towards an understanding of whether certain species may be attracted to vessels or certain survey gears. Separately, personnel on watch (those navigating the vessel and other crew; these will typically not be NEFSC personnel) monitor for marine mammals at all times when the vessel is being operated. The primary focus for this type of watch is to avoid striking marine mammals and to generally avoid navigational hazards. These personnel on watch typically have other duties associated with navigation and other vessel operations and are not required to record or report to the scientific party data on marine mammal sightings, except when gear is being deployed, soaking, or retrieved or when marine mammals are observed in the path of the ship during transit.

NEFSC will also monitor disturbance of hauled out pinnipeds resulting from the presence of researchers, paying particular attention to the distance at which pinnipeds are disturbed. Disturbance will be recorded according to the three-point scale, representing increasing seal response to disturbance, as shown in Table 15.

Training

NMFS considers the suite of monitoring and operational procedures required through this rulemaking to be necessary to avoid adverse interactions with protected species and still allow NEFSC to fulfill its scientific missions. However, some mitigation measures such as the move-on rule require judgments about the risk of gear interactions with protected species and the best procedures for minimizing that risk on a case-by-case basis. Vessel operators and Chief Scientists are charged with making those judgments at sea. They are all highly experienced professionals but there may be inconsistencies across the range of research surveys conducted and funded by NEFSC in how those judgments are made. In addition, some of the mitigation measures described above could also be considered ''best practices'' for safe seamanship and avoidance of hazards during fishing (*e.g.,* prior surveillance of a sample site before setting trawl gear). At least for some of the research activities considered, explicit links between the implementation of these best practices and their usefulness as mitigation measures for avoidance of protected species may not have been formalized and clearly communicated with all scientific parties and vessel operators. NMFS therefore proposes a series of improvements to NEFSC protected species training, awareness, and reporting procedures. NMFS expects these new procedures will facilitate and improve the implementation of the mitigation measures described above.

NEFSC will continue to use the process for its Chief Scientists and vessel operators to communicate with each other about their experiences with marine mammal interactions during research work with the goal of improving decision-making regarding avoidance of adverse interactions. As noted above, there are many situations where professional judgment is used to decide the best course of action for avoiding marine mammal interactions before and during the time research gear is in the water. The intent of this mitigation measure is to draw on the collective experience of people who have been making those decisions, provide a forum for the exchange of information about what went right and what went wrong, and try to determine

if there are any rules-of-thumb or key factors to consider that would help in future decisions regarding avoidance practices. NEFSC would coordinate not only among its staff and vessel captains but also with those from other fisheries science centers and institutions with similar experience.

NEFSC would also continue utilizing the formalized marine mammal training program required for all NEFSC research projects and for all crew members that may be posted on monitoring duty or handle incidentally caught marine mammals. Training programs would be conducted on a regular basis and would include topics such as monitoring and sighting protocols, species identification, decision-making factors for avoiding take, procedures for handling and documenting marine mammals caught in research gear, and reporting requirements. The Observer Program currently provides protected species training (and other types of training) for NMFS-certified observers placed on board commercial fishing vessels. NEFSC Chief Scientists and appropriate members of NEFSC research crews will be trained using similar monitoring, data collection, and reporting protocols for marine mammal as is required by the Observer Program. All NEFSC research crew members that may be assigned to monitor for the presence of marine mammals during future surveys will be required to attend an initial training course and refresher courses annually or as necessary. The implementation of this training program would formalize and standardize the information provided to all research crew that might experience marine mammal interactions during research activities.

For all NEFSC research projects and vessels, written cruise instructions and protocols for avoiding adverse interactions with marine mammals will be reviewed and, if found insufficient, made fully consistent with the Observer Program training materials and any guidance on decision-making that arises out of the two training opportunities described above. In addition, informational placards and reporting procedures will be reviewed and updated as necessary for consistency and accuracy. All NEFSC research cruises already include pre-sail review of marine mammal protocols for affected crew but NEFSC will also review its briefing instructions for consistency and accuracy.

NEFSC will continue to coordinate with GARFO, NEFSC fishery scientists, NOAA research vessel personnel, and other NMFS staff as appropriate to review data collection, marine mammal interactions, and refine data collection and mitigation protocols, as required. NEFSC will also coordinate with NMFS' Office of Science and Technology to ensure training and guidance related to handling procedures and data collection is consistent with other fishery science centers, where appropriate.

Reporting

NMFS has established a formal incidental take reporting system, the Protected Species Incidental Take (PSIT) database, requiring that incidental takes of protected species be reported within 48 hours of the occurrence. The PSIT generates automated messages to NMFS leadership and other relevant staff, alerting them to the event and to the fact that updated information describing the circumstances of the event has been inputted to the database. The PSIT and CS reports represent not only valuable real-time reporting and information dissemination tools but also serve as an archive of information that may be mined in the future to study why takes occur by species, gear, region, etc. The NEFSC is required to report all takes of protected species, including marine mammals, to this database within 48 hours of the occurrence and following standard protocol.

In the unanticipated event that NEFSC fisheries research activities clearly cause the take of a marine mammal in a prohibited manner, NEFSC personnel engaged in the research activity must immediately cease such activity until such time as an appropriate decision regarding activity continuation can be made by the NEFSC Director (or designee). The incident must be reported immediately to OPR and the NMFS GARFO. OPR will review the circumstances of the prohibited take and work with NEFSC to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The immediate decision made by NEFSC regarding continuation of the specified activity is subject to OPR concurrence. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) Description of the incident including, but not limited to, monitoring prior to and occurring at time of the incident;

(iii) Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility);

(iv) Description of all marine mammal observations in the 24 hours preceding the incident;

(v) Species identification or description of the animal(s) involved;

(vi) Status of all sound source use in the 24 hours preceding the incident;

(vii) Water depth;

(viii) Fate of the animal(s) (*e.g.,* dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared, etc.); and

(ix) Photographs or video footage of the animal(s).

In the event that NEFSC discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.,* in less than a moderate state of decomposition), NEFSC must immediately report the incident to OPR and the NMFS GARFO The report must include the information identified above. Activities may continue while OPR reviews the circumstances of the incident. OPR will work with NEFSC to determine whether additional mitigation measures or modifications to the activities are appropriate.

In the event that NEFSC discovers an injured or dead marine mammal and determines that the injury or death is not associated with or related to NEFSC fisheries research activities (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, scavenger damage), NEFSC must report the incident to OPR and GARFO, NMFS, within 24 hours of the discovery. NEFSC must provide photographs or video footage or other documentation of the stranded animal sighting to OPR.

In the event of a ship strike of a marine mammal by any NEFSC or partner vessel involved in the activities covered by the authorization, NEFSC or partner must immediately report the information described above, as well as the following additional information:

(i) Vessel's speed during and leading up to the incident;

(ii) Vessel's course/heading and what operations were being conducted;

(iii) Status of all sound sources in use;

(iv) Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;

(v) Estimated size and length of animal that was struck; and

(vi) Description of the behavior of the marine mammal immediately preceding and following the strike.

NEFSC will also collect and report all necessary data, to the extent practicable given the primacy of human safety and the well-being of captured or entangled marine mammals, to facilitate serious injury (SI) determinations for marine

mammals that are released alive. NEFSC will require that the CS complete data forms and address supplemental questions, both of which have been developed to aid in SI determinations. NEFSC understands the critical need to provide as much relevant information as possible about marine mammal interactions to inform decisions regarding SI determinations. In addition, the NEFSC will perform all necessary reporting to ensure that any incidental M/SI is incorporated as appropriate into relevant SARs.

Negligible Impact Analysis and Determination

Introduction—NMFS has defined negligible impact 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 (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' by mortality, serious injury, and Level A or Level B harassment, we consider other factors, such as the likely nature of any behavioral responses (*e.g.,* intensity, duration), the context of any such responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, and specific consideration of take by M/SI previously authorized for other NMFS research activities).

We note here that the takes from potential gear interactions enumerated below could result in non-serious injury, but their worst potential outcome (mortality) is analyzed for the purposes of the negligible impact determination. We discuss here the connection, and differences, between the legal mechanisms for authorizing incidental take under section 101(a)(5) for activities such as NEFSC's research activities, and for authorizing incidental take from commercial fisheries. In 1988, Congress amended the MMPA's provisions for addressing incidental take of marine mammals in commercial fishing operations. Congress directed NMFS to develop and recommend a new long-term regime to govern such incidental taking (see MMC, 1994). The need to develop a system suited to the unique circumstances of commercial fishing operations led NMFS to suggest a new conceptual means and associated regulatory framework. That concept, PBR, and a system for developing plans containing regulatory and voluntary measures to reduce incidental take for fisheries that exceed PBR were incorporated as sections 117 and 118 in the 1994 amendments to the MMPA.

PBR is defined in section 3 of the MMPA (16 U.S.C. 1362(20)) as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (OSP) and, although not controlling, can be one measure considered among other factors when evaluating the effects of M/SI on a marine mammal species or stock during the section 101(a)(5)(A) process. OSP is defined in section 3 of the MMPA (16 U.S.C. 1362(9)) as the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element. Through section 2, an overarching goal of the statute is to ensure that each species or stock of marine mammal is maintained at or returned to its OSP.

PBR values are calculated by NMFS as the level of annual removal from a stock that will allow that stock to equilibrate within OSP at least 95 percent of the time, and is the product of factors relating to the minimum population estimate of the stock (N_{min}), the productivity rate of the stock at a small population size, and a recovery factor. Determination of appropriate values for these three elements incorporates significant precaution, such that application of the parameter to the management of marine mammal stocks may be reasonably certain to achieve the goals of the MMPA. For example, calculation of N_{min} incorporates the precision and variability associated with abundance information, while also providing reasonable assurance that the stock size is equal to or greater than the estimate (Barlow *et al.,* 1995). In general, the three factors are developed on a stock-specific basis in consideration of one another in order to produce conservative PBR values that appropriately account for both imprecision that may be estimated, as well as potential bias stemming from lack of knowledge (Wade, 1998).

Congress called for PBR to be applied within the management framework for commercial fishing incidental take under section 118 of the MMPA. As a result, PBR cannot be applied appropriately outside of the section 118 regulatory framework without consideration of how it applies within the section 118 framework, as well as how the other statutory management frameworks in the MMPA differ from the framework in section 118. PBR was not designed and is not used as an absolute threshold limiting commercial fisheries. Rather, it serves as a means to evaluate the relative impacts of those activities on marine mammal stocks. Even where commercial fishing is causing M/SI at levels that exceed PBR, the fishery is not suspended. When M/SI exceeds PBR in the commercial fishing context under section 118, NMFS may develop a take reduction plan, usually with the assistance of a take reduction team. The take reduction plan will include measures to reduce and/or minimize the taking of marine mammals by commercial fisheries to a level below the stock's PBR. That is, where the total annual human-caused M/SI exceeds PBR, NMFS is not required to halt fishing activities contributing to total M/SI but rather utilizes the take reduction process to further mitigate the effects of fishery activities via additional bycatch reduction measures. In other words, under section 118 of the MMPA, PBR does not serve as a strict cap on the operation of commercial fisheries that may incidentally take marine mammals.

Similarly, to the extent PBR may be relevant when considering the impacts of incidental take from activities other than commercial fisheries, using it as the sole reason to deny (or issue) incidental take authorization for those activities would be inconsistent with Congress's intent under section 101(a)(5), NMFS' long-standing regulatory definition of ''negligible impact,'' and the use of PBR under section 118. The standard for authorizing incidental take for activities other than commercial fisheries under section 101(a)(5) continues to be, among other things that are not related to PBR, whether the total taking will have a negligible impact on the species or stock. Nowhere does section 101(a)(5)(A) reference use of PBR to

make the negligible impact finding or authorize incidental take through multi-year regulations, nor does its companion provision at 101(a)(5)(D) for authorizing non-lethal incidental take under the same negligible-impact standard. NMFS' MMPA implementing regulations state that take has a negligible impact when it does not adversely affect the species or stock through effects on annual rates of recruitment or survival—likewise without reference to PBR. When Congress amended the MMPA in 1994 to add section 118 for commercial fishing, it did not alter the standards for authorizing non-commercial fishing incidental take under section 101(a)(5), implicitly acknowledging that the negligible impact standard under section 101(a)(5) is separate from the PBR metric under section 118. In fact, in 1994 Congress also amended section 101(a)(5)(E) (a separate provision governing commercial fishing incidental take for species listed under the Endangered Species Act) to add compliance with the new section 118 but retained the standard of the negligible impact finding under section 101(a)(5)(A) (and section 101(a)(5)(D)), showing that Congress understood that the determination of negligible impact and application of PBR may share certain features but are, in fact, different.

Since the introduction of PBR in 1994, NMFS had used the concept almost entirely within the context of implementing sections 117 and 118 and other commercial fisheries management-related provisions of the MMPA. Prior to the Court's ruling in *Conservation Council for Hawaii* v. *National Marine Fisheries Service,* 97 F. Supp. 3d 1210 (D. Haw. 2015) and consideration of PBR in a series of section 101(a)(5) rulemakings, there were a few examples where PBR had informed agency deliberations under other MMPA sections and programs, such as playing a role in the issuance of a few scientific research permits and subsistence takings. But as the Court found when reviewing examples of past PBR consideration in *Georgia Aquarium* v. *Pritzker,* 135 F. Supp. 3d 1280 (N.D. Ga. 2015), where NMFS had considered PBR outside the commercial fisheries context, ''it has treated PBR as only one 'quantitative tool' and [has not used it] as the sole basis for its impact analyses.'' Further, the agency's thoughts regarding the appropriate role of PBR in relation to MMPA programs outside the commercial fishing context have evolved since the agency's early application of PBR to section 101(a)(5) decisions. Specifically, NMFS' denial of a request for incidental take authorization for the U.S. Coast Guard in 1996 seemingly was based on the potential for lethal take in relation to PBR and did not appear to consider other factors that might also have informed the potential for ship strike in relation to negligible impact (61 FR 54157; October 17, 1996).

The MMPA requires that PBR be estimated in SARs and that it be used in applications related to the management of take incidental to commercial fisheries (*i.e.,* the take reduction planning process described in section 118 of the MMPA and the determination of whether a stock is ''strategic'' as defined in section 3), but nothing in the statute requires the application of PBR outside the management of commercial fisheries interactions with marine mammals. Nonetheless, NMFS recognizes that as a quantitative metric, PBR may be useful as a consideration when evaluating the impacts of other human-caused activities on marine mammal stocks. Outside the commercial fishing context, and in consideration of all known human-caused mortality, PBR can help inform the potential effects of M/SI requested to be authorized under 101(a)(5)(A). As noted by NMFS and the U.S. Fish and Wildlife Service in our implementation regulations for the 1986 amendments to the MMPA (54 FR 40341, September 29, 1989), the Services consider many factors, when available, in making a negligible impact determination, including, but not limited to, the status of the species or stock relative to OSP (if known); whether the recruitment rate for the species or stock is increasing, decreasing, stable, or unknown; the size and distribution of the population; and existing impacts and environmental conditions. In this multi-factor analysis, PBR can be a useful indicator for when, and to what extent, the agency should take an especially close look at the circumstances associated with the potential mortality, along with any other factors that could influence annual rates of recruitment or survival.

When considering PBR during evaluation of effects of M/SI under section 101(a)(5)(A), we first calculate a metric for each species or stock that incorporates information regarding ongoing anthropogenic M/SI into the PBR value (*i.e.,* PBR minus the total annual anthropogenic mortality/serious injury estimate in the SAR), which is called ''residual PBR'' (Wood *et al.,* 2012). We first focus our analysis on residual PBR because it incorporates anthropogenic mortality occurring from other sources. If the ongoing human-caused mortality from other sources does not exceed PBR, then residual PBR is a positive number, and we consider how the anticipated or potential incidental M/SI from the activities being evaluated compares to residual PBR using the framework in the following paragraph. If the ongoing anthropogenic mortality from other sources already exceeds PBR, then residual PBR is a negative number and we consider the M/SI from the activities being evaluated as described further below.

When ongoing total anthropogenic mortality from the applicant's specified activities does not exceed PBR and residual PBR is a positive number, as a simplifying analytical tool we first consider whether the specified activities could cause incidental M/SI that is less than 10 percent of residual PBR (the ''insignificance threshold,'' see below). If so, we consider M/SI from the specified activities to represent an insignificant incremental increase in ongoing anthropogenic M/SI for the marine mammal stock in question that alone (*i.e.,* in the absence of any other take) will not adversely affect annual rates of recruitment and survival. As such, this amount of M/SI would not be expected to affect rates of recruitment or survival in a manner resulting in more than a negligible impact on the affected stock unless there are other factors that could affect reproduction or survival, such as Level A and/or Level B harassment, or other considerations such as information that illustrates uncertainty involved in the calculation of PBR for some stocks. In a few prior incidental take rulemakings, this threshold was identified as the ''significance threshold,'' but it is more accurately labeled an insignificance threshold, and so we use that terminology here. Assuming that any additional incidental take by Level A or Level B harassment from the activities in question would not combine with the effects of the authorized M/SI to exceed the negligible impact level, the anticipated M/SI caused by the activities being evaluated would have a negligible impact on the species or stock. However, M/SI above the 10 percent insignificance threshold does not indicate that the M/SI associated with the specified activities is approaching a level that would necessarily exceed negligible impact. Rather, the 10 percent insignificance threshold is meant only to identify instances where additional analysis of the anticipated M/SI is not required because the negligible impact standard clearly will not be exceeded on that basis alone.

Where the anticipated M/SI is near, at, or above residual PBR, consideration of other factors (positive or negative), including those outlined above, as well as mitigation is especially important to assessing whether the M/SI will have a negligible impact on the species or stock. PBR is a conservative metric and not sufficiently precise to serve as an absolute predictor of population effects upon which mortality caps would appropriately be based. For example, in some cases stock abundance (which is one of three key inputs into the PBR calculation) is underestimated because marine mammal survey data within the U.S. Exclusive Economic Zone (EEZ) are used to calculate the abundance even when the stock range extends well beyond the U.S. EEZ. An underestimate of abundance could result in an underestimate of PBR. Alternatively, we sometimes may not have complete M/SI data beyond the U.S. EEZ to compare to PBR, which could result in an overestimate of residual PBR. The accuracy and certainty around the data that feed any PBR calculation, such as the abundance estimates, must be carefully considered to evaluate whether the calculated PBR accurately reflects the circumstances of the particular stock. M/SI that exceeds PBR may still potentially be found to be negligible in light of other factors that offset concern, especially when robust mitigation and adaptive management provisions are included.

PBR was designed as a tool for evaluating mortality and is defined as the number of animals that can be removed while allowing that stock to reach or maintain its OSP. OSP is defined as a population that falls within a range from the population level that is the largest supportable within the ecosystem to the population level that results in maximum net productivity, and thus is an aspirational management goal of the overall statute with no specific timeframe by which it should be met. PBR is designed to ensure minimal deviation from this overarching goal, with the formula for PBR typically ensuring that growth towards OSP is not reduced by more than 10 percent (or equilibrates to OSP 95 percent of the time). As PBR is applied by NMFS, it provides that growth toward OSP is not reduced by more than 10 percent, which certainly allows a stock to reach or maintain its OSP in a conservative and precautionary manner—and we can therefore clearly conclude that if PBR were not exceeded, there would not be adverse effects on the affected species or stocks. Nonetheless, it is equally clear that in some cases the time to reach this aspirational OSP level could be slowed by more than 10 percent (*i.e.,* total human-caused mortality in excess of PBR could be allowed) without adversely affecting a species or stock through effects on its rates of recruitment or survival. Thus even in situations where the inputs to calculate PBR are thought to accurately represent factors such as the species' or stock's abundance or productivity rate, it is still possible for incidental take to have a negligible impact on the species or stock even where M/SI exceeds residual PBR or PBR.

PBR is helpful in informing the analysis of the effects of mortality on a species or stock because it is important from a biological perspective to be able to consider how the total mortality in a given year may affect the population. However, section 101(a)(5)(A) of the MMPA indicates that NMFS shall authorize the requested incidental take from a specified activity if we find that the total of such taking [*i.e.,* from the specified activity] will have a negligible impact on such species or stock. In other words, the task under the statute is to evaluate the applicant's anticipated take in relation to their take's impact on the species or stock, not other entities' impacts on the species or stock. Neither the MMPA nor NMFS' implementing regulations call for consideration of other unrelated activities and their impacts on the species or stock. In fact, in response to public comments on the implementing regulations NMFS explained that such effects are not considered in making negligible impact findings under section 101(a)(5), although the extent to which a species or stock is being impacted by other anthropogenic activities is not ignored. Such effects are reflected in the baseline of existing impacts as reflected in the species' or stock's abundance, distribution, reproductive rate, and other biological indicators.

Our evaluation of the M/SI for each of the species and stocks for which M/SI could occur follows. In addition, all mortality authorized for some of the same species or stocks over the next several years pursuant to our final rulemakings for the NMFS Southeast Fisheries Science Center (SEFSC) and U.S. Navy has been incorporated into the residual PBR. By considering the maximum potential incidental M/SI in relation to PBR and ongoing sources of anthropogenic mortality, we begin our evaluation of whether the potential incremental addition of M/SI through NEFSC research activities may affect the species' or stocks' annual rates of recruitment or survival. We also consider the interaction of those mortalities with incidental taking of that species or stock by harassment pursuant to the specified activity.

We first consider maximum potential incidental M/SI for each stock (Table 10) in consideration of NMFS's threshold for identifying insignificant M/SI take (10 percent of residual PBR (69 FR 43338; July 20, 2004)). By considering the maximum potential incidental M/SI in relation to PBR and ongoing sources of anthropogenic mortality, we begin our evaluation of whether the potential incremental addition of M/SI through NEFSC research activities may affect the species' or stock's annual rates of recruitment or survival. We also consider the interaction of those mortalities with incidental taking of that species or stock by harassment pursuant to the specified activity.

Summary of Estimated Incidental Take

Here we provide a summary of the total incidental take authorization on an annual basis, as well as other information relevant to the negligible impact analysis. Table 19 shows information relevant to our negligible impact analysis concerning the annual amount of M/SI take that could occur for each stock when considering the authorized incidental take along with other sources of M/SI. As noted previously, although some gear interactions may result in Level A harassment or the release of an uninjured animal, for the purposes of the negligible impact analysis, we assume that all of these takes could potentially be in the form of M/SI.

We previously authorized take of marine mammals incidental to fisheries research operations conducted by the SEFSC (see 85 FR 27028, May 6, 2020) and U.S. Navy (84 FR 70712, December 23, 2019). This take would occur to some of the same stocks for which we may authorize take incidental to NEFSC fisheries research operations. Therefore, in order to evaluate the likely impact of the take by M/SI in this rule, we consider not only other ongoing sources of human-caused mortality but the potential mortality authorized for SEFSC fisheries and ecosystem research and U.S. Navy testing and training in the Atlantic Ocean. As used in this document, other ongoing sources of human-caused (anthropogenic) mortality refers to estimates of realized or actual annual mortality reported in the SARs and does not include authorized or unknown mortality. Below, we consider the total taking by M/SI for NEFSC activities and previously authorized for SEFSC and Navy activities together to produce a

maximum annual M/SI take level (including take of unidentified marine mammals that could accrue to any relevant stock) and compare that value to the stock's PBR value, considering ongoing sources of anthropogenic mortality. PBR and annual M/SI values considered in Table 19 reflect the most recent information available (*i.e.,* draft 2020 SARs).

TABLE 19—SUMMARY INFORMATION RELATED TO NEFSC ANNUAL TAKE BY MORTALITY OR SERIOUS INJURY AUTHORIZATION, 2021–2026.

Species	Stock	Stock abundance	NEFSC M/SI take (annual)	PBR	Annual M/SI	SEFSC take by M/SI	Navy AFTT take by M/SI	r-PBR	Total M/SI take r-PBR (percent)
Minke whale	Canadian East Coast	2,591	1	170	10.6	0	0.14	159.26	0.63
Risso's dolphin	W North Atlantic	35,493	0.6	303	54.3	0.2	0	248.5	0.24
Atlantic white-sided dolphin		93,233	0.6	544	26	0	1.4	516.6	0.12
White-beaked common dolphin.		536,016	0.4	4,153	0	0	0	4153	0.01
Short-beaked common dolphin.		172,974	1.4	1,452	399	0.8	0	1052.2	0.13
Atlantic spotted dolphin		39,921	0.4	320	0	0.8	0	319.2	0.13
bottlenose dolphin	(offshore stock)	62,851	1.6	519	28	0.8	0	490.2	0.33
bottlenose dolphin	(N migratory stock)	6,639	1.6	48	12.2–21.5	0.8	0	25.7–35	<1
bottlenose dolphin	(S migratory stock)	3,751	0.2	23	0 to 18.3	0.8	0	3.9–22.2	<7.8–70
Harbor porpoise	GoM/Bay of Fundy	95,543	1.4	851	217	0.2	0	633.8	0.22
Harbor seal	W North Atlantic	75,834	5	2,006	350	0.2	0	1,656	0.30
Gray seal		27,131	5	1,389	47,296	0.2	0	−45,907	

All but one stocks that may potentially be taken by M/SI fall below the insignificance threshold (*i.e.,* 10 percent of residual PBR). The annual take of grey seals is above the insignificance threshold.

Stocks With M/SI Below the Insignificance Threshold

As noted above, for a species or stock with incidental M/SI less than 10 percent of residual PBR, we consider M/SI from the specified activities to represent an insignificant incremental increase in ongoing anthropogenic M/SI that alone (*i.e.,* in the absence of any other take and barring any other unusual circumstances) will clearly not adversely affect annual rates of recruitment and survival. In this case, as shown in Table 19, the following species or stocks have M/SI from NEFSC fisheries research below their insignificance threshold: Minke whale (Canadian east coast); Risso's dolphin; the Western North Atlantic stocks of Atlantic white-sided dolphin; White-beaked common dolphin; Short-beaked common dolphin; Atlantic spotted dolphin; bottlenose dolphin (offshore and Northern migratory); harbor porpoise (Gulf of Marine/Bay of Fundy), and harbor seal (Western North Atlantic).

For these stocks with authorized M/SI below the insignificance threshold, there are no other known factors, information, or unusual circumstances that indicate anticipated M/SI below the insignificance threshold could have adverse effects on annual rates of recruitment or survival and they are not discussed further.

Stocks With M/SI Above the Insignificance Threshold

There is one stock for which we propose to authorize take where the annual rate of M/SI is above the 10 percent insignificance threshold: The western North Atlantic stock of gray seals. For this species, we explain below why we have determined the take is not expected or likely to adversely affect the species or stock through effects on annual rates of recruitment or survival.

At first glance, the annual rate of mortality of gray seals exceeds PBR in absence of any take authorized here or in other LOAs. However, the size of population reported in the SAR (and consequently the PBR value) is estimated separately for the portion of the population in Canada versus the U.S., and mainly reflects the size of the breeding population in each respective country. However, the annual estimated human-caused mortality and serious injury values in the SAR reflects both U.S. and Canada M/SI. For the period 2014–2018, the average annual estimated human-caused mortality and serious injury to gray seals in the U.S. and Canada was 4,729 (953 U.S./3,776 Canada) per year. Therefore, The U.S. portion of 2013–2017 average annual human-caused mortality and serious injury during 2014–2018 in U.S. waters does not exceed the portion of PBR in of the U.S. waters portion of the stocks but is still high (approximately 68 percent of PBR).

In U.S. waters, the number of pupping sites has increased from 1 in 1988 to 9 in 2019, and are located in Maine and Massachusetts (Wood et al. 2019). Mean rates of increase in the number of pups born at various times since 1988 at 4 of the more frequently surveyed pupping sites (Muskeget, Monomoy, Seal, and Green Islands) ranged from –0.2 percent (95 percent CI: −2.3–1.9) to 26.3 percent (95 percent CI: 21.6–31.4) (Wood et al. 2019). These high rates of increase provide further support that seals from other areas are continually supplementing the breeding population in U.S. waters. From 1988–2019, the estimated mean rate of increase in the number of pups born was 12.8 percent on Muskeget Island, 26.3 percent on Monomoy Island, 11.5 percent on Seal Island, and −0.2 percent on Green Island (Wood et al. 2019). These rates only reflect new recruits to the population and do not reflect changes in total population growth resulting from Canadian seals migrating to the region. Overall, the total population of gray seals in Canada was estimated to be increasing by 4.4 percent per year from 1960–2016 (Hammill et al. 2017). The status of the gray seal population relative to OSP in U.S. Atlantic EEZ waters is unknown, but the stock's abundance appears to be increasing in both Canadian and U.S. waters. For these reasons, the issuance of the M/SI take is not likely to affect annual rates of recruitment of survival.

Acoustic Effects

As described in greater depth previously, the NEFSC's use of active acoustic sources has the likely potential to result in no greater than Level B (behavioral) harassment of marine mammals. Level A harassment is not an anticipated outcome of exposure, and we are not proposing to authorize it. Marine mammals are expected to have

short-term, minor behavioral reactions to exposure such as moving away from the source. Some marine mammals (*e.g.,* delphinids) may choose to bow ride the source vessel; in which case exposure is expected to have no effect on behavior. For the majority of species, the amount of annual take by Level B harassment is very low (less than 1 percent) in relation to the population abundance estimate. For stocks above 1 percent (n = 3), the amount of annual take by Level B harassment is less than 12 percent.

We have produced what we believe to be conservative estimates of potential incidents of Level B harassment. The procedure for producing these estimates, described in detail in the notice of proposed rulemaking for the initial LOA (80 FR 39542, July 9, 2015) and summarized earlier in the Estimated Take section, represents NMFS' best effort towards balancing the need to quantify the potential for occurrence of Level B harassment due to production of underwater sound with a general lack of information related to the specific way that these acoustic signals, which are generally highly directional and transient, interact with the physical environment and to a meaningful understanding of marine mammal perception of these signals and occurrence in the areas where the NEFSC operates. The sources considered here have moderate to high output frequencies (10 to 200 kHz), generally short ping durations, and are typically focused (highly directional) to serve their intended purpose of mapping specific objects, depths, or environmental features. In addition, some of these sources can be operated in different output modes (*e.g.,* energy can be distributed among multiple output beams) that may lessen the likelihood of perception by and potential impacts on marine mammals in comparison with the quantitative estimates that guide our take authorization.

In particular, low-frequency hearing specialists (*i.e.,* mysticetes) are less likely to perceive or, given perception, to react to these signals. As described previously, NEFSC determined that the EK60, ME 70, and DSM 300 sources comprise the total effective exposures relative to line-kilometers surveyed. Acoustic disturbance takes are calculated for these three dominant sources. Of these dominant acoustic sources, only the EK 60 can use a frequency within the hearing range of baleen whales (18k Hz). Therefore, Level B harassment of baleen whales is only expected for exposure to the EK60. The other two dominant sources are outside of their hearing range. There is some minimal potential for temporary effects to hearing for certain marine mammals, but most effects would likely be limited to temporary behavioral disturbance. Effects on individuals that are taken by Level B harassment will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring), reactions that are considered to be of low severity (*e.g.,* Southall *et al.,* 2007). There is the potential for behavioral reactions of greater severity, including displacement, but because of the directional nature of the sources considered here and because the source is itself moving, these outcomes are unlikely and would be of short duration if they did occur. Although there is no information on which to base any distinction between incidents of harassment and individuals harassed, the same factors, in conjunction with the fact that NEFSC survey effort is widely dispersed in space and time, indicate that repeated exposures of the same individuals would be unlikely. The acoustic sources proposed to be used by NEFSC are generally of low source level, higher frequency, and narrow beamwidth. As described previously, there is some minimal potential for temporary effects to hearing for certain marine mammals, but most effects would likely be limited to temporary behavioral disturbance. Effects on individuals that are taken by Level B harassment will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring), reactions that are considered to be of low severity (*e.g.,* Ellison *et al.,* 2012). Individuals may move away from the source if disturbed; however, because the source is itself moving and because of the directional nature of the sources considered here, there is unlikely to be even temporary displacement from areas of significance and any disturbance would be of short duration. The areas ensonified above the Level B harassment threshold during NEFSC surveys are extremely small relative to the overall survey areas. Although there is no information on which to base any distinction between incidents of harassment and individuals harassed, the same factors, in conjunction with the fact that NEFSC survey effort is widely dispersed in space and time, indicate that repeated exposures of the same individuals would be very unlikely. The short term, minor behavioral responses that may occur incidental to NEFSC use of acoustic sources, are not expected to result in impacts the reproduction or survival of any individuals, much less have an adverse impact on the population.

Similarly, disturbance of pinnipeds by researchers are expected to be infrequent and cause only a temporary disturbance on the order of minutes. This level of periodic incidental harassment would have temporary effects and would not be expected to alter the continued use of the tidal ledges by seals. Anecdotal reports from previous monitoring show that the pinnipeds returned to the various sites and did not permanently abandon haulout sites after the NEFSC conducted their research activities. Monitoring results from other activities involving the disturbance of pinnipeds and relevant studies of pinniped populations that experience more regular vessel disturbance indicate that individually significant or population level impacts are unlikely to occur. When considering the individual animals likely affected by this disturbance, only a small fraction of the estimated population abundance of the affected stocks would be expected to experience the disturbance. Therefore, the NEFSC activity cannot be reasonably expected to, and is not reasonably likely to, adversely affect species or stocks through effects on annual rates of recruitment or survival.

Conclusions

In summary, as described in the *Serious Injury and Mortality* section, the takes by serious injury or mortality from NEFSC activities, alone, are unlikely to adversely affect any species or stock through effects on annual rates of recruitment or survival. Further, the low severity and magnitude of expected Level B harassment is not predicted to affect the reproduction or survival of any individual marine mammals, much less the rates of recruitment or survival of any species or stock. Therefore, the authorized Level B harassment, alone or in combination with the M/SI authorized for some species or stocks, will result in a negligible impact on the effected stocks and species.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

Please see Table 18 for information relating to this small numbers analysis. The total amount of take authorized is less than one percent for a majority of stocks, and no more than 12 percent for any given stock.

Based on the analysis contained herein of the proposed activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by the issuance of regulations to the NEFSC. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults whenever we propose to authorize take for endangered or threatened species, in this case with the Greater Atlantic Regional Fisheries Office (GARFO).

GARFO issued a biological opinion to the NEFSC (concerning the conduct of the specified activities) and OPR (concerning issuance of the LOA) on October 8, 2021, which concluded that the proposed actions are not likely to adversely affect any listed marine mammal species or adversely modify critical habitat.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

In July 2016, the NEFSC published a Final Programmatic Environmental Assessment (PEA) for Fisheries Research Conducted and Funded by the NEFSC (NMFS 2016a) to consider the direct, indirect and cumulative effects to the human environment resulting from NEFSC's activities as well as OPR's issuance of the regulations and subsequent incidental take authorization. NMFS made the PEA available to the public for review and comment, in relation specifically to its suitability for assessment of the impacts of our action under the MMPA. OPR signed a Finding of No Significant Impact (FONSI) on August 3, 2016. These documents are available at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-noaa-fisheries-nefsc-fisheries-and-ecosystem-research.*

On September 18, 2020, NMFS announced the availability of a Draft Supplemental PEA for Fisheries Research Conducted and Funded by the Northeast Fisheries Science Center for review and comment (85 FR 58339). The purpose of the Draft SPEA is to evaluate potential direct, indirect, and cumulative effects of unforeseen changes in research that were not analyzed in the 2016 PEA, or new research activities along the U.S. East Coast. Where necessary, updates to certain information on species, stock status or other components of the affected environment that may result in different conclusions from the 2016 PEA are presented in this analysis. The supplemental PEA is available at *https://www.fisheries.noaa.gov/action/draft-supplemental-programmatic-environmental-assessment-nefsc-research-now-available.*

NMFS evaluated information in the PEA, SPEA, and NEFSC's application, as well as the 2016 FONSI, and determined that the initial FONSI is sufficient to support issuance of these regulations and subsequent 5-year Letter of Authorization. NMFS has documented this determination in a memorandum for the record.

National Marine Sanctuaries Act (NMSA)

On September 16, 2015, NMFS OPR Permits and Conservation Division, requested consultation under Section 304(d) of the NMSA on the issuance of regulations and a Letter of Authorization to the NEFSC from 2016-2021. Similarly, the NEFSC initiated consultation pursuant to section 304(d) of the NMSA on August 4, 2015, to conduct fisheries research activities within Stellwagen Bank National Marine Sanctuary (NMS). On September 23, 2015, the Office of National Marine Sanctuaries (ONMS) responded with comments and recommendations which were incorporated into the NEFSC's PEA and NMFS final rule. The survey activities being considered under this final rule or their potential impacts on marine mammals are not significantly different from the activities considered in the 2015 consultation. Therefore, PR1 has determined that re-initiation of NMSA 304(d) consultation is not required for the issuance of the 2021–2026 LOA because the changes in the action and potential impacts do not meet the triggers for re-initiation of consultation.

Adaptive Management

The regulations governing the take of marine mammals incidental to NEFSC fisheries research survey operations would contain an adaptive management component. The inclusion of an adaptive management component will be both valuable and necessary within the context of 5-year regulations for activities that have been associated with marine mammal mortality.

The reporting requirements associated with this rule are designed to provide OPR with monitoring data from the previous year to allow consideration of whether any changes are appropriate. OPR and the NEFSC will meet annually to discuss the monitoring reports and current science and whether mitigation or monitoring modifications are appropriate. The use of adaptive management allows OPR to consider new information from different sources to determine (with input from the NEFSC regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to

marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal research and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Classification

The Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. NMFS is the sole entity that would be responsible for adhering to the requirements in these regulations, and NMFS is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

This rule does not contain a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act (PRA) because the applicant is a Federal agency. Notwithstanding any other provision of law, no person is required to respond to nor must a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOAs, and reports.

Waiver of Delay in Effective Date

NMFS has determined that there is good cause under the Administrative Procedure Act (5 U.S.C 553(d)(3)) to waive the 30-day delay in the effective date of this final rule. No individual or entity other than the NEFSC is affected by the provisions of these regulations. The NEFSC requested that this final rule take effect on September 10, 2021, to accommodate the NEFSC's LOA expiring on September 9, 2021, so as to not cause a disruption in research activities. The waiver of the 30-day delay of the effective date of the final rule will ensure that the MMPA final rule and LOA are in place as soon as possible to minimize the lapse in MMPA take coverage. Any delay in finalizing the rule would result in either: (1) A suspension of planned research, which would disrupt the provision of vital data necessary for effective management of fisheries; or (2) the NEFSC's procedural non-compliance with the MMPA (should the NEFSC conduct research without an LOA), thereby resulting in the potential for unauthorized takes of marine mammals. Moreover, the NEFSC is ready to implement the regulations immediately and requested the waiver. For these reasons, NMFS finds good cause to waive the 30-day delay in the effective date. In addition, the rule authorizes incidental take of marine mammals that would otherwise be prohibited under the statute. Therefore, by granting an exception to the NEFSC, the rule will relieve restrictions under the MMPA, which provides a separate basis for waiving the 30-day effective date for the rule.

List of Subjects in 50 CFR Part 219

Endangered and threatened species, Fish, Marine mammals, Reporting and recordkeeping requirements, Wildlife.

Dated: October 15, 2021.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 219 is amended as follows:

PART 219—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 219 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Add subpart D to read as follows:

Subpart D—Taking Marine Mammals Incidental to Northeast Fisheries Science Center Fisheries Research in the Atlantic Coast Region

Sec.

219.31 ≤Specified activity and specified geographical region.
219.32 ≤Effective dates.
219.33 ≤Permissible methods of taking.
219.34 ≤Prohibitions.
219.35 ≤Mitigation requirements.
219.36 ≤Requirements for monitoring and reporting.
219.37 ≤Letters of Authorization.
219.38 ≤Renewals and modifications of Letters of Authorization.
219.39–219.40 [Reserved]

Subpart D—Taking Marine Mammals Incidental to Northeast Fisheries Science Center Fisheries Research in the Atlantic Coast Region

§ 219.31 ≤Specified activity and specified geographical region.

(a) This subpart applies only to the National Marine Fisheries Service's (NMFS) Northeast Fisheries Science Center and those persons it authorizes or funds to conduct activities in the area outlined in paragraph (b) of this section during research survey program operations.

(b) The incidental taking of marine mammals by Northeast Fisheries Science Center may be authorized in a Letter of Authorization (LOA) only if it occurs within the Northeast and Southeast Large Marine Ecosystem.

§ 219.32 ≤Effective dates.

Regulations in this subpart are effective from October 21, 2021, through October 21, 2026.

§ 219.33 ≤Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 219.37, the Holder of the LOA (hereinafter ''NEFSC'') may incidentally, but not intentionally, take marine mammals within the area described in § 219.31(b) by Level B harassment associated with use of active acoustic systems and physical or visual disturbance of hauled out pinnipeds and by Level A harassment, serious injury, or mortality associated with use of trawl, dredge, bottom and pelagic longline, gillnet, pot and trap, and fyke net gears, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 219.34 ≤Prohibitions.

Except for takings contemplated in § 219.33 and authorized by a LOA issued under §§ 216.106 of this chapter and 219.37, it shall be unlawful for any person to do any of the following in connection with the activities described in § 219.31:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 of this chapter and 219.37;

(b) Take any marine mammal not specified in such LOA;

(c) Take any marine mammal specified in such LOA in any manner other than as specified;

(d) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOA if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 219.35 ≤Mitigation requirements.

When conducting the activities identified in § 219.31(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 219.37 must be implemented. These mitigation measures must include but are not limited to:

(a) *General conditions.* (1) NEFSC must take all necessary measures to coordinate and communicate in advance of each specific survey with the National Oceanic and Atmospheric Administration's (NOAA) Office of Marine and Aviation Operations (OMAO) or other relevant parties on non-NOAA platforms to ensure that all mitigation measures and monitoring requirements described herein, as well as the specific manner of implementation and relevant event-contingent decision-making processes, are clearly understood and agreed upon;

(2) NEFSC must coordinate and conduct briefings at the outset of each survey and as necessary between the ship's crew (Commanding Officer/master or designee(s), contracted vessel owners, as appropriate) and scientific party or in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;

(3) NEFSC must coordinate as necessary on a daily basis during survey cruises with OMAO personnel or other relevant personnel on non-NOAA platforms to ensure that requirements, procedures, and decision-making processes are understood and properly implemented;

(4) When deploying any type of sampling gear at sea, NEFSC must at all times monitor for any unusual circumstances that may arise at a sampling site and use best professional judgment to avoid any potential risks to marine mammals during use of all research equipment;

(5) All vessels must comply with applicable and relevant take reduction plans, including any required use of acoustic deterrent devices;

(6) If a NEFSC vessel 65 ft (19.8 m) or longer is traveling within a North Atlantic right whale Seasonal Management Area, the vessel shall not exceed 10 knots in speed. When practicable, all NEFSC vessels traveling within a Dynamic Management Area or acoustically-triggered Slow Zone should not exceed 10 knots in speed;

(7) All NEFSC vessels shall maintain a separation distance of 500 m and 100 m from a North Atlantic right whale and other large whales, respectively;

(8) NEFSC must implement handling and/or disentanglement protocols as specified in the guidance provided to NEFSC survey personnel; and

(9) In the case of a bottlenose dolphin entanglement resulting in mortality and stock origin is unknown, the NEFSC must request and arrange for expedited genetic sampling for stock determination and photograph the dorsal fin and submit the image to the NMFS Regional Marine Mammal Stranding Coordinator for identification/matching to bottlenose dolphins in the Bottlenose Dolphin Photo-identification Catalog.

(b) *Trawl survey protocols.* (1) NEFSC must conduct trawl operations as soon as is practicable upon arrival at the sampling station;

(2) NEFSC must initiate marine mammal watches (visual observation) 15 minutes prior to sampling within 1 nm of the site. Marine mammal watches must be conducted by scanning the surrounding waters with the naked eye and binoculars (or monocular). During nighttime operations, visual observation will be conducted using the naked eye and available vessel lighting;

(3) NEFSC must implement the following ''move-on rule.'' If a marine mammal is sighted within 1 nautical mile (nm) of the planned location in the 15 minutes before gear deployment, NEFSC may move the vessel away from the marine mammal to a different section of the sampling area if the animal appears to be at risk of interaction with the gear based on best professional judgement. If, after moving on, marine mammals are still visible from the vessel, NEFSC may decide to move again or to skip the station. NMFS may use best professional judgement in making this decision;

(4) NEFSC must maintain visual monitoring effort during the entire period of time that trawl gear is in the water (*i.e.,* throughout gear deployment, fishing, and retrieval). If marine mammals are sighted before the gear is fully removed from the water, NEFSC must take the most appropriate action to avoid marine mammal interaction. NEFSC may use best professional judgment in making this decision;

(5) If trawling operations have been suspended because of the presence of marine mammals, NEFSC may resume only after there are no sightings for 15 minutes within 1nm of sampling location;

(6) If deploying bongo plankton or other small net prior to trawl gear, NEFSC will continue visual observations until trawl gear is ready to be deployed;

(7) NEFSC must implement standard survey protocols to minimize potential for marine mammal interactions. These protocols include, but are not limited to:

(i) Standard tow durations of no more than 30 minutes at target depth for distances less than 3 nautical miles (nm). The exceptions to the 30-minute tow duration are the Atlantic Herring Acoustic Pelagic Trawl Survey and the Deepwater Biodiversity Survey where total time in the water (deployment, fishing, and haul-back) is 40 to 60 minutes and 180 minutes, respectively;

(ii) Trawl tow distances of no more than 3 nm;

(iii) Bottom trawl tows will be made in either straight lines or following depth contours, whereas other tows targeting fish aggregations and deep-water biodiversity tows may be made along oceanographic or bathymetric features;

(iv) Sharp course changes will be avoided in all surveys;

(v) Open the codend of the net close to the deck/sorting area to avoid damage to animals that may be caught in gear; and

(vi) Gear will be emptied as close to the deck/sorting area and as quickly as possible after retrieval; and

(vii) Trawl nets must be cleaned prior to deployment.

(c) *Dredge survey protocols.* (1) NEFSC must deploy dredge gear as soon as is practicable upon arrival at the sampling station;

(2) NEFSC must initiate marine mammal watches (visual observation) prior to sampling. Marine mammal watches must be conducted by scanning the surrounding waters with the naked eye and binoculars (or monocular). During nighttime operations, visual observation must be conducted using the naked eye and available vessel lighting;

(3) NEFSC must implement the following ''move-on rule.'' If marine mammals are sighted within 1 nautical mile (nm) of the planned location in the 15 minutes before gear deployment, the NEFSC may decide to move the vessel away from the marine mammal to a different section of the sampling area if the animal appears to be at risk of interaction with the gear, based on best professional judgement. If, after moving on, marine mammals are still visible

from the vessel, NEFSC may decide to move again or to skip the station'';

(4) NEFSC must maintain visual monitoring effort during the entire period of time that dredge gear is in the water (*i.e.,* throughout gear deployment, fishing, and retrieval). If marine mammals are sighted before the gear is fully removed from the water, NEFSC must take the most appropriate action to avoid marine mammal interaction. NEFSC may use best professional judgment in making this decision;

(5) If dredging operations have been suspended because of the presence of marine mammals, NEFSC may resume operations when practicable only when the animals are believed to have departed the area or after 15 minutes of no sightings. NEFSC may use best professional judgment in making this determination; and

(6) NEFSC must carefully empty the dredge gear as close to the deck/sorting area and quickly as possible upon retrieval to determine if marine mammals are present in the gear.

(d) *Bottom and pelagic longline survey protocols.* (1) NEFSC must deploy longline gear as soon as is practicable upon arrival at the sampling station;

(2) NEFSC must initiate marine mammal watches (visual observation) no less than fifteen minutes prior to both deployment and retrieval of the longline gear. Marine mammal watches must be conducted by scanning the surrounding waters with the naked eye and binoculars (or monocular). During nighttime operations, visual observation must be conducted using the naked eye and available vessel lighting;

(3) NEFSC must implement the following ''move-on rule.'' If marine mammals are sighted within 1 nautical mile (nmi) of the planned location in the 15 minutes before gear deployment, the NEFSC may decide to move the vessel away from the marine mammal to a different section of the sampling area if the animal appears to be at risk of interaction with the gear, based on best professional judgement. If, after moving on, marine mammals are still visible from the vessel, NEFSC may decide to move again or to skip the station;

(4) For the Apex Predators Bottom Longline Coastal Shark Survey, if one or more marine mammals are observed within 1 nautical mile (nm) of the planned location in the 15 minutes before gear deployment, NEFSC must transit to a different section of the sampling area to maintain a minimum set distance of 1 nmi from the observed marine mammals. If, after moving on, marine mammals remain within 1 nmi, NEFSC may decide to move again or to skip the station. NEFSC may use best professional judgment in making this decision but may not elect to conduct pelagic longline survey activity when animals remain within the 1-nmi zone;

(5) NEFSC must maintain visual monitoring effort during the entire period of gear deployment or retrieval. If marine mammals are sighted before the gear is fully deployed or retrieved, NEFSC must take the most appropriate action to avoid marine mammal interaction. NEFSC may use best professional judgment in making this decision;

(6) If deployment or retrieval operations have been suspended because of the presence of marine mammals, NEFSC may resume such operations after there are no sightings of marine mammals for at least 15 minutes within 1nm area of sampling location. In no case will longlines be deployed if animals are considered at-risk of interaction; and

(7) NEFSC must implement standard survey protocols, including maximum soak durations and a prohibition on chumming.

(e) *Gillnet survey protocols.* (1) The NEFSC must deploy gillnet gear as soon as is practicable upon arrival at the sampling station;

(2) The NEFSC must initiate marine mammal watches (visual observation) prior to both deployment and retrieval of the gillnet gear. When the vessel is on station during the soak, marine mammal watches must be conducted during the soak by scanning the surrounding waters with the naked eye and binoculars (or monocular);

(3) The NEFSC must implement the following ''move-on rule.'' If marine mammals are sighted within 1 nmi of the planned location in the 15 minutes before gear deployment, the NEFSC and/or its cooperating institutions, contracted vessels, or commercially-hired captains, may decide to move the vessel away from the marine mammal to a different section of the sampling area if the animal appears to be at risk of interaction with the gear based on best professional judgement. If, after moving on, marine mammals are still visible from the vessel, the NEFSC and/or its cooperating institutions, contracted vessels, or commercially-hired captains may decide to move again or to skip the station;

(4) If marine mammals are sighted near the vessel during the soak and are determined to be at risk of interacting with the gear, then the NEFSC must carefully retrieve the gear as quickly as possible. The NEFSC may use best professional judgment in making this decision;

(5) The NEFSC must implement standard survey protocols, including continuously monitoring the gillnet gear during soak time and removing debris with each pass as the net is reset into the water to minimize bycatch;

(6) The NEFSC must ensure that surveys deploy acoustic pingers on gillnets in areas where required for commercial fisheries. NEFSC must ensure that the devices are operating properly before deploying the net;

(7) NEFSC must maintain visual monitoring effort during the entire period of gear deployment or retrieval. If marine mammals are sighted during the soak and are deemed at risk of interaction, the gillnet must be pulled. If fishing operations are halted, operations resume when animal(s) have not been sighted within 15 minutes or are determined to no longer be at risk. In other instances, the station is moved or cancelled;

(8) NEFSC must ensure that cooperating institutions, contracted vessels, or commercially-hired captains conducting gillnet surveys adhere to monitoring and mitigation requirements and must include required protocols in all survey instructions, contracts, and agreements;

(9) For the COASTSPAN gillnet surveys, the NEFSC will actively monitor for potential bottlenose dolphin entanglements by hand-checking the gillnet every 30 minutes or if a disturbance in the net is observed. In the unexpected case of a bottlenose dolphin entanglement resulting in mortality, NEFSC must request and arrange for expedited genetic sampling for stock determination. NEFSC must also photograph the dorsal fin and submit the image to the NMFS Southeast Stranding Coordinator for identification/matching to bottlenose dolphins in the Mid-Atlantic Bottlenose Dolphin Photo-Identification Catalog;

(10) NEFSC must pull gear immediately if disturbance in the nets is observed.

(11) All gillnets will be designed with minimal net slack and excess floating and trailing lines will be removed.

(12) NEFSC will set only new or fully repaired gill nets, and modify nets to avoid large vertical gaps between float line and net as well as lead line and net when set,

(13) On Observer Training cruises, acoustic pingers and weak links may be used on all gillnets consistent with the regulations and TRPs for commercial fisheries. NEFSC must ensure that surveys deploy acoustic deterrent devices on gillnets in areas where required for commercial fisheries. NEFSC must ensure that the devices are

operating properly before deploying the net.

(f) *Pot and trap survey protocols.* (1) The NEFSC must deploy pot gear as soon as is practicable upon arrival at the sampling station;

(2) The NEFSC must initiate marine mammal watches (visual observation) no less than 15 minutes prior to both deployment and retrieval of the pot and trap gear. Marine mammal watches must be conducted by scanning the surrounding waters with the naked eye and binoculars (or monocular). During nighttime operations, visual observation must be conducted using the naked eye and available vessel lighting;

(3) The NEFSC and/or its cooperating institutions, contracted vessels, or commercially-hired captains must implement the following ''move-on'' rule. If marine mammals are sighted within 1 nmi of the planned location in the 15 minutes before gear deployment, the NEFSC and/or its cooperating institutions, contracted vessels, or commercially-hired captains, as appropriate, may decide to move the vessel away from the marine mammal to a different section of the sampling area if the animal appears to be at risk of interaction with the gear, based on best professional judgement. If, after moving on, marine mammals are still visible from the vessel, the NEFSC may decide to move again or to skip the station;

(4) If marine mammals are sighted near the vessel during the soak and are determined to be at risk of interacting with the gear, then the NEFSC and/or its cooperating institutions, contracted vessels, or commercially-hired captains must carefully retrieve the gear as quickly as possible. The NEFSC may use best professional judgment in making this decision; and

(5) The NEFSC must ensure that surveys deploy gear fulfilling all pot/trap universal commercial gear configurations such as weak link requirements and marking requirements as specified by applicable take reduction plans as required for commercial pot/trap fisheries.

(g) *Fyke net gear protocols.* (1) NEFSC must conduct fyke net gear deployment as soon as is practicable upon arrival at the sampling station;

(2) NEFSC must visually survey the area prior to both deployment and retrieval of the fyke net gear. NEFSC must conduct monitoring and retrieval of the gear every 12- to 24-hour soak period;

(3) If marine mammals are in close proximity (approximately 328 feet [100 meters]) of the set location, NEFSC must determine if the net should be removed from the water and the set location should be moved using best professional judgment;

(4) If marine mammals are observed to interact with the gear during the setting, NEFSC must remove the gear from the water and implement best handling practices; and

(5) NEFSC must install and use a marine mammal excluder device at all times when using fyke nets equal or greater to 2 m.

(h) *Rotary screw trap gear protocols.* (1) NEFSC must conduct rotary screw trap deployment as soon as is practicable upon arrival at the sampling station;

(2) NEFSC must visually survey the area prior to both setting and retrieval of the rotary screw trap gear. If marine mammals are observed in the sampling area, NEFSC must suspend or delay the sampling. NEFSC may use best professional judgment in making this decision;

(3) NEFSC must tend to the trap on a daily basis to monitor for marine mammal interactions with the gear; and

(4) If the rotary screw trap captures a marine mammal, NEFSC must remove gear and implement best handling practices.

§ 219.36 ≤Requirements for monitoring and reporting.

(a) *Compliance coordinator.* NEFSC shall designate a compliance coordinator who shall be responsible for ensuring compliance with all requirements of any LOA issued pursuant to § 216.106 of this chapter and § 219.7 and for preparing for any subsequent request(s) for incidental take authorization.

(b) *Visual monitoring program.* (1) Marine mammal visual monitoring must occur prior to deployment of beam, mid-water, and bottom trawl, bottom and pelagic longline, gillnet, fyke net, pot, trap, and rotary screw trap gear; throughout deployment of gear and active fishing of all research gears; and throughout retrieval of all research gear;

(2) Marine mammal watches must be conducted by watch-standers (those navigating the vessel and/or other crew) at all times when the vessel is being operated;

(3) NEFSC must monitor any potential disturbance of pinnipeds on ledges, paying particular attention to the distance at which different species of pinniped are disturbed. Disturbance must be recorded according to a three-point scale of response to disturbance; and

(4) The NEFSC must continue to conduct a local census of pinniped haulout areas prior to conducting any fisheries research in the Penobscot River estuary. The NEFSC's census reports must include an accounting of disturbance based on the three-point scale of response severity metrics.

(c) *Training.* (1) NEFSC must conduct annual training for all chief scientists and other personnel (including its cooperating institutions, contracted vessels, or commercially-hired captains) who may be responsible for conducting dedicated marine mammal visual observations to explain mitigation measures and monitoring and reporting requirements, mitigation and monitoring protocols, marine mammal identification, completion of datasheets, and use of equipment. NEFSC may determine the agenda for these trainings;

(2) NEFSC must also dedicate a portion of training to discussion of best professional judgment, including use in any incidents of marine mammal interaction and instructive examples where use of best professional judgment was determined to be successful or unsuccessful; and

(3) NEFSC must coordinate with NMFS' Southeast Fisheries Science Center (SEFSC) regarding surveys conducted in the southern portion of the Atlantic coast region, such that training and guidance related to handling procedures and data collection is consistent.

(d) *Handling procedures and data collection.* (1) NEFSC must develop and implement standardized marine mammal handling, disentanglement, and data collection procedures. These standard procedures will be subject to approval by NMFS Office of Protected Resources (OPR);

(2) When practicable, for any marine mammal interaction involving the release of a live animal, NEFSC must collect necessary data to facilitate a serious injury determination;

(3) NEFSC must provide its relevant personnel with standard guidance and training regarding handling of marine mammals, including how to identify different species, bring/or not bring an individual aboard a vessel, assess the level of consciousness, remove fishing gear, return an individual to water, and log activities pertaining to the interaction; and

(4) NEFSC must record such data on standardized forms, which will be subject to approval by OPR. The data must be collected at a sufficient level of detail (*e.g.,* circumstances leading to the interaction, extent of injury, condition upon release) to facilitate serious injury determinations under the MMPA.

(e) *Reporting.* (i) NEFSC must report all incidents of marine mammal interaction to NMFS' Protected Species

Incidental Take database within 48 hours of occurrence. Information related to marine mammal interaction (animal captured or entangled in research gear) must include details of survey effort, full descriptions of any observations of the animals, the context (vessel and conditions), decisions made and rationale for decisions made in vessel and gear handling.

(ii) The NEFSC must submit annual reports. The period of reporting will be one year beginning at the date of issuance of the LOA. NEFSC must submit an annual summary report to OPR not later than ninety days following the end of the reporting period. These reports must contain, at minimum, the following:

(A) Annual line-kilometers surveyed during which the EK60, ME70, DSM300 (or equivalent sources) were predominant;

(B) Summary information regarding use of the following: All trawl gear, all longline gear, all gillnet gear, all dredge gear, fyke net gear, and rotary screw trap gear (including number of sets, hook hours, tows, and tending frequency specific to each gear type);

(C) Accounts of all incidents of marine mammal interactions, including circumstances of the event and descriptions of any mitigation procedures implemented or not implemented and why;

(D) Summary information from the pinniped haulout censuses in the and summary information related to any disturbance of pinnipeds, including event-specific total counts of animals present, counts of reactions according to a three-point scale of response severity, and distance of closest approach;

(E) A written evaluation of the effectiveness of NEFSC mitigation strategies in reducing the number of marine mammal interactions with survey gear, including best professional judgment and suggestions for changes to the mitigation strategies, if any;

(F) Final outcome of serious injury determinations for all incidents of marine mammal interactions where the animal(s) were released alive; and

(G) A summary of all relevant training provided by the NEFSC and any coordination with the NMFS Southeast Fishery Science Center, the Greater Atlantic Regional Fisheries Office, and the Southeast Regional Office.

(iii) Reporting of North Atlantic right whales and injured or dead marine mammals:

(A) In the event that the NEFSC observes a North Atlantic right whale during a survey, they must report the sighting as soon as possible to 866–755–6622 if the sighting occurs in the Northeast region (VA to ME) or to 877–WHALE–HELP if the sighting occurs in the Southeast region (FL to NC). The NEFSC must also report the sighting to the U.S. Coast Guard via Channel 16.

(B) In the event that the NEFSC discovers an injured or dead marine mammal, NEFSC must report the incident to OPR (*PR.ITP.MonitoringReports@noaa.gov*), 866–755–6622 in the Northeast region (VA to ME) and 877–WHALE–HELP in the Southeast region (FL to NC).

(C) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a prohibited manner, NEFSC must immediately cease such activity until such time as an appropriate decision regarding activity continuation can be made by the NEFSC Director (or designee). The incident must be immediately reported to the contacts in 6(c)(ii). OPR will review the circumstances of the prohibited take and work with NEFSC to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(3) In the event of a ship strike of a marine mammal by any vessel involved in the activities covered by the authorization, NEFSC must report the incident to OPR and to the appropriate Regional Stranding Network as soon as feasible. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Vessel's speed during and leading up to the incident;

(iv) Vessel's course/heading and what operations were being conducted (if applicable);

(v) Status of all sound sources in use;

(vi) Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;

(vii) Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;

(viii) Estimated size and length of animal that was struck;

(ix) Description of the behavior of the marine mammal immediately preceding and following the strike;

(x) If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;

(xi) Estimated fate of the animal (*e.g.,* dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and

(xii) To the extent practicable, photographs or video footage of the animal(s).

§ 219.37 ≤Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, NEFSC must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, NEFSC may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, NEFSC must apply for and obtain a modification of the LOA as described in § 219.38.

(e) The LOA must set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA must be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA must be published in the **Federal Register** within 30 days of a determination.

§ 219.38 ≤Renewals and modifications of Letters of Authorization.

(a) A LOA issued under §§ 216.106 of this chapter and 219.37 for the activity identified in § 219.31(a) must be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the

anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) OPR determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For an LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), OPR may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 219.37 for the activity identified in § 219.31(a) may be modified by OPR under the following circumstances:

(1) OPR may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with NEFSC regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from NEFSC's monitoring from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, OPR will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) If OPR determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 219.32(b), a LOA may be modified without prior notice or opportunity for public comment. Notification would be published in the **Federal Register** within 30 days of the action.

§ § 219.39–219.40 [Reserved]

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Narrow-Headed Gartersnake; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2020–0011; FF09E21000 FXES1111090FEDR 223]

RIN 1018–BD96

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Narrow-Headed Gartersnake

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the narrow-headed gartersnake (*Thamnophis rufipunctatus*) under the Endangered Species Act of 1973 (Act), as amended. In total, 23,785 acres (9,625 hectares) in Greenlee, Apache, Yavapai, Gila, and Coconino Counties, Arizona, and Grant, Hidalgo, and Catron Counties, New Mexico, fall within the boundaries of the critical habitat designation for the narrow-headed gartersnake. This rule extends the Act's protections to the narrow-headed gartersnake's designated critical habitat.

DATES: This rule is effective November 22, 2021.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov*. Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0011.

The coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are available at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0011 or on the Service's website at *https://www.fws.gov/southwest/es/arizona/*. Additional supporting information that we developed for this critical habitat designation will be available on the Service's website set out above and at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Jeff Humphrey, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, Fish and Wildlife Office, 9828 North 31st Ave. #C3, Phoenix, AZ 85051–2517; telephone 602–242–0210. 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, we must designate critical habitat to the maximum extent prudent and determinable. On July 8, 2014, we published a final rule to list the narrow-headed gartersnake as a threatened species (79 FR 38678). Designations of critical habitat can be completed only by issuing a rule.

What this document does. This rule designates critical habitat for the narrow-headed gartersnake of approximately 23,785 acres (9,625 hectares) in Greenlee, Apache, Yavapai, Gila, and Coconino Counties, Arizona, and Grant, Hidalgo, and Catron Counties, New Mexico.

The basis for our action. Under section 4(a)(3) of the Act, if we determine that any species is an endangered or threatened species, we must, to the maximum extent prudent and determinable, designate critical habitat. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such areas as part of critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

The critical habitat we are designating in this rule, consisting of eight units comprising approximately 447 stream miles (719 kilometers) within a maximum 326-foot (100-meter) lateral extent of the active stream channel, in an area of 23,784 acres (9,625 hectares) for the narrow-headed gartersnake, constitutes our current best assessment of the areas that meet the definition of critical habitat for the species.

Peer review and public comment. During the proposed rule stage, we sought the expert opinions of eight appropriate specialists. We received responses from three specialists, which informed our determination. Information we received from peer review is incorporated into this final rule. We also considered all comments and information we received from the public during the comment period.

Previous Federal Actions

Please refer to the final listing rule (79 FR 38678; July 8, 2014), the original proposed critical habitat rule (78 FR 41550; July 10, 2013), and the revised proposed critical habitat rule (85 FR 23608; April 28, 2020) for the narrow-headed gartersnake for a detailed description of previous Federal actions concerning this species. Those rules included the northern Mexican gartersnake (*Thamnophis eques megalops*), but we designated critical habitat for the northern Mexican gartersnake in an earlier, separate final rule (80 FR 22518; April 28, 2021). This rule designates critical habitat only for the narrow-headed gartersnake.

Supporting Documents

In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we stated that a draft analysis document under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) for the designation of critical habitat would be completed. We have now finalized an environmental assessment with a finding of no significant impact under NEPA. The environmental assessment and finding of no significant impact are available at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0011 and from the Arizona Ecological Services Field Office at *https://www.fws.gov/southwest/es/arizona/*. See Required Determinations, below, for a discussion of our NEPA obligations for this designation.

No changes were made to our economic analysis after considering public comment on the draft document. The final updated economic analysis document (IEc 2021, entire) is available at *http://www.regulations.gov at* Docket No. FWS–R2–ES–2020–0011.

Summary of Changes From the Proposed Rule

We reviewed the comments related to critical habitat for the narrow-headed gartersnake (see Summary of Comments and Recommendations, below), completed our analysis of areas

considered for exclusion under section 4(b)(2) of the Act (16 U.S.C. 1531 *et seq.*), reviewed our analysis of the physical or biological features (PBFs) essential to the long-term conservation of the narrow-headed gartersnake, and finalized the economic analysis of the designation. This final rule incorporates changes from our 2020 revised proposed critical habitat rule (85 FR 23608; April 28, 2020) based on the comments that we received, and have responded to in this document, and considers efforts to conserve the narrow-headed gartersnake.

As a result, our final designation of critical habitat reflects the following changes from the April 28, 2020, revised proposed rule (85 FR 23608):

(1) We revised unit areas based on comments we received regarding areas that did or did not contain the PBFs essential to the conservation of the species. These changes resulted in a net increase of 5,081 acres (ac) (2,056 hectares (ha)) of critical habitat. Critical habitat units were extended laterally to capture areas needed for brumation, a period of dormancy during the winter. All areas added to this final critical habitat designation were proposed as critical habitat for the narrow-headed gartersnake in the 2013 original proposed critical habitat rule (78 FR 41550; July 10, 2013) (see *Summary of Essential Physical or Biological Features*).

(2) We modified PBFs 1(B), 1(C), 1(D), and 3 for the narrow-headed gartersnake as identified below under Physical or Biological Features Essential to the Conservation of the Species.

(3) We excluded approximately 508 ac (206 ha) from portions of units for the narrow-headed gartersnake, as identified below in Table 2 (Areas excluded from critical habitat designation by critical habitat unit for the narrow-headed gartersnake).

(4) We corrected several errors in unit descriptions.

Summary of Comments and Recommendations

We requested written comments from the public on the original proposed critical habitat rule (78 FR 41550; July 10, 2013) and on the revised proposed critical habitat rule (85 FR 23608; April 28, 2020) for the narrow-headed gartersnake. The comment period for the original proposed critical habitat rule opened on July 10 and closed on September 9, 2013; the comment period for the revised proposed critical habitat rule opened on April 28 and closed on June 29, 2020.

For the original proposed critical habitat rule (78 FR 41550; July 10, 2013), we contacted appropriate Federal, State, and Tribal governments; local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed critical habitat designation. For the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we again contacted all interested parties, including appropriate Federal and State agencies, Tribal governments, scientific experts and organizations, and other interested parties, and invited them to submit written comments on the revised proposal. In the April 28, 2020, revised proposed rule, we stated that any comments we received in response to the July 10, 2013, proposed rule need not be resubmitted as they would be fully considered in this final rule. Newspaper notices inviting general public comments were published throughout the range of the proposed critical habitat designation for both the original and revised proposed rules.

During the comment period on the original proposed critical habitat rule (78 FR 41550; July 10, 2013), we received approximately 30 written comment letters on the proposed critical habitat designation. During the comment period on the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we received an additional 40 comment letters on the revised proposed critical habitat designation or the draft economic analysis (IEc 2019, entire). We also received one additional request for exclusion of an area that was not identified in the revised proposed rule. We reviewed each exclusion request and whether the requester provided information or a reasoned rationale to initiate an analysis or support an exclusion (see Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016)). All substantive information provided during both comment periods has either been incorporated directly into this final determination or is addressed in our responses below.

We also note that we no longer use primary constituent elements (PCEs) to identify areas as critical habitat. We eliminated PCEs due to redundancy with the physical or biological features (PBFs). This change in terminology is in accordance with a February 11, 2016 (81 FR 7414), rule to implement changes to the regulations for designating critical habitat. In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we used the comments we had received and additional information to revise: (1) The PBFs that are essential to the conservation of the species and which may require special management considerations or protection under the Act; (2) the criteria used to define the areas occupied at the time of listing for the species; and (3) the criteria used to identify critical habitat boundaries. We then applied the revised PBFs and identification criteria for the species, along with additional information we received regarding where these PBFs exist on the landscape to determine the geographic extent of each critical habitat unit. We received comments on the original proposed critical habitat rule (78 FR 41550; July 10, 2013) that referred to PCEs, and our responses to those comments below correlate with the respective PBFs from the revised proposed critical habitat rule (85 FR 23608; April 28, 2020).

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review actions under the Act, we solicited expert opinion on the original proposed critical habitat rule (78 FR 41550; July 10, 2013) from eight knowledgeable individuals with scientific expertise that includes familiarity with the narrow-headed gartersnake and its habitat, biological needs, and threats. We received responses from three of the peer reviewers. In 2020, during the public comment period for the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we received comments from one of the peer reviewers regarding our revised proposed rule. We address these peer reviewer comments in this final rule as appropriate.

This rule designates critical habitat only for the narrow-headed gartersnake; therefore, in this rule, we limit our discussion of the peer reviewer and public comments we received to those concerning the narrow-headed gartersnake. We reviewed all the comments we received from the peer reviewers for substantive issues and new information regarding the narrow-headed gartersnake and its habitat use and needs. The peer reviewers provided additional information, clarifications, and suggestions to improve the designation. Our revised proposed critical habitat rule (85 FR 23608; April 28, 2020) was developed in part to address some of the concerns and information raised by the peer reviewers in 2013. The additional details and information we received from or that were raised by the peer reviewers have been incorporated into this final rule, as appropriate. Substantive comments we

received from peer reviewers as well as Federal, State, Tribal, and local governments, nongovernmental organizations, and the public are summarized below.

Comment 1: One peer reviewer commented that nonnative fishes of the Centrarchidae and Ictaluridae families characterized by the term ''spiny-rayed fishes'' are not the only nonnative fishes that are detrimental to native fishes that are the prey for the gartersnake. They stated that the red shiner in the Cyprinidae family, nonnative mosquitofish in the Poeciliidae family, and nonnative trouts in the Salmonidae family all negatively impact native fishes as well. A second peer reviewer also commented that brown trout (*Salmo trutta*) are a harmful nonnative and would impact the PBFs related to lack of nonnative species in several subunits.

Our Response: In determining the PBFs for the gartersnake, we intended to identify those species of nonnative fish that were both considered highly predatory on gartersnakes and also highly competitive with gartersnakes in terms of common prey resources. The nonnative fish species we view as most harmful to gartersnake populations include bass (*Micropterus* sp.), flathead catfish (*Pylodictis* sp.), channel catfish (*Ictalurus* sp.), sunfish (Centrarchidae), bullheads (*Ameiurus* sp.), bluegill (*Lepomis* sp.), crappie (*Pomoxis* sp.), and brown trout. While other species may negatively impact native fishes, we highlighted the nonnative fish species that pose the greatest threat to narrow-headed gartersnakes.

Comment 2: One peer reviewer stated that our application of the ''adverse modification'' standard to fish renovation efforts is flawed because we can salvage gartersnakes prior to stream renovations and release them after a native fish prey base has been reestablished.

Our Response: For the public and section 7 practitioners to understand the types of actions considered to have potential effects to designated critical habitat, we generally identify those types of actions that could potentially result in adverse modification of designated critical habitat. The actual effects of a proposed action on designated critical habitat are dependent on many factors related to both the action being proposed and the project area. Conservation measures can be evaluated against specific attributes of the proposed action at the time of consultation for their suitability and potential implementation. We agree that salvaging gartersnakes prior to stream renovations and then releasing them after a native fish prey base has been reestablished could be a conservation recommendation identified during section 7 consultation to address effects of such a proposed action that includes fish renovation efforts.

Comment 3: One peer reviewer stated that no areas should be excluded from the critical habitat designation based on existing habitat conservation plans because we cannot enforce implementation of conservation plans.

Our Response: Section 4(b)(2) of the Act (16 U.S.C. 1533(b)(2)) states that we shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Act provides that we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. Under our Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016), when conducting this analysis we consider a number of factors including whether there are permitted conservation plans covering the species in the area such as habitat conservation plans, safe harbor agreements, or candidate conservation agreements with assurances, or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. Under the policy, we analyze habitat conservation plans when weighing whether the benefits of exclusion outweigh the benefits of including these areas in the critical habitat designation, and our analysis includes looking at whether the permittee is properly implementing the plan and is expected to continue doing so. We have conducted a weighing analysis to determine if the benefits of exclusion outweigh the benefits of including these areas, and we have used our discretion to determine if the existing habitat conservation plans are sufficient to conserve the species (see discussion under Consideration of Impacts under Section 4(b)(2) of the Act, below).

Comment 4: One peer reviewer commented that it would be helpful to have a rating system for the PBFs about prey bases consisting of native fishes and an absence of nonnative fishes, to show a gradient among sites.

Our Response: For recovery implementation purposes, we see value in understanding and tracking the status of the PBFs related to prey base and absence of nonnative aquatic predators, such as nonnative fishes. However, in terms of species composition or relative abundance, we do not currently have information on what the threshold of each nonnative aquatic predator, or combination of such predators, is to be considered detrimental to the narrow-headed gartersnake. These thresholds would also vary depending on the condition of other PBFs, including organic and inorganic structural features in a stream.

Comment 5: One peer reviewer commented on several PBFs that are incorrectly applied to several subunits for the narrow-headed gartersnake, including PBF 3 in the Campbell Blue Subunit, West Fork Gila River Subunit, the lower 2 miles of Iron Creek Subunit, and Little Creek Subunit, and PBF 4 in the lower 2 miles of Iron Creek Subunit, Little Creek Subunit, and South Fork Negrito Creek.

Our Response: While we did not include descriptions of PBFs for each subunit in this document, we used the information provided by the peer reviewer in our reevaluation of occupancy in the revised proposed critical habitat rule (85 FR 23608; April 28, 2020).

Comment 6: One peer reviewer commented that Willow Creek should be a subunit for the narrow-headed gartersnake because there is a museum record from 1989 or 1990 and there are adequate PBFs. Because the site was formerly suitable, it is likely to become recolonized.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we reviewed gartersnake occupancy to determine that a stream or stream reach was occupied by the narrow-headed gartersnake at the time of listing if it is within the historical range of the species, contains all PBFs for the species (although the PBFs concerning prey availability and presence of nonnative, aquatic predators are often in degraded condition), and has a last known record of occupancy between 1998 and 2019 (see Occupancy Records, 85 FR 23608, p. 23617–23619) (see Criteria Used To Identify Critical Habitat). Willow Creek does not have a record for the narrow-headed gartersnake that meets this occupancy definition, so it is not included in this final critical habitat designation for the species.

Comment 7: One peer reviewer commented that we should add the mainstem of the Negrito reach from the confluence of the north and south fork Negrito Creeks to its confluence with the Tularosa River reach.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we reviewed gartersnake occupancy to determine that a stream or stream reach was occupied by the narrow-headed gartersnake at the time of listing if it is within the historical range of the species, contains all PBFs for the species (although the PBFs concerning prey availability and presence of nonnative, aquatic predators are often in degraded condition), and has a last known record of occupancy between 1998 and 2019 (see Occupancy Records, 85 FR 23608, p. 23617–23619) (see Criteria Used To Identify Critical Habitat). The mainstem of Negrito Creek meets this definition for the narrow-headed gartersnake and is included in this final critical habitat designation for the species.

Federal Agency Comments

Comment 8: The U.S. Forest Service (USFS) commented that the term ''spatially intermittent flow'' used in PCE 1 of the original proposed critical habitat rule (78 FR 41550; July 10, 2013) is ambiguous because spacing between sections of flowing water can vary greatly and may not meet the biological needs of the gartersnake or its prey base.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020) and this rule, we define perennial, intermittent, and ephemeral as related to stream flow included in PBF 1 for the narrow-headed gartersnake and clarify the spectrum of stream flow regimes that provide stream habitat for the species based on scientifically accepted stream flow definitions (Levick *et al.* 2008, p. 6; Stromberg *et al.* 2009, p. 330) (see ''Stream Flow'' in 85 FR 23608, April 28, 2020, p. 23613; see also Physical or Biological Features Essential to the Conservation of the Species, below).

Comment 9: USFS requested clarification of what level of water pollutants are ''low enough not to affect recruitment'' for PBF 1(C) for narrow-headed gartersnake in the revised proposed critical habitat rule (85 FR 23608; April 28, 2020).

Our Response: We do not have specific data related to water pollutants that are ''at levels low enough such that recruitment of narrow-headed gartersnakes is not inhibited'' (85 FR 23608, April 28, 2020, p. 23648). Therefore, in this rule, we have amended this PBF to read as follows: ''Water quality that meets or exceeds applicable State surface water quality standards'' (see Physical or Biological Features Essential to the Conservation of the Species, below). Although water quality is not identified as a threat to the narrow-headed gartersnake, it is a threat to its prey base. Water quality that is absent of pollutants or has low levels of pollutants is needed to support the fish prey base for the narrow-headed gartersnake. State water quality standards identify levels of pollutants required to maintain communities of organisms that have a taxa richness, species composition, and functional organization that includes the fish prey base of the narrow-headed gartersnake.

Comment 10: In response to the original proposed critical habitat rule (78 FR 41550; July 10, 2013), a Federal agency stated that we should make it clear that when the 600-foot (ft) (182-meter (m)) width of critical habitat falls outside the stream channel, such as when channels are constricted by narrow canyon walls, critical habitat does not include upland areas that would not be used by the narrow-headed gartersnake.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020) for the narrow-headed gartersnake, we defined the lateral extent of critical habitat to include terrestrial features within 89 ft (27 m) of the active channel of a stream that provide thermoregulation, shelter sites, and protection from predators. This lateral extent includes some portions of narrow canyon walls and limits upland areas beyond narrow canyon walls. This lateral distance was based on the greatest average distance narrow-headed gartersnakes moved from the water during the wet season at two different sites on the Tularosa River in New Mexico over a 3-year study with a sample size of 69 individuals (Jennings and Christman 2012, p. 12) (see ''Terrestrial Space Along Streams,'' 85 FR 23608, April 28, 2020, pp. 23614–23616).

Subsequently, we received two comments on the revised proposed critical habitat rule (85 FR 23608; April 28, 2020) that a distance of 89 ft (27 m) did not capture known brumation sites on canyon walls used by narrow-headed gartersnakes in Oak Creek Canyon in Arizona (see *Comment 43,* below). As explained in our response to comment 43 below, we increased the lateral extent of critical habitat up to 328 ft (100 m) in areas with steep canyon walls to more accurately capture areas used by the narrow-headed gartersnake for brumation. This lateral extent also limits upland areas beyond narrow canyon walls, and we conclude that the changes that we made in this rule address all comments on this issue.

Comment 11: In response to the original proposed critical habitat rule (78 FR 41550; July 10, 2013), USFS commented that the gartersnake has strong fidelity for brumation or natal sites.

Our Response: Although we have information that the narrow-headed gartersnake uses brumation sites, we are not aware of any literature supporting a conclusion that the species has strong fidelity for these brumation sites. In this designation, we include some areas that capture the PBFs of brumation sites that have been documented in telemetry studies conducted that are described in the revised proposed critical habitat rule (85 FR 23608, April 28, 2020—see ''Terrestrial Space Along Streams'' on pp. 85 FR 23614–23616).

Comment 12: In response to the original proposed critical habitat rule (78 FR 41550; July 10, 2013), several Federal entities commented that various areas in the proposal do not currently contain the PBFs for narrow-headed gartersnakes. USFS further stated that it would be more realistic if we limited critical habitat to the areas that had the PBFs, if the PBFs are clearly defined and determinable.

Our Response: For the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we reevaluated all streams to determine which stream reaches contain PBFs. The revised proposed critical habitat rule and this rule do not include stream reaches where we determined that water flow became completely ephemeral along an otherwise perennial or spatially intermittent stream, hydrologic processes needed to maintain streams could not be recovered, nonnative aquatic predators outnumbered native prey species, or streams were outside the elevation range for the narrow-headed gartersnake. The revised proposed critical habitat rule (85 FR 23608; April 28, 2020) and this rule include areas that were occupied at the time of listing and contain at least one of the PBFs. We acknowledge that in some locations, the PBFs concerning prey availability and presence of nonnative aquatic predators are often in degraded condition and may require special management (see Changes to Criteria Used to Identify Critical Habitat in 85 FR 23608, April 28, 2020, pp. 85 FR 23617–23623; and see Regulation Promulgation, below).

Comment 13: In response to the original proposed critical habitat rule (78 FR 41550; July 10, 2013), several Federal agencies provided lists of

specific areas included in proposed critical habitat that do not have stream flow requirements defined in PBF 1(A) to support the narrow-headed gartersnake or its corresponding prey species identified in PBF 3. These agencies identified reaches that lacked PBF 1(A) in some areas along the following streams included in the 2013 proposed critical habitat rule for the narrow-headed gartersnake: Diamond Creek, Little Creek, and Turkey Creek in the Upper Gila River Subbasin; Eagle Creek in the Middle Gila River Subbasin; Dry Blue Creek, San Francisco River, and South Fork Negrito Creek in the San Francisco River Subbasin; and Canyon Creek and Carrizo Creek in the Upper Salt River Subbasin. These areas included stream reaches where water flow became completely ephemeral along an otherwise perennial or spatially intermittent stream, and many included the origin of streams, some of which were outside of the known elevation range of the species.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we did not include stream reaches where water flow becomes completely ephemeral along an otherwise perennial or spatially intermittent stream, and we incorporated related information received from USFS and others regarding stream flow. We incorporated stream flow information received from USFS for Diamond Creek and Gilita Creek in the Upper Gila River Subbasin Unit for narrow-headed gartersnake. Based on information from USFS and others related to lack of stream flow along Diamond Creek and Gilita Creek, designated critical habitat for the narrow-headed gartersnake along Diamond Creek ends 0.26 miles (mi) (0.4 kilometers (km)) upstream from Star Canyon, and critical habitat along Gilita Creek ends upstream of Willow Creek. The rule set that we applied in the 2020 revised proposed rule limited critical habitat to the known elevation range of the species and limited stream length by dispersal distance from confirmed gartersnake locations dated 1998 or later. When applied, these two factors of the rule set removed all other areas that the commenting Federal agencies identified as not having stream flow requirements for the narrow-headed gartersnake.

Comment 14: In response to the original proposed critical habitat rule (78 FR 41550; July 10, 2013), USFS stated that narrow-headed gartersnake critical habitat in high montane meadows and stream origins in ponderosa pine and mixed conifer forests does not have potential to develop shoreline habitat as it is defined in PBF 1(C): Shoreline habitat with adequate structural complexity and appropriate amounts of shrub- and sapling-sized plants.

Our Response: The PBFs in the revised proposed critical habitat rule (85 FR 23608; April 28, 2020) and this rule do not include the term ''shoreline habitat'' or the components that were included in shoreline habitat in the 2013 proposed rule. Instead, PBFs 1(B) and 1(D) focus on components that are found throughout all habitat types used by the narrow-headed gartersnake, including organic and natural inorganic structural features important to the narrow-headed gartersnake that fall within the stream channel and within terrestrial habitat that is up to 328 ft (100 m) from the active stream channel.

Comment 15: USFS stated that many areas included in critical habitat in the original proposed critical habitat rule (78 FR 41550; July 10, 2013) do not have PBF 4: An absence of nonnative fish species of the families Centrarchidae and Ictaluridae, bullfrogs, and/or crayfish. USFS also stated that much of proposed critical habitat may not have the capacity to ever become recolonized by the narrow-headed gartersnake due to the current and likely future conditions of these nonnative invasive species. In response to the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), USFS further commented that it will be difficult if not impossible for USFS to attain this PBF on its lands that it manages because nonnative species are managed by the State and not by USFS.

Our Response: The revised proposed critical habitat rule (85 FR 23608; April 28, 2020) and this final rule include areas that were occupied at the time of listing, but areas that contain nonnative aquatic predators are often in degraded condition and require special management. While recognizing USFS concerns, these areas have the capacity to be managed to improve the condition of the PBFs for the narrow-headed gartersnake through cooperative efforts between State wildlife agencies and USFS, and these types of efforts have already successfully been undertaken by USFS and State wildlife agencies within the range of the narrow-headed gartersnake.

Comment 16: In response to the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), USFS stated that we did not provide much explanation for what might constitute special management considerations that may be needed in critical habitat, so it is not clear what types of management are likely to result in improved PBFs. USFS commented that there should be some recognition of the potential value of restorative actions that often have short-term adverse effects but are designed to result in beneficial effects (*e.g.,* channel restoration, prescribed fire, riparian vegetation improvements, etc.).

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we stated that we were not changing any of the special management considerations from the 2013 original proposed critical habitat rule for the narrow-headed gartersnake (see Special Management Considerations or Protection in 85 FR 23608, April 28, 2020, p. 23624). However, the 2013 original proposed critical habitat rule did not include recognition of the potential value of restorative actions that often have short-term adverse effects but are designed to result in beneficial effects (see *Special Management Considerations or Protection* in 78 FR 41550, July 10, 2013, pp. 41555–41556). To address this comment and the information lacking in the 2013 original proposed critical habitat rule, we have added this information to the discussion of special management considerations in this final rule.

Comment 17: In response to the original proposed critical habitat rule (78 FR 41550; July 10, 2013), USFS stated that proposed critical habitat for the narrow-headed gartersnake included areas outside of the known elevation range and areas that do not have records of the species, including portions of Diamond Creek, Gilita Creek, and Iron Creek in the Upper Gila River Subbasin.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we included the elevation range of narrow-headed gartersnake as a PBF essential to the conservation of the species and did not include areas in the proposed critical habitat designation outside of this elevation range.

Comment 18: In response to the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), USFS stated that East Fork Black River, Bear Wallow Creek, and Fish Creek were not considered occupied by narrow-headed gartersnake in the original proposed critical habitat rule (78 FR 41550; July 10, 2013), and that we did not provide information to support these additions in the 2020 revised proposed critical habitat rule. USFS questioned the validity of the Arizona Game and Fish Department (AGFD) record for narrow-headed gartersnake in Fish Creek and further stated that Fish Creek was

heavily impacted by the 2011 Wallow Fire. USFS recommended removing East Fork Black River, Bear Wallow Creek, and Fish Creek from the final designation.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we reviewed gartersnake occupancy to determine that a stream or stream reach was occupied at the time of listing for the narrow-headed gartersnake if it is within the historical range of the species, contains PBFs for the species (although the PBFs concerning prey availability and presence of nonnative aquatic predators are often in degraded condition), and has a last known record of occupancy between 1998 and 2019 (see Occupancy Records, 85 FR 23608, p. 23617–23619) (see Criteria Used To Identify Critical Habitat). During this review, we became aware of additional records for areas we did not include in the 2013 proposed rule, and so we included them in our occupancy determination. While we did not discuss individual gartersnake records that contribute to occupancy in the 2013 proposed rule or the 2020 revised proposed rule, we have these records in our files. AGFD provided and verified records of narrow-headed gartersnakes in the East Fork Black River, Bear Wallow Creek, and Fish Creek (Arizona Game and Fish Department 2013, entire; Ryan 2020, pers. comm.). While the 2011 Wallow Fire significantly reduced native fish abundance in Fish Creek, native fish have since recolonized the stream (Nowak *et al.* 2017, Table 3). For these reasons, we included these areas in this final designation.

Comment 19: In response to the original proposed critical habitat rule (78 FR 41550; July 10, 2013), USFS stated that proposed critical habitat will affect numerous livestock grazing allotments on the Tonto National Forest. In addition, another Federal agency stated concerns about current and potential future management of public lands within proposed designated critical habitat areas, including grazing and off-highway vehicle (OHV) use. There is a grazing permit renewal under review that would allow for grazing October through January within the Palmerita Ranch allotment on riparian and upland areas. The agency also stated that there is a special recreational permit issued for an annual 3-day OHV poker run event, which would occur partially on navigable washes on Federal lands.

Our Response: With respect to livestock grazing and OHV use in areas of critical habitat, Federal agencies that authorize, carry out, or fund actions that may affect listed species or designated critical habitat are required to consult with us to ensure the action is not likely to jeopardize listed species or destroy or adversely modify designated critical habitat. This consultation requirement under section 7 of the Act is not a prohibition of Federal agency actions; rather, it is a means by which they may ensure that their actions proceed in a manner that avoids jeopardy or adverse modification. Even in areas absent designated critical habitat, if the Federal agency action may affect a listed species, consultation is still required to ensure the action is not likely to jeopardize the species. Because the areas designated as critical habitat are occupied and consultation will be required to meet the jeopardy standard, the impact of the critical habitat designation should be minimal and administrative in nature.

Comment 20: In response to the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), USFS stated that maintenance of adequate base flow in Eagle Creek is impacted by State water law and rights and outside of the purview of USFS. USFS expressed concern that Federal agencies may be impacted by the Act's section 7 reasonable and prudent measures that are not implementable.

Our Response: We understand that maintenance of adequate base flow in streams is impacted by State water law and rights that are outside of the purview of USFS. Under section 7 of the Act when evaluating the effects on critical habitat, we consider impacts on base flow from ongoing State water management operations within the designated units that are not within the agencies' discretion to modify to be part of the baseline of an effects analysis. Service policy states that section 7 consultation should result in reasonable and prudent measures that minimize the impacts of incidental take to the extent reasonable and prudent. They should be developed in coordination with the action agency and applicant, in any, to ensure that the measures are reasonable, that they cause only minor changes to the project, and that they are within the legal authority and jurisdiction of the agency or applicant to carry out. Therefore, they must be implementable.

Comment 21: In response to the original proposed critical habitat rule (78 FR 41550; July 10, 2013), USFS requested we define disturbance thresholds for actions ''that would significantly increase sediment deposition or scouring within the stream channel'' such as vegetation treatments, prescribed fire, and wildfire suppression. USFS also requested we include language addressing the scope, scale, and duration of actions ''that would alter water chemistry beyond the tolerance limits of a gartersnake prey base'' and actions ''that would remove, diminish, or significantly alter the structural complexity of key natural structural habitat features in and adjacent to critical habitat.'' USFS stated that these actions are extremely broad in scope and do not differentiate short-term impacts from true long-term, more permanent impacts that could result in adverse modification.

Our Response: The purpose of the designation of critical habitat to identify those areas critical to the conservation of the species. For the public and section 7 practitioners to understand the types of actions considered to have potential effects on designated critical habitat, we generally identify those types of actions that could potentially result in adverse modification of designated critical habitat. The actual effects of a proposed action on designated critical habitat are dependent on many factors related to both the action being proposed and the project area. Therefore, we cannot determine and include thresholds for adverse modification in this rule. The appropriate process for that determination is the Act's section 7 process, during which specific factors within the proposed action and conditions within the project area can be evaluated.

Comment 22: In response to the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), USFS commented that ''[a]ctions and structures that would physically block movement of gartersnakes and their prey species'' should not include a discussion of predatory species, because the presence of nonnative aquatic predatory species in a waterbody reduces population viability, which is considered under actions included in those ''that would directly or indirectly result in the introduction, spread, or augmentation of predatory nonnative species in gartersnake habitat.''

Our Response: Including this language with regard to nonnative aquatic predatory species within the description of actions and structures that would block the movements of gartersnakes and their prey species, as well as within the description of actions that would result in the introduction, spread, and augmentation of predatory nonnative species, is important to clarify two different types of effects that result from similar actions. The presence of such nonnative aquatic predatory species can both act as a barrier to movement and reduce habitat

quality due to presence of nonnative aquatic predatory species.

Comment 23: In response to both the original proposed critical habitat rule (78 FR 41550; July 10, 2013) and the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), USFS and others stated that we need to provide a reasonable, rational, and non-arbitrary timeframe for restocking of streams treated with piscicides, as the application of a standard that would determine adverse modification if the prey base was affected as described for 7 or more days would in many cases preclude the application of piscicides to restore listed or at-risk aquatic species, forsaking their recovery for gartersnakes.

Our Response: The purpose of the designation of critical habitat is not to evaluate every potential project or action that could adversely affect or modify designated critical habitat, but rather to identify those areas critical to the conservation of the narrow-headed gartersnake. For the public and section 7 practitioners to understand the types of actions considered to have potential effects to designated critical habitat, we generally identify those types of actions that could potentially result in adverse modification of designated critical habitat. The actual effects of a proposed action of designated critical habitat are dependent on many factors related to both the action being proposed and the project area. Therefore, we cannot determine and include overall thresholds for adverse modification in this rule. The appropriate process for that determination is during the Act's section 7 process, during which specific factors within the proposed action and conditions within the project area can be evaluated.

Comment 24: The U.S. Small Business Administration and other commenters stated that we should consider the full scope of economic impacts to small entities and conduct a thorough Regulatory Flexibility Act analysis for critical habitat rules.

Our Response: Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), Federal agencies are required to evaluate the potential incremental impacts of a rulemaking only on directly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, we can certify that this rule will not have a significant economic impact on a substantial number of small entities (see Required Determinations, below). Thus, no regulatory flexibility analysis is required.

Comment 25: The U.S. Small Business Administration commented that we should continue to engage with stakeholders early in the process and consider public comments.

Our Response: Stakeholder engagement is important to balancing the long-term conservation of sensitive species and their habitats with the interests of stakeholders and the needs of the public. For our original proposed critical habitat rule (78 FR 41550; July 10, 2013) and revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we conducted outreach to relevant Federal, State, and local municipalities and stakeholders, and published public news releases to alert the public to the proposals and request public comments. Specifically, in the proposed rules, we solicited information from the public regarding potential exclusions of areas based on management plans or other conservation efforts including partnerships, as well as other information related to the species and potential impacts of designating critical habitat. This final rule outlines our consideration of public comments we received on both the original and revised proposed rules.

State Comments

Comment 26: Arizona Game and Fish Department (AGFD) commented that while they recognize the intent of our use of the term ''predatory sportfish,'' it is important to point out that all sportfish are predatory, as are all of our native fishes (*i.e.,* they all prey on other organisms) and all interactions with sportfish are not negative. Further, not all sportfish or native species eat snakes.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we used the term ''predatory sportfish'' to explain how we delineated critical habitat: We identified and removed stream reaches where stocking or management of predatory sportfish is a priority and is conducted on a regular basis. In this rule, we have removed the term ''predatory sportfish'' and replaced it with ''nonnative fish species of the families Centrarchidae and Ictaluridae,'' so that it is consistent with the description of species used in the PBF related to nonnative aquatic predators.

Comment 27: In response to our original proposed critical habitat rule (78 FR 41550; July 10, 2013), New Mexico Department of Game and Fish (NMDGF) commented that the narrow-headed gartersnake is known both historically and recently from all three of its properties within or adjacent to the Upper Gila River Subbasin Unit. These properties include the Red Rock Wildlife Management Area, which is a public fishing and recreation area; the Bill Evans Fishing Area, which is a public fishing site; and the Heart Bar Wildlife Area, which is a public fishing and recreation area. NMDGF also noted that the proposal includes its Glenwood State Fish Hatchery within the narrow-headed gartersnake San Francisco River Subbasin Unit.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we reviewed narrow-headed gartersnake occupancy to determine that a stream or stream reach was occupied at the time of listing for the narrow-headed gartersnake if it is within the historical range of the species, contains PBFs for the species (although the PBFs concerning prey availability and presence of nonnative aquatic predators are often in degraded condition), and has a last known record of occupancy between 1998 and 2019 (see Occupancy Records, 85 FR 23608, p. 23617–23619) (see Criteria Used To Identify Critical Habitat). As a result of our review of occupancy and implementation of our rule set for stream length, we have added Red Rock Wildlife Management Area, Bill Evans Fish Area, and Heart Bar Wildlife Area to the description of the Upper Gila River Subbasin Unit in this final critical habitat designation for the narrow-headed gartersnake.

Comment 28: AGFD stated that the revised proposed critical habitat rule (85 FR 23608; April 28, 2020) is adequate for recovery of the narrow-headed gartersnake and that there are some areas that were occupied historically but from which the species has been extirpated. AGFD will continue the recovery efforts of reintroducing narrow-headed gartersnakes back into historically occupied habitats to contribute to recovery, regardless of their current occupied status or their critical habitat designation.

Our Response: We appreciate the AGFD's partnership in the conservation and recovery of the narrow-headed

gartersnake. We only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied at the time of listing by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, we must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of the PBFs essential to the conservation of the species. At this point in time, we do not know what areas within the species' historical range will contribute to the conservation of the species.

Comment 29: Both AGFD and NMDGF stated concerns with the *Application of the ''Adverse Modification'' Standard* discussion in the revised proposed critical habitat rule (85 FR 23608, April 28, 2020, pp. 23633–23634). AGFD pointed out that in the same discussion in the original proposed critical habitat rule (78 FR 41550, July 10, 2013, pp. 41576–41577), we discuss activities ''that may affect critical habitat, when carried out, funded, or authorized by a Federal agency [and that] should result in section 7 consultation,'' but in the 2020 revised proposed critical habitat rule, we discuss the same activities but change the ''may affect critical habitat'' to ''are likely to destroy or adversely modify critical habitat.'' AGFD recommended that in the final rule we use the same language in this discussion that we used in the 2013 original proposed critical habitat rule. AGFD also expressed concern that the 2020 revised proposed critical habitat rule essentially says that the effect has already been determined that any of these activities will destroy or adversely modify critical habitat.

Our Response: The change in wording as it applies to the *Application of the ''Adverse Modification'' Standard* in the 2020 revised proposed critical habitat rule (85 FR 23608, April 28, 2020) was a response to correct an error in phrasing from the original proposed critical habitat rule (78 FR 41550, July 10, 2013). In this rule's *Application of the ''Adverse Modification'' Standard* discussion, below, we include actions that could cause adverse effects to critical habitat, and not necessarily cause adverse modification to critical habitat, so that the public and section 7 practitioners can understand the types of actions we consider to have potential effects to designated critical habitat. The actual effects of a proposed action on designated critical habitat are dependent on many factors related to both the action being proposed and the project area. Therefore, we cannot determine and include thresholds for adverse modification in this rule. The appropriate process for that determination is the Act's section 7 process, during which specific factors within the proposed action and conditions within the project area can be evaluated.

Comment 30: Both AGFD and NMDGF stated concerns with some activities included in the analysis of the ''adverse modification'' standard because the activities are valuable to the restoration and recovery of native species even if they have temporary impacts to critical habitat. AGFD and NMDGF expressed concern about the time threshold we included in the *Application of the ''Adverse Modification'' Standard* discussion to determine that actions that would deliberately remove, diminish, or significantly alter the native or nonnative, soft-rayed fish component of the prey base within occupied habitat for a period of 7 days or longer would reach an adverse modification determination. AGFD further explained that stream renovation projects are needed to ensure that a healthy native fish community exists and that gartersnakes will also thrive. Chemical renovations can take longer than 7 days for the chemicals to dissipate to levels that are safe for native fish, or multiple treatments may need to be conducted to be effective. NMDGF requested removing fish barriers, water diversion, fish habitat restoration, and chemical treatments from the *Application of the ''Adverse Modification'' Standard* discussion in the final rule.

Our Response: In this rule's *Application of the ''Adverse Modification'' Standard* discussion, below, we acknowledge that some conservation actions will have short-term adverse effects but will ultimately result in long-term benefits to gartersnake critical habitat. The actual effects of a proposed action of designated critical habitat are dependent on many factors related to both the action being proposed and the project area. The appropriate process for that determination is the Act's section 7 process, during which specific factors within the proposed action and conditions within the project area can be evaluated. We understand that there are no clear data to suggest that narrow-headed gartersnakes must feed within 7 days of their last meal. As stated above, we also agree that it is not possible to determine and include thresholds for adverse modification in this rule. Therefore, in this rule, we removed the time threshold that commenters interpreted to limit fish removal to a 7-day window.

Comment 31: NMDGF requested exclusion for the Glenwood State Fish Hatchery in the Whitewater Creek Subunit of the San Francisco River Subbasin Unit for the narrow-headed gartersnake because there are no records of the species within the hatchery boundary and Whitewater Creek is not perennial at the hatchery. NMDGF further explains that the Service's Memorandum for the Intra-Service Section 7 Endangered Species Act Consultation for the Proposed Operation and Maintenance of Hatchery Facilities NM F–66 Project concurred with a ''no effect'' determination for the narrow-headed gartersnake because the snake is not currently present.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we reviewed narrow-headed gartersnake occupancy to determine that a stream or stream reach was occupied at the time of listing for narrow-headed gartersnake if it is within the historical range of the species, contains PBFs for the species (although the PBFs concerning prey availability and presence of nonnative aquatic predators are often in degraded condition), and has a last known record of occupancy between 1998 and 2019 (see Occupancy Records, 85 FR 23608, p. 23617–23619) (see Criteria Used To Identify Critical Habitat). The segment of Whitewater Creek included in the critical habitat designation for the narrow-headed gartersnake meets this definition.

In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020) and this rule, we also define perennial, intermittent, and ephemeral as related to stream flow included in PBF 1 for the narrow-headed gartersnake and clarify the spectrum of stream flow regimes that provide stream habitat for the species based on scientifically accepted stream flow definitions (Levick *et al.* 2008, p. 6; Stromberg *et al.* 2009, p. 330) (see ''Stream Flow'' in 85 FR 23608, April 28, 2020, p. 23613; see also Physical or Biological Features Essential to the Conservation of the Species, below). Although Whitewater Creek is ephemeral at the Glenwood State Fish Hatchery, it is perennial upstream of the hatchery and downstream at its confluence with the San Francisco River, so the entire stream segment meets our definition of critical habitat.

Under section 7 of the Act, Federal agencies are required to consult with the Service to ensure that the actions they carry out, fund, or authorize are not

likely to jeopardize the continued existence of the species, or destroy or adversely modify critical habitat. For a jeopardy or ''take'' analysis, we analyze effects to a species if the species is present in the action area during the time of the action. For an adverse modification analysis, we analyze effects to critical habitat if critical habitat for a species is present in the action area. Therefore, defining where a species is occupied at the time of listing for critical habitat designation is not synonymous with a determination that an area is currently occupied for purposes of a jeopardy analysis under section 7 of the Act or a ''take'' analysis under section 10 of the Act. Those determinations depend on the best available information at the time of the analysis, and the likely effects and likelihood of take depend on the action under consideration.

While the Glenwood State Fish Hatchery along Whitewater Creek meets our definition of critical habitat, consideration of possible exclusions from critical habitat are in our discretion and generally follow our Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016). With respect to NMDGF's request to exclude the Glenwood State Fish Hatchery along Whitewater Creek, we are not excluding the area from this final rule. See Consideration of Impacts under Section 4(b)(2) of the Act, *Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General,* below.

Comment 32: New Mexico Department of Agriculture (NMDA) expressed support for excluding private lands owned by Freeport-McMoRan within the U-Bar Ranch property along the Gila River from critical habitat for the narrow-headed gartersnake. NMDA stated that voluntary conservation planning and actions on the property are adequate for conserving the species. Freeport-McMoRan Tyrone Inc. and Pacific Western Land Company (collectively known as ''FMC'') also commented that lands owned by FMC along the upper Gila River in the Gila/Cliff Valley, Grant County, New Mexico, should be excluded from critical habitat pursuant to section 4(b)(2) of the Act based on their habitat management plans for spikedace (*Meda fulgida*) and loach minnow (*Rhinichthys cobitis*) and for southwestern willow flycatcher (*Empidonax traillii extimus*). They stated that these management plans protect and support habitat for aquatic and riparian species, including native prey species for the narrow-headed gartersnake.

Our Response: Consideration of possible exclusions from critical habitat are in our discretion and generally follow our Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016). In response to FMC's request to exclude their lands along the upper Gila River based on FMC habitat management plans for spikedace and loach minnow and for grazing management actions benefiting southwestern willow flycatcher, we have determined that the exclusion would not be appropriate for several reasons. Although we commend FMC for investing time, effort, and funding for conservation on the Gila River, the habitat conservation efforts to date that have been implemented are focused on management actions for spikedace, loach minnow, and southwestern willow flycatcher along the Gila River. There are no conservation efforts specific to the narrow-headed gartersnake included in these plans. In identifying critical habitat for the narrow-headed gartersnake, we identified those areas that meet the definition of critical habitat under section 3(5)(A) of the Act. Although management actions for one listed species may overlap other species' habitat or be mutually beneficial to multiple listed species, the PBFs in occupied habitat for the narrow-headed gartersnake differ from the PBFs identified for spikedace, loach minnow, and southwestern willow flycatcher. As a result, excluding these areas based on management for listed fish and bird species does not meet our criteria for exclusion. With respect to the Upper Gila River Subbasin Unit for the narrow-headed gartersnake, we determined that the benefits of exclusion do not outweigh the benefits of inclusion. See Consideration of Impacts under Section 4(b)(2) of the Act, *Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General,* below.

Comment 33: NMDA commented that we should reconsider the value of critical habitat if we cannot identify a case in which consultation would require additional conservation measures.

Our Response: We are required by section 4(a)(3) of the Act to designate critical habitat for listed species if we find that the designation is prudent and determinable, as we did for the narrow-headed gartersnake, regardless of whether we can foresee project modifications that may be required.

Comment 34: NMDGF requested that we exclude developed, human-made fish migration barrier structures from critical habitat because including them will hinder conservation efforts for native fish and snakes by delaying construction and maintenance efforts of these structures.

Our Response: When determining critical habitat boundaries, we made efforts to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack the PBFs. The human-made fish barriers are in-water structures that fall within the boundaries of habitats used by narrow-headed gartersnakes. Because of this and the limitations of map scale, any developed lands, such as constructed fish barriers left inside critical habitat boundaries, are not considered critical habitat because they lack the necessary PBFs. However, a Federal action involving the fish barriers, such as maintenance, may trigger section 7 consultation with respect to critical habitat or the prohibition of adverse modification if the specific action would affect the PBFs in surrounding critical habitat.

Comment 35: The New Mexico Interstate Stream Commission commented that the Service must complete an environmental impact statement (EIS) for designating critical habitat.

Our Response: NEPA dictates that the Service determine the appropriate level of NEPA review (40 CFR 1501.3). The Service completed an environmental assessment (EA) to determine whether an EIS was necessary or if a finding of no significant impact (FONSI) could be determined. The Service released a draft EA that was available for public comment from December 18, 2020, to January 16, 2021, on the Arizona Ecological Services Field Office website; we received five comments on the draft EA. After addressing the public comments received, the Service finalized the EA and found that designating critical habitat for the narrow-headed gartersnake would not result in significant impacts to the environment. A copy of the final EA and FONSI is available at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0011. Therefore, the appropriate NEPA process was completed, and an EIS is not required.

Tribal Comments

In accordance with our requirements to coordinate with Tribes on a government-to-government basis, we solicited information from the following 17 Tribes regarding the designation of critical habitat for the narrow-headed gartersnake: Chemehuevi Indian Tribe, Cocopah Indian Tribe, Colorado River

Indian Tribes, Fort McDowell Yavapai Nation, Fort Mojave Indian Tribe, Gila River Indian Community (GRIC), Hopi Tribe, Hualapai Tribe, Mescalero Apache Tribe, Pascua Yaqui Tribe, Salt River Pima—Maricopa Indian Community, San Carlos Apache Tribe, Tohono O'odham Nation, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache Nation, and Yavapai-Prescott Indian Tribe. While all of these Tribes may have interest in lands included in proposed critical habitat for the narrow-headed gartersnake, the only Tribal land included in the revised proposed critical habitat designation (85 FR 23608; April 28, 2020) was land owned by the San Carlos Apache Tribe and the White Mountain Apache Tribe. We also met with representatives of the GRIC and White Mountain Apache Tribe to discuss this proposed designation. The GRIC expressed concern regarding potential effects that critical habitat may have on water allocation. In communications with the Service, the San Carlos Apache Tribe expressed interest in being excluded from the designation, and White Mountain Apache Tribe sent a letter requesting to be excluded from the designation.

Comment 36: GRIC expressed concern about how designation of critical habitat for the narrow-headed gartersnake on the Gila and San Francisco Rivers might cause potential curtailment of water inflow to San Carlos Reservoir and subsequent downstream delivery to GRIC pursuant to their water rights settlement.

Our Response: We do not anticipate water inflow to San Carlos Reservoir and subsequent downstream delivery of water to GRIC will be impacted by this critical habitat designation. The economic analysis outlines the substantial baseline protections currently afforded the narrow-headed gartersnake throughout the designation, and it includes a determination that the impacts of this critical habitat designation will be minimal (see Consideration of Impacts under Section 4(b)(2) of the Act, *Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act*).

Comment 37: White Mountain Apache Tribe requested that the White Mountain Apache Homeland be excluded from the designation of critical habitat based on the White Mountain Apache Tribe's management and conservation of narrow-headed gartersnake habitat through several measures. These measures include formally approving the White Mountain Apache Native Fish Management Plan that includes prey species of the narrow-headed gartersnake; enacting Resolution 89–149 to designate streams and riparian zones as sensitive fish and wildlife areas; adopting a Water Quality Protection Ordinance to promote the health of Tribal waters and the people, plants, and wildlife that depend on them; and implementing overall holistic management of wildlife and natural resources within the Tribe's Homeland. White Mountain Apache Tribe also stated that the designation would infringe on Tribal sovereignty and directly interfere with Tribal self-government recognized as paramount in Joint Secretarial Order No. 3206.

Our Response: We have reviewed the request for exclusion from the White Mountain Apache Tribe and excluded all Tribal lands from the final designation under section 4(b)(2) of the Act (see Consideration of Impacts under Section 4(b)(2) of the Act, below). Because all Tribal lands have been excluded from this final critical habitat designation, any required conservation activities on Tribal lands would be based solely on the presence of the narrow-headed gartersnake on Tribal lands due to the listing of the species as a threatened species under the Act (see 79 FR 38678; July 8, 2014).

Public Comments

Comment 38: Several commenters stated that designating critical habitat for the narrow-headed gartersnake is not prudent because disclosing where individuals can be found would increase illegal taking of these species. Several commenters also stated that designating critical habitat is not prudent because most of the stream reaches included in the proposed designation have already been designated as critical habitat for other listed species.

Our Response: As discussed in the final listing rule (79 FR 38678; July 8, 2014), there is no imminent threat of take attributed to illegal collection for this species, and identification and mapping of critical habitat is not expected to initiate any such threat.

Additionally, criteria used to determine if designation of critical habitat for the narrow-headed gartersnake is prudent pursuant to our regulations (50 CFR 424.12(a)(1)) may differ from criteria used to designate critical habitat for other listed species. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) has been met and because there are no other circumstances we have identified for which this designation of critical habitat would not be prudent, we have determined that the designation of critical habitat is prudent for the species.

In development of the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we used the best scientific and commercial information available. In that revised proposed rule, we reassessed occupancy at the time of listing by reviewing all records for the narrow-headed gartersnake that we used in our original proposed critical habitat rule (78 FR 41550; July 10, 2013) in conjunction with expected survivorship of the species. We also used subsequent surveys in areas that had no detection of the species, and reviewed changes in threats that may have prevented occupancy at the time of listing. We determined that the best available information reflecting occupancy at the time of listing supports a more recent date of records since 1998, which includes areas within the United States (see Criteria Used To Identify Critical Habitat, below). This and other information represent the best scientific and commercial data available and led us to determine areas of occupancy at the time of listing. Our review of the best scientific and commercial data available supports the conclusion that the designation of critical habitat is prudent and determinable for the narrow-headed gartersnake.

Comment 39: Multiple commenters stated that the available data are insufficient to identify the species' needs and impacts from wildfires in order to determine areas for critical habitat.

Our Response: In development of the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we used the best scientific and commercial information available. We have sufficient information to determine the areas essential to the conservation of the species (*i.e.,* critical habitat) as documented in the 2020 revised proposed rule. In addition to reviewing narrow-headed gartersnake-specific survey reports, we also focused on survey reports and heritage data for fish and amphibians from State wildlife agencies, as they captured important data on the existing community ecology that affects the status of the narrow-headed gartersnake. In addition to species data sources, we used publicly available geospatial datasets depicting water bodies, stream flow, vegetation type, and elevation to identify critical habitat areas. We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where the species is located. This and other information represent the best scientific and commercial data available and led us to

conclude that the designation of critical habitat is determinable for the narrow-headed gartersnake.

As discussed in the final listing rule (79 FR 38678; July 8, 2014), landscape-scale wildfires have impacted the species and its habitats. We understand that wildfires can cause sedimentation that can reduce water quality and prey availability for the narrow-headed gartersnake, and we included areas in critical habitat that had records of the species from 1998 to 2019, but that may need special management to maintain PBFs 1 and 3 as a result of recent or future wildfires.

Comment 40: Two commenters stated that ephemeral reaches of streams, as well as intermittent streams, can provide habitat for narrow-headed gartersnakes. Gartersnakes use them on a seasonal basis, and they may have lower densities of nonnative aquatic species. Therefore, they should be included in the critical habitat designation.

Our Response: In development of the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we clarified the spectrum of stream flow regimes that provide stream habitat for the narrow-headed gartersnake based on scientifically accepted stream flow definitions (Levick *et al.* 2008, p. 6; Stromberg *et al.* 2009, p. 330). We define a ''spatially intermittent'' stream as a stream that is interrupted, perennially interrupted, or spatially intermittent; has perennial flow occurring in areas with shallow bedrock or high hydraulic connectivity to regional aquifers; and has ephemeral to intermittent flow occurring in areas with deeper alluvial basins or greater distance from the headwaters (Stromberg *et al.* 2009, p. 330). The spatial patterning of wet and dry reaches on spatially intermittent streams changes through time in response to climatic fluctuations and to human modifications of the landscape (Stromberg *et al.* 2009, p. 331).

We explain that streams that have perennial or spatially intermittent flow can provide stream habitat for the species (Levick *et al.* 2008, p. 6; Stromberg *et al.* 2009, p. 330) (see ''Stream Flow'' in 85 FR 23608, April 28, 2020, p. 23613; and Physical or Biological Features Essential to the Conservation of the Species, below). While streams with intermittent flow reaches do serve as habitat for narrow-headed gartersnakes and are included in the designation, ephemeral streams do not. Within the range of the narrow-headed gartersnake, perennial streams become ephemeral as they approach their headwaters. Narrow-headed gartersnakes have not been found in these ephemeral reaches because fish communities become sparse to nonexistent in these areas so that the gartersnake prey base is likely absent. In addition, there is no upstream habitat above the headwaters of a stream, so these ephemeral reaches do not provide connectivity and are not included in critical habitat.

Comment 41: One commenter stated that we should maintain a shoreline component as part of the PBFs that identify critical habitat. They stated their view that eliminating the shoreline component could result in improperly leaving out habitats that narrow-headed gartersnakes use because they span the transition between upland riparian and in-stream habitats.

Our Response: We do not use the term ''shoreline habitat'' in the PBFs for the narrow-headed gartersnake because shorelines fluctuate. Instead, we are focusing on the substrate. The key to the original primary constituent element for ''shoreline habitat'' was the substrate itself, not the fluctuating shoreline. The revised PBF 1 focuses on the organic and natural inorganic structural features important to the narrow-headed gartersnake that fall within the stream channel and still encompass the transition between in-stream habitat and land habitat.

Comment 42: One commenter stated that there are no currently available data on the effects of pollutants on the recruitment of narrow-headed gartersnakes; therefore, including PBF 1(C) for the narrow-headed gartersnake, which concerns water quality with low to zero levels of pollutants, is not using the best available science.

Our Response: We do not have specific data related to the effects of water pollutants on the recruitment of the narrow-headed gartersnake. Therefore, in this rule, we have amended the relevant PBF to read as follows: ''Water quality that meets or exceeds applicable State surface water quality standards.'' (For more information, see Physical or Biological Features Essential to the Conservation of the Species, below). Although water quality is not identified as a direct threat to the narrow-headed gartersnake, it is a threat to its prey base. Water quality that is absent of pollutants or has low levels of pollutants is needed to support the fish prey base for the narrow-headed gartersnake. State water quality standards identify levels of pollutants required to maintain communities of organisms that have a taxa richness, species composition, and functional organization that includes the fish prey base of the narrow-headed gartersnake.

Comment 43: Two commenters stated that 89 ft (27 m) from the water's edge does not capture the lateral distance from streams that individual narrow-headed gartersnakes moved for brumation in Oak Creek Canyon, Arizona, which is between 276 and 328 ft (84 and 100 m).

Our Response: We agree that terrestrial habitat as defined in PBF 1(D) for the narrow-headed gartersnake does not include all known brumation sites for the species, including several sites located on steep slopes in Oak Creek Canyon that we discussed in the revised proposed rule (see ''Terrestrial Space Along Streams,'' 85 FR 23608, April 28, 2020, pp. 23614–23616). In the 2020 revised proposed rule, we modified that lateral extent boundary of critical habitat to 89 ft from the active channel of a stream based on the greatest average distance moved from water during the wet season on the Tularosa River in New Mexico from a 3-year study with a sample size of 69 individuals at two different sites. Because this study was conducted during the active season, it does not include brumation sites. We also did not include areas for brumation in PBF 1(D) for the narrow-headed gartersnake. This was an oversight, and we have added brumation to PBF 1(D) for narrow-headed gartersnake in this final rule. As a result, we have also increased the lateral extent of critical habitat for the narrow-headed gartersnake up to 328 ft (100 m) from the water's edge, so that critical habitat includes additional areas for brumation along streams within narrow-walled canyons such as Oak Creek Canyon in Arizona (see *Summary of Essential Physical or Biological Features,* below). All areas included in this final rule as a result of increasing the lateral extent of critical habitat units was proposed as critical habitat for the narrow-headed gartersnake in the 2013 original proposed critical habitat rule (78 FR 41550; July 10, 2013).

Comment 44: One commenter stated that the proposed critical habitat for the narrow-headed gartersnake in Eagle Creek in Greenlee County, Arizona, lacks recent detections, is primarily on Tribal land, and lacks habitat for the species because it is dominated by nonnative aquatic predators.

Our Response: In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we reviewed gartersnake occupancy to determine that a stream or stream reach was occupied at the time of listing for the narrow-headed gartersnake if it is within the historical range of the species, contains

PBFs for the species (although the PBFs concerning prey availability and presence of nonnative aquatic predators are often in degraded condition), and has a last known record of occupancy between 1998 and 2019 (see Occupancy Records, 85 FR 23608, p. 23617–23619) (see Criteria Used To Identify Critical Habitat). The segment of Eagle Creek included in critical habitat for the narrow-headed gartersnake meets this definition, but the areas of it owned by the San Carlos Apache Tribe were excluded from this final designation.

Comment 45: One commenter stated that we should determine occupancy at the time of listing (2014) from 1980 to today, as was done in the original proposed critical habitat rule (78 FR 41550; July 10, 2013), rather than 1998 to today, which was done in the revised proposed critical habitat rule (85 FR 23608; April 28, 2020). Repeated discoveries of populations of narrow-headed gartersnakes that were thought to be lost or were unknown indicates using 1980 as the earliest year to determine occupancy at the time of listing is therefore more appropriate. A lack of documentation of occupancy reflects incomplete survey effort rather than true non-occupancy.

Our Response: As explained extensively in the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), although it is possible that narrow-headed gartersnakes are still extant in areas where they were detected only during the 1980s or prior, we have determined that the best available information reflecting occupancy at the time of listing supports a more recent date of records since 1998.

Based on our analyses in the listing rule (79 FR 38678; July 8, 2014), we conclude that there has been a significant decline in the species over the past 50 years. This decline appeared to accelerate during the two decades immediately before listing occurred. From this observation, we conclude that many areas that were occupied by the species in surveys during the 1980s are likely no longer occupied because those populations have likely disappeared. To determine where loss of populations was most likely, we reviewed survey efforts after 1989 that did not detect narrow-headed gartersnakes in some of the areas included in the original proposed critical habitat rule (78 FR 41550; July 10, 2013). All surveys conducted since the 1980s that were considered included at least the same amount or more search effort than those surveys that detected the species in the 1980s. Since 1998, researchers have detected narrow-headed gartersnakes in many areas where they were found in the 1980s, and this includes some areas where they had not been found prior to the 2014 final listing rule (see Criteria Used To Identify Critical Habitat, below). An increase in a species' detection information often occurs as a result of a species being listed as an endangered or threatened species, due to increased survey effort spurred by consultation requirements under section 7, as well as recovery actions or State coordination efforts under section 6, of the Act. Additional occupancy information is also sometimes obtained as a result of academic research on a species. Because the best available information supports a conclusion that these areas were occupied at the time of listing, we have included these areas in critical habitat (see Criteria Used To Identify Critical Habitat, below).

Comment 46: Multiple comments suggested we consider using longer stream lengths to determine gartersnake occupancy. A species might use a stream's entire wetted length, rather than just certain reaches, and the narrow-headed gartersnake had previously been connected in large stretches of river that are part of high-quality contiguous riparian habitat.

Our Response: In the original proposed critical habitat rule (78 FR 41550; July 10, 2013), we included the entire stream length of a perennial or intermittent stream if it had at least one known record for the narrow-headed gartersnake and at least one record of a native prey species present. In doing so, we included many areas that were not within the known range of the species, did not have records of the species, or did not contain the PBFs. For the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we reevaluated all streams based on comments and reports on water availability, prey availability, and surveys to determine which reaches contain the PBFs.

In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020) and this final rule, critical habitat includes occupied streams or stream reaches within the historical range with survey records of the narrow-headed gartersnake dated from 1998 to 2019 that have retained the necessary PBFs that will allow for the maintenance and expansion of existing populations. We placed outer boundaries on the portion of a stream that is considered occupied. We identified the most upstream and downstream records of the narrow-headed gartersnake along each continuous stream reach determined by presence of PBFs, and we extended the stream reach to include a dispersal distance of 2.2 mi (3.6 km). After identifying the stream reaches that meet the above parameters, we then connected those reaches with intervening areas that have the PBFs. We consider these intervening areas occupied because the species occurs upstream and downstream and multiple PBFs are present that allow the species to move through these stream reaches.

Comment 47: One commenter stated that critical habitat should include areas where native prey is limited and/or where nonnative species are present, for both occupied and unoccupied critical habitat, because narrow-headed gartersnakes can survive with low natural prey populations and the presence of nonnatives. Another commenter stated that we should not exclude stream reaches where other Federal, State, Tribal, or private entities may stock predatory sportfish regularly or as needed, because recovery of listed species should be prioritized in those areas.

Our Response: This critical habitat designation includes many areas that are occupied by the narrow-headed gartersnake, where native prey is limited, and where nonnative species that prey on gartersnakes are present. Please see Final Critical Habitat Designation, below, for unit descriptions, including why units meet the definition of critical habitat for the narrow-headed gartersnake.

Areas subject to stocking of predatory sportfish are not occupied by the narrow-headed gartersnake. We have not identified any unoccupied areas that meet the definition of critical habitat. Please see our response to *Comment 50,* below.

Comment 48: One commenter stated that the gartersnake is currently distributed in stream reaches that are dominated by nonnative vertebrates and crayfish; therefore, the best available science does not support excluding areas as critical habitat based on an abundance of nonnative aquatic predators.

Our Response: We acknowledge that the narrow-headed gartersnake is extant in some areas that have abundant nonnative aquatic predators, some of which also are prey for gartersnakes, so the presence of nonnative aquatic predators is not always indicative of absence of the gartersnake (Holycross *et al.* 2006). Although we acknowledge that we do not have a thorough understanding of narrow-headed gartersnake population dynamics in the presence of nonnative aquatic predators as compared to other areas, areas with aquatic predators that are currently known to support gartersnake

populations are included in this critical habitat designation. That said, we think it is reasonable to conclude, based on the best scientific data currently available, that streams or stream reaches should not be included in the final designation if the last known occupancy is prior to 1998 and the stream reaches have experienced a rapid decline in native prey species coupled with an increase in nonnative aquatic predators since gartersnakes were detected in these areas prior to 1998 (85 FR 23608; April 28, 2020).

Comment 49: Several commenters stated that designation of unoccupied critical habitat is needed for the narrow-headed gartersnake. Specifically, habitat fragmentation, small populations, and genetics threaten the species with extinction and thus make unoccupied critical habitat essential. Designating unoccupied habitat is also important to restore connectivity among populations, and the Service should also consider reintroduction of the gartersnake to unoccupied areas.

Our Response: As discussed in the final listing rule (79 FR 38678; July 8, 2014), continued population decline and extirpations threaten the genetic representation of the narrow-headed gartersnake because some populations have become disconnected and isolated from neighboring populations. This can lead to a reduction in the species' redundancy and resiliency when isolated, small populations are at increased vulnerability to the effects of threats and stochastic events, without a means for natural recolonization.

As required by section 4(b) of the Act, we use the best scientific and commercial data available in determining areas within the geographical area occupied at the time of listing that contain the features essential to the conservation of the species and which may require special management considerations or protection, and areas outside of the geographical area occupied at the time of listing that are essential for the conservation of the species. However, based on the best scientific data available we have not identified any unoccupied areas that are essential for the conservation of the species. While we know the conservation of the species will depend on increasing the number and distribution of populations of the narrow-headed gartersnake, not all of its historical range will be essential to the conservation of the species, and we are unable to delineate any specific unoccupied areas that are essential at this time. A number of areas within these watersheds continue to contain some or could develop many of the PBFs upon which the species depends, although the best available scientific data indicate all these areas are currently unoccupied. Some areas in these watersheds with the potential to support the PBFs are likely important to the overall conservation strategy for the narrow-headed gartersnake. Any specific areas essential to the species' conservation within these watersheds are not currently identifiable due to our limited understanding regarding the ideal configuration for the development of future habitat to support the narrow-headed gartersnake's persistence, and the ideal size, number, and configuration of these habitats. Although there may be a future need to expand the area occupied by the species to reach recovery, these areas have not been identified in recovery planning for the narrow-headed gartersnake. Therefore, we cannot identify unoccupied areas that are currently essential to the conservation of the species that should be designated as critical habitat.

Comment 50: One commenter stated that only including areas occupied by the species at the time of listing does not allow for naturally occurring range expansion into other areas with suitable habitat that already exist or are newly created from habitat restoration activities.

Our Response: Limiting critical habitat to areas occupied by a species at the time of listing does not prevent a species from naturally expanding into other areas. As discussed in the final listing rule (79 FR 38678; July 8, 2014), continued population decline and extirpations threaten the genetic representation of the narrow-headed gartersnake because some populations have become disconnected and isolated from neighboring populations. This can lead to a reduction in the species' redundancy and resiliency when isolated, small populations are at increased vulnerability to the effects of threats and stochastic events, without a means for natural recolonization.

As required by section 4(b) of the Act, we use the best scientific and commercial data available in determining areas within the geographical area occupied at the time of listing that contain the features essential to the conservation of a species and which may require special management considerations or protection, and areas outside of the geographical area occupied at the time of listing that are essential for the conservation of the species. However, based on the best scientific data available we have not identified any unoccupied areas that that are essential for the conservation of the species. While we know the conservation of the species will depend on increasing the number and distribution of populations of the narrow-headed gartersnake, not all of the species' historical range will be essential to the conservation of the species, and we are unable to delineate any specific unoccupied areas that are essential at this time. A number of areas within these watersheds continue to contain some, or could develop many, of the PBFs upon which the species depends, although the best available scientific data indicate all these areas are currently unoccupied. Some areas in these watersheds with the potential to support the PBFs are likely important to the overall conservation strategy for the narrow-headed gartersnake. Any specific areas essential to the species' conservation within these watersheds are not currently identifiable due to our limited understanding regarding the ideal configuration for the development of future habitat to support the narrow-headed gartersnake's persistence, and the ideal size, number, and configuration of these habitats. Although there may be a future need to expand the area occupied by the species to reach recovery, these areas have not been identified in recovery planning for the narrow-headed gartersnake. Therefore, we cannot identify unoccupied areas that are currently essential to the conservation of the species that should be designated as critical habitat.

Comment 51: One commenter stated that there are recent sightings of narrow-headed gartersnakes in Turkey Creek (which is part of the Upper Gila River Subbasin), so this area should not have been removed from the original proposed critical habitat designation.

Our Response: This record was from 2020, and we are not aware of any confirmed records between 1998 and 2019, as delineated in our rule set (see Occupancy Records, 85 FR 23608, p. 23617–23619) (see Criteria Used To Identify Critical Habitat), that document the narrow-headed gartersnake in Turkey Creek, so this site is not included in our critical habitat designation because it does not meet the definition of an occupied reach for the species.

Comment 52: One commenter requested confirmation that upper and lower Oak Creek have been removed from critical habitat, both of which have recent sightings of narrow-headed gartersnakes.

Our Response: This area has not been removed from the critical habitat designation. In the revised proposed critical habitat rule (85 FR 23608; April

28, 2020), we reviewed gartersnake occupancy to determine that a stream or stream reach was occupied at the time of listing for narrow-headed gartersnake if it is within the historical range of the species, contains PBFs for the species (although the PBFs concerning prey availability and presence of nonnative aquatic predators are often in degraded condition), and has a last known record of occupancy between 1998 and 2019. The segment of Oak Creek from its confluence with Sterling Canyon downstream to 800 ft before its confluence with Turkey Creek meets this definition and is included in this critical habitat designation for the narrow-headed gartersnake.

Comment 53: Several commenters stated that our use of historical data spanning two decades to characterize areas of critical habitat that are ''occupied at the time of listing'' for purposes of a designation under section 3(5)(A)(i) of the Act is not synonymous with a determination that habitat is currently occupied for purposes of a ''take'' analysis under sections 7 and 10 of the Act, and that the distinction between these two concepts needs to be fully acknowledged and its implications explained in the final rule.

Our Response: We designate areas as critical habitat that are occupied at the time of listing if those areas have one or more of the PBFs present that are essential to the conservation of the species and may require special management considerations or protection (see 81 FR 7414; February 11, 2016). In the 2020 revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we estimated that maximum longevity for the narrow-headed gartersnake is 15 years, so it is reasonable to conclude that a gartersnake detected between 1998 and 2019 represents a population that could still be present at the time of listing in 2014, depending on the extent of threats in the area. We also included narrow-headed gartersnake detections after the species was listed because these areas were likely occupied at the time of listing in 2014. As a result, there are areas in this final designation of critical habitat with records of gartersnakes from 1998 through 2019.

Under section 7 of the Act, Federal agencies are required to consult with the Service to ensure that the actions they carry out, fund, or authorize are not likely to jeopardize the continued existence of the species, or destroy or adversely modify critical habitat. For a jeopardy or ''take'' analysis, we analyze effects to a species if the species is present in the action area during the time of the action. For an adverse modification analysis, we analyze effects to critical habitat if critical habitat for a species is present in the action area. Therefore, defining where a species is occupied at the time of listing for critical habitat designation is not synonymous with a determination that an area is currently occupied for purposes of a jeopardy analysis under section 7 of the Act or a ''take'' analysis under section 10 of the Act. Those determinations depend on the best available information at the time of the analysis, and the likely effects and likelihood of take depend on the action under consideration.

Comment 54: One commenter stated that livestock grazing would have a significant impact on habitat for the narrow-headed gartersnake and that special management considerations and protection would benefit the species.

Our Response: As discussed in the final listing rule (79 FR 38678; July 8, 2014), livestock grazing is a largely managed land use, and, where closely managed, it is not likely to pose significant threats to the narrow-headed gartersnake. In cases where poor livestock management results in fence lines in persistent disrepair, allowing unmanaged livestock access to occupied habitat, adverse effects from loss of vegetative cover, sedimentation, or alteration of prey base may result. Activities that significantly reduce cover or increase sedimentation are addressed below under *Application of the ''Adverse Modification'' Standard* and Special Management Considerations or Protection.

Comment 55: One commenter stated that while we note that critical habitat units that have nonnative fish require special management, we do not explain how this management will be accomplished or whether it is even possible to reduce nonnatives to a level that will support narrow-headed gartersnakes.

Our Response: We expect the science of removing nonnative fish will continue to evolve over time; for that reason, we did not prescribe specific methods of special management as part of this final designation. At this time, in the areas that require management of nonnative fish, special management may involve using mechanical or chemical methods to remove nonnative, invasive fish species.

Comment 56: One commenter requested that we include a statement regarding the application of the ''adverse modification'' standard that existing activities are part of the baseline and, therefore, are presumed not to adversely modify critical habitat. The commenter further stated that we should affirmatively state that ''adverse modification'' will not be found where the agency, working with the project proponent, demonstrates that it will offset impacts to critical habitat through the protection and maintenance of alternative habitat within the designation, which is of comparable quality to the habitat that would be lost.

Our Response: Section 7 of the Act requires us to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. This adverse modification standard does not change whether the activities are ongoing or new, and we do not have a mechanism to determine that existing activities are presumed to not destroy or adversely modify critical habitat. Any new activity under section 7 will require evaluation of the effects of the action based on the specifics of the location of the project and its effects.

Comment 57: Several commenters stated that we should consider an increased scope of economic impacts to small entities for the critical habitat rule. They also stated that the economic impact of the proposed designation would be significant on agricultural and ranching operations.

Our Response: For the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we made available, and requested public comments on, a draft economic analysis (DEA) to examine the incremental costs associated with the designation of critical habitat. Our DEA did not find that there would be significant economic impacts to agriculture from this designation of critical habitat. This analysis includes impacts to third-party entities, such as local governments and private landowners. Critical habitat does not restrict private landowner access to their property, and private landowners would only need to consult with the Service under section 7 of the Act if Federal agency funding or permitting for an activity is needed. Because the areas are considered occupied, most costs are not associated with the critical habitat designation, but rather with listing of the species as threatened. In our mapping of critical habitat, we focused on areas that contain the PBFs for the species. We do not anticipate requesting additional modifications for livestock grazing or agricultural operations, or cost-share projects undertaken with agencies such as the U.S. Department of Agriculture's Natural Resources

Conservation Service (NRCS), as a result of the critical habitat designation beyond those required for the species itself. The economic analysis outlines the substantial baseline protections currently afforded the narrow-headed gartersnake through its listed status under the Act and the presence of the species in all designated critical habitat units, as well as overlap with the designated critical habitat of other, similar listed species. As a result of these protections, the economic analysis concludes that incremental impacts associated with section 7 consultations for the narrow-headed gartersnake are likely limited to additional administrative effort. Many of the areas designated as critical habitat for the narrow-headed gartersnake are already designated critical habitat for other listed species, and thus the designation of critical habitat for the narrow-headed gartersnake is not anticipated to cause an incremental increase in economic effects.

However, we recognize the potential for landowners' perceptions of the Act to influence land use decisions, including decisions to participate in Federal programs such as those managed by NRCS. Several factors can influence the magnitude of perception-related effects, including the community's experience with the Act and understanding of the degree to which future section 7 consultations could delay or affect land use activities. Information is not available to predict the impact of the designation of critical habitat on landowners' decisions to pursue cost-share projects with NRCS in the future. However, incremental effects due to the designation of critical habitat for the narrow-headed gartersnake are likely to be minimized because the species is already listed.

Comment 58: One commenter requested we update the economic analysis to account for the impact of COVID–19 on economic conditions.

Our Response: We do not anticipate any additional effects on economic conditions as a result of the impact of the COVID–19 pandemic. For the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we made available, and requested public comments on, our DEA to examine the incremental costs associated with the designation of critical habitat. The DEA did not identify significant impacts. Because the critical habitat areas are considered occupied, the majority of costs are not associated with the critical habitat designation, but rather with listing of the species as threatened. If Federal funding is involved, the Federal agency providing the funding is the party responsible for meeting the Act's obligations to consult on projects on private lands. We have considered and applied the best available scientific and commercial information in determining the economic impacts associated with designating critical habitat. Critical habitat designation may also generate ancillary benefits by protecting the PBFs on which the species depends. As a result, management actions undertaken to conserve the species or its habitat may have coincident, positive social welfare implications, such as increased recreational opportunities in a region or improved property values on nearby parcels.

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating

to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. The implementing regulations at 50 CFR 424.12(b)(2) further delineate unoccupied critical habitat by setting out three specific parameters: (1) When designating critical habitat, the Secretary will first evaluate areas occupied by the species; (2) the Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species; and (3) for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of the narrow-headed gartersnake from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the proposed and final listing rules published in the **Federal Register** on July 10, 2013 (78 FR 41500), and July 8, 2014 (79 FR 38678), respectively. The physical or biological features identified here focus primarily on foraging and dispersal habitat and secondarily on thermoregulation, shelter, and brumation habitat because most of the habitat relationship research data derived from studies of these activities for the narrow-headed gartersnake.

We define the stream flow regimes that provide stream habitat for the narrow-headed gartersnake based on stream flow definitions in Levick *et al.* (2008, p. 6) and Stromberg *et al.* (2009, p. 330). A perennial stream or portion of a stream is defined as having surface flow continuously year-round, except for infrequent periods of severe drought (Levick *et al.* 2008, p. 6). An intermittent stream is a stream where portions flow continuously only at certain times of the year (Levick *et al.* 2008, p. 6). An intermittent stream flows when it receives water from a spring, a ground-water source, or a surface source (such as melting snow (*i.e.,* seasonal)). During the dry seasons, frequently compounded by high evapotranspiration of watershed vegetation, the groundwater table may drop below the elevation of the streambed, causing surface flow to cease or reduce to a series of separate pools or short areas of flow (Gordon *et al.* 2004, p. 51). An ephemeral stream is usually dry except for brief periods immediately following precipitation, and its channel is at all times above the groundwater table (Levick *et al.* 2008, p. 6). In the range of the narrow-headed gartersnake, many streams have reaches with year-round water that are separated by intermittent or ephemeral reaches of flow, as a result of differences in geology along the stream. This variation of flow along a stream is common enough in the Southwest that hydrologists use the terms ''interrupted,'' ''perennial interrupted,'' or ''spatially intermittent'' to describe the spatial segmentation of a dryland stream into reaches that are perennial, intermittent, or ephemeral (Levick *et al.* 2008, p. 6; Stromberg *et al.* 2009, p. 330; Stromberg *et al.* 2013, p. 413). A stream that is interrupted, perennially interrupted, or spatially intermittent has perennial flow occurring in areas with shallow bedrock or high hydraulic connectivity to regional aquifers, and ephemeral to intermittent flow occurring in areas with deeper alluvial basins or greater distance from the headwaters (Stromberg *et al.* 2009, p. 330). The spatial patterning of wet and dry reaches on spatially intermittent streams changes through time in response to climatic fluctuations and to human modifications of the landscape (Stromberg *et al.* 2009, p. 331). In the remainder of this document, we use the terms ''perennial,'' ''spatially intermittent,'' and ''ephemeral'' in accordance with the above definitions.

Narrow-headed gartersnakes are primarily found in rocky stretches of canyon-bound headwater streams that have perennial flow or limited spatially intermittent flow that is primarily perennial. Narrow-headed gartersnakes have been documented in pools and shallow portions of an intermittent flow reach of the Blue River with wet areas separated by dry segments of 0.6 to 1.2 miles (1 to 2 km) in length (Cotten *et al.* 2017, p. 687). The wetted areas where gartersnakes were detected also had abundant native prey of the narrow-headed gartersnake, indicating that these areas may provide greater foraging opportunities during low flow periods (Cotten *et al.* 2017, p. 687). However, ephemeral reaches of streams do not provide habitat for narrow-headed gartersnakes. Within the range of the narrow-headed gartersnake, perennial streams become ephemeral as they approach their headwaters. Narrow-headed gartersnakes have not been found in these ephemeral reaches because their fish prey base is likely absent and there is no upstream perennial habitat, so the ephemeral reaches do not provide connectivity.

Narrow-headed gartersnakes depend on terrestrial and aquatic habitat for all of their life-history functions, so it is important that hydrologic processes are present to maintain both the terrestrial and aquatic components of habitat for the species. Hydrologic processes are the flow regime and physical hydrologic and geomorphic connection that create and maintain a stream channel and continuously redefine the boundary between aquatic and terrestrial habitat used by the narrow-headed gartersnake.

We have determined that the following physical or biological features are essential to the conservation of the narrow-headed gartersnake:

1. Perennial streams or spatially intermittent streams that provide both aquatic and terrestrial habitat that allows for immigration, emigration, and maintenance of population connectivity of narrow-headed gartersnakes and contain:

(A) Pools, riffles, and cobble and boulder substrate, with a low amount of fine sediment and substrate embeddedness;

(B) Organic and natural inorganic structural features (*e.g.,* cobble bars, rock piles, large boulders, logs or stumps, aquatic vegetation, vegetated islands, logs, and debris jams) in the stream channel for basking, thermoregulation, shelter, prey base maintenance, and protection from predators;

(C) Water quality that meets or exceeds applicable State surface water quality standards; and

(D) Terrestrial habitat up to 328 feet (100 meters) from the active stream channel (water's edge) that includes flood debris, rock piles, and rock walls containing cracks and crevices, small mammal burrows, downed woody debris, and streamside vegetation (*e.g.,* alder, willow, sedges, and shrubs) for thermoregulation, shelter, brumation, and protection from predators throughout the year.

2. Hydrologic processes that maintain aquatic and riparian habitat through:

(A) A natural flow regime that allows for periodic flooding, or if flows are modified or regulated, a flow regime that allows for the movement of water, sediment, nutrients, and debris through the stream network, as well as maintenance of native fish populations; and

(B) Physical hydrologic and geomorphic connection between the active stream channel and its adjacent terrestrial areas.

3. A combination of native fishes, and soft-rayed, nonnative fish species such that prey availability occurs across seasons and years.

4. An absence of nonnative aquatic predators, such as fish species of the families Centrarchidae and Ictaluridae, American bullfrogs (*Lithobates catesbeianus*), and/or crayfish (*Orconectes virilis, Procambarus clarki,* etc.), or occurrence of these nonnative species at low enough levels such that recruitment of narrow-headed gartersnakes is not inhibited and maintenance of viable prey populations is still occurring.

5. Elevations of 2,300 to 8,200 feet (700 to 2,500 meters).

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection.

A detailed discussion of activities influencing the narrow-headed gartersnake and its habitat can be found in the final listing rule (79 FR 38678; July 8, 2014). All areas of critical habitat will require some level of management to address the current and future threats to the narrow-headed gartersnake and to maintain or restore the PBFs. Special management within critical habitat will be needed to ensure these areas provide adequate water quantity, quality, and permanence or near permanence; cover (particularly in the presence of nonnative aquatic predators); an adequate prey base; and absence of or low numbers of nonnative aquatic

predators that can affect population persistence. Activities that may be considered adverse to the conservation benefits of critical habitat include those which: (1) Completely dewater or reduce the amount of water to unsuitable levels in critical habitat; (2) result in a significant reduction of protective cover within critical habitat when nonnative aquatic predator species are present; (3) remove or significantly alter structural terrestrial features of critical habitat that alter natural behaviors such as thermoregulation, brumation, gestation, and foraging; (4) appreciably diminish the prey base for a period of time determined to likely cause population-level effects; and (5) directly promote increases in nonnative aquatic predator populations, result in the introduction of nonnative aquatic predators, or result in the continued persistence of nonnative aquatic predators. Common examples of these activities may include, but are not limited to, various types of development, channelization, diversions, road construction, erosion control, bank stabilization, wastewater discharge, enhancement or expansion of human recreation opportunities, fish community renovations, and stocking of nonnative, spiny-rayed fish species or promotion of policies that directly or indirectly introduce nonnative aquatic predators as bait. The activities listed above are just a subset of examples that have the potential to affect critical habitat and PBFs if they are conducted within designated units; however, some of these activities, when conducted appropriately, may be compatible with maintenance of adequate PBFs or even improve upon their value over time. For activities planned within critical habitat, we encourage interested parties to contact the local Ecological Services field office (see **FOR FURTHER INFORMATION CONTACT**).

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not designating any areas as critical habitat outside the geographical area occupied by the species at the time of listing because we have not identified any unoccupied areas that meet the definition of critical habitat. Sites within the Gila River, San Francisco River, Salt River, and Verde River watersheds were previously occupied by the narrow-headed gartersnake. While we know the conservation of the species will depend on increasing the number and distribution of populations of the narrow-headed gartersnake, not all of its historical range will be essential to the conservation of the species, and we are unable to delineate any specific unoccupied areas that are essential at this time. A number of areas within these watersheds continue to contain some or could develop many of the physical and biological features upon which the species depends, although the best available scientific data indicate all these areas are currently unoccupied. Some areas in these watersheds with the potential to support the physical and biological features are likely important to the overall conservation strategy for the narrow-headed gartersnake. Any specific areas essential to the species' conservation within these watersheds are not currently identifiable due to our limited understanding regarding the ideal configuration for the development of future habitat to support the narrow-headed gartersnake's persistence, the ideal size, number, and configuration of these habitats. Finally, the specific areas needed for conservation will depend in part on landowner willingness to restore and maintain the species' habitat in these areas. Therefore, although there may be a future need to expand the area occupied by the narrow-headed gartersnake species to reach recovery, there are no unoccupied areas that are currently essential to the species conservation and that should be designated as critical habitat.

To identify areas for critical habitat for the narrow-headed gartersnake, we used a variety of sources for species data including fish species survey reports, museum records, heritage data from State wildlife agencies, peer-reviewed literature, agency reports, and incidental sight records accompanied by photo vouchers and other supporting documentation verified by interviews with species experts. Holycross *et al.* (2020, entire) was a key source of information for vouchered historical and current records of the narrow-headed gartersnake species across its range. Other sources for current records of the narrow-headed gartersnake included Christman and Jennings (2017, entire), Hellekson (2012, entire), Jennings *et al.* (2017, entire), Jennings and Christman (2019, entire), and Jennings *et al.* (2018). In addition to reviewing gartersnake-specific survey reports, we also focused on survey reports and heritage data from State wildlife agencies for fish as they captured important data on the existing community ecology that affects the status of the narrow-headed gartersnake within its range. In addition to species data sources, we used publicly available geospatial datasets depicting water bodies, stream flow, elevation, and aerial imagery to identify areas for critical habitat designation.

We determined that a stream or stream reach was occupied at the time of listing for narrow-headed gartersnake if it is within the historical range of the species, contains all PBFs for the species (although the PBFs concerning prey availability and presence of nonnative predators are often in degraded condition), and has a last known record of occupancy between 1998 and 2019. We determined occupancy at the time of listing for the narrow-headed gartersnake by reviewing all records for the species in conjunction with expected survivorship of the species, subsequent surveys in areas that had no detection of the species, and changes in threats over time that may have prevented occupancy at time of listing. Understanding longevity of a species can inform how long we can reasonably expect a species is still extant in an area, regardless of detection probability. Narrow-headed gartersnakes may live up to 10 years or longer in the wild (Rosen and Schwalbe 1988, p. 38). An individual narrow-headed gartersnake captured in the wild as an adult was kept in captivity for 11 years and is estimated to be 16 years old (Ryan 2020, pers. comm.). Based on this information, we estimate maximum longevity for the narrow-headed gartersnake is 15 years, so that it is reasonable to conclude that a gartersnake detected between 1998 and 2019 represents a population that could still be present at the time of listing in 2014, depending on the extent of threats in the area. Although it is possible that gartersnakes are still extant in areas where they were detected prior to 1998, we have determined that the best available information reflecting occupancy at the time of listing supports a more recent date of records since 1998.

Based on our analyses in the final listing rule (79 FR 38678; July 8, 2014), we conclude that there has been a significant decline in the species over the past 50 years. This decline appeared to accelerate during the two decades immediately before listing occurred.

From this observation, we conclude that many areas that were occupied by the species in surveys during the 1980s are likely no longer occupied because those populations have disappeared. To determine where loss of populations was likely, we reviewed survey efforts after 1989 that did not detect gartersnakes to determine whether the cryptic nature of the species was a valid argument for considering areas that only have gartersnake records from the 1980s as still occupied at the time of listing in 2014. All of the surveys conducted since the 1980s included at least the same amount or more search effort than those surveys that detected each species in the 1980s. Since 1998, researchers have detected narrow-headed gartersnakes in many areas where they were found in the 1980s. Areas where the species was found after 1997 are included in this final rule. Additionally, comparable surveys did detect gartersnakes in other areas where the species was present in the 1980s. Finally, we would expect that some populations would be lost during the decades preceding listing when numbers of gartersnakes were declining. These declines are what eventually led to the need to list the narrow-headed gartersnake.

As explained in the final listing rule (79 FR 38678, July 8, 2014, pp. 38688–38702), aquatic vertebrate survey efforts throughout the range of the narrow-headed gartersnake indicate that native prey species of narrow-headed gartersnakes have decreased or are absent, while nonnative predators of gartersnakes and their prey, including bullfrogs, crayfish, and spiny-rayed fish, continue to increase in many of the areas where narrow-headed gartersnakes were present in the 1980s (Emmons and Nowak 2012, pp. 11–14; Gibson *et al.* 2015, pp. 360–364, Jennings *et al.* 2020, p. 15). We acknowledge that narrow-headed gartersnakes are extant in some areas that have abundant nonnative aquatic predators, some of which also are prey for gartersnakes, so presence of nonnative aquatic predators is not always indicative of absence of these gartersnakes (Emmons and Nowak 2012, p. 31). We also acknowledge that we do not have a good understanding of why gartersnake populations are able to survive in some areas with nonnative aquatic predators and not in other areas. However, we think it is reasonable to conclude that streams and stream reaches were not occupied at the time of listing if they have only gartersnake records older than 1998 and have experienced a rapid decline in native prey species coupled with an increase in nonnative aquatic predators since gartersnakes were detected in these areas in the 1980s.

We included detections of the narrow-headed gartersnake that occurred after the species was listed because these areas were likely occupied at the time of listing in 2014. As stated earlier, the species is cryptic in nature and may not be detected without intensive surveys. Because populations of this species are generally small, isolated, and in decline, it is not likely that the species has colonized new areas since 2014; these areas were most likely occupied at the time of listing, but either had not been surveyed or the species was present but not detected during surveys. However, we did not include streams where narrow-headed gartersnakes were released for recovery purposes after the species was listed that had not been historically occupied by the species.

Stream reaches that lack PBFs include areas where water flow became completely ephemeral along an otherwise perennial or spatially intermittent stream, hydrologic processes needed to maintain streams could not be recovered, nonnative aquatic predators outnumbered native prey species, or streams were outside the elevation range. In addition, reaches with multiple negative surveys without a subsequent positive survey or reaches that have no records of the narrow-headed gartersnake species are not included. We do include stream reaches that lack survey data for the species, if they have positive observation records of the species dated 1998 or later both upstream and downstream of the stream reach and have all of the PBFs.

We also reviewed the best available information we have on home range size and potential dispersal distance for the narrow-headed gartersnake species to inform upstream and downstream boundaries of each unit and subunit of critical habitat. The maximum longitudinal distance measured across home range areas of a male narrow-headed gartersnake tracked for 51 days over 3 years during the dry and wet seasons was approximately 1,312 ft (400 m) (Jennings and Christman 2012, p. 10). The maximum longitudinal distance measured across home ranges areas ranged from 82 to 656 ft (25 to 200 m) for eight other narrow-headed gartersnakes tracked at least 6 days over 1 to 2 years (Jennings and Christman 2012, pp. 9–10). These longitudinal home range distances were all determined from adult gartersnakes and did not inform how juvenile gartersnakes are dispersing along a stream. Juvenile dispersal is important because snakes of different age classes behave differently, and juvenile gartersnakes may move farther along a stream as they search for and establish suitable home ranges than do adults with established home ranges. Because we have no information on how juvenile narrow-headed gartersnakes disperse, we used information from a long-term dispersal study on neonate, juvenile, and adult age classes of the Oregon gartersnake (*Thamnophis atratus hydrophilus*) in a free-flowing stream environment in northern California (Welsh *et al.* 2010, entire). This is the only dispersal study available for another aquatic *Thamnophis* species in the United States, so we used it as a surrogate for determining upstream and downstream movements of narrow-headed gartersnakes. The greatest movement was made by a juvenile recaptured as an adult 2.2 mi (3.6 km) upstream from the initial capture location (Welsh *et al.* 2010, p. 79). Therefore, in this final rule, we delineate upstream and downstream critical habitat boundaries of a stream reach at 2.2 mi (3.6 km) from a known narrow-headed gartersnake observation record.

In this final rule, we modified the lateral extent of critical habitat to include areas of brumation habitat since we inadvertently left out brumation habitat as part of PBF 1(D) in the revised proposed rule (85 FR 23608; April 28, 2020). We now incorporate the best information available on brumation habitat and other terrestrial habitat use of the narrow-headed gartersnake to inform lateral boundaries of each unit and subunit of critical habitat. There are three reported narrow-headed gartersnakes using brumation sites on steep slopes in Oak Creek Canyon, Arizona (Nowak 2006, pp. 19–20). Horizontal distances from stream centerline to these brumation sites ranged between 276 and 328 ft (84 and 101 m) (Nowak 2015, pers. comm.). There were also at least five other individual narrow-headed gartersnakes overwintering at brumation sites that were not on steep slopes at 66 to 98 ft (20 to 30 m) from the water's edge (Nowak 2006, pp. 20–21). The distance from the stream appeared to be dependent on the adjacent terrestrial topography so that gartersnakes were found farther from the stream in steeper terrain. The Nowak (2006) study is the only study that has documented brumation sites of telemetered narrow-headed gartersnakes.

Although we have no information on brumation sites in New Mexico, we have information on how narrow-headed gartersnakes moved in three different stream channels during the active season. A telemetry study of

narrow-headed gartersnakes on the Tularosa River, Gila River, and Whitewater Creek during two active (wet and dry) seasons of narrow-headed gartersnakes found individuals an average of 58.7 ft (17.9 m) from water across four different sites on the three streams with a sample size of 69 individuals (Jennings and Chirstman 2012, pp. 9–10). Narrow-headed gartersnakes were found with lowest average distance of 22.7 ft (6.9 m) during the dry season of 2010, and highest average distance of 88.3 ft (26.9 m) during the wet season in 2010 (Jennings and Chirstman 2012, pp. 9–10). While narrow-headed gartersnakes in New Mexico have been documented up to 285 ft (87 m) from water, most snakes are found within 3.28 ft (1 m) of the water's edge during both active seasons (Jennings and Christman 2012, pp. 9–10). During the active season, individual narrow-headed gartersnakes were most often found outside of water under boulders, small rocks, and broken concrete slabs located less than 328 ft (100 m) from the water in Oak Creek and West Fork Oak Creek (Nowak 2006, p. 26).

Sites much farther from water where gartersnakes were found in both Arizona and New Mexico during the active season may provide lower predation risk, protection from flooding, and warmer temperatures that are advantageous during gestation, after a large meal, or when snakes are more vulnerable prior to molting (Jennings and Christman 2012, p. 21). Brumation sites documented in Arizona by Nowak (2006) are likely higher in steeper terrain because of the thermal gradient in canyon habitats during winter: Temperatures increase dramatically in areas hit by sun at the tops of these canyons that get some amount of direct sunlight in winter. Higher brumation sites may also prevent the gartersnakes from being flooded out of these sites during high stream flow events.

Therefore, in this final rule, we delineate lateral extent of critical habitat boundaries of a stream to fall within 328 ft (100 m) of the active channel of a stream. Lateral extent varies based on topography as explained above. The active channel effectively defines a river or stream as a feature on the landscape (Mersel and Lichvar 2014, pp. 11–12). The active channel is established and maintained by flows that occur with some regularity (several times per year to several times per decade), but not by very rare and extremely high flood events. The outer limits of the active channel can generally be defined by three primary indicators that together form a discernable mark on the landscape: A topographic break in slope, change in vegetation characteristics, and change in sediment characteristics (Mersel and Lichvar 2014, pp. 13–14). The active channel is often a fairly obvious and easy feature to identify in the field, allowing for rapid and consistent identification (Mersel and Lichvar 2014, p. 14). Further, the active channel can be consistently recognized by the public. Any area that was added in this final rule as a result of increasing the lateral extent of critical habitat units was included in the 2013 original proposed critical habitat rule for the narrow-headed gartersnake (78 FR 41550; July 10, 2013).

The maps define the critical habitat designation, as modified by any accompanying regulatory text, presented at the end of this document under Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document.

In summary, for areas within the geographic area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the following criteria:

1. We mapped records of the narrow-headed gartersnake from 1998 to 2019. We then examined these areas to determine if narrow-headed gartersnakes could still occur in them, as described below.

2. We identified the streams in which narrow-headed gartersnakes were found since 1998 (used flowline layer in the U.S. Geological Survey (USGS) National Hydrography Dataset to represent stream centerlines).

3. We identified and removed upstream and downstream ends of streams that were below 2,300 ft or above 8,200 ft in elevation using USGS National Elevation Dataset.

4. We identified perennial, intermittent, and ephemeral reaches of streams. We removed upstream end reaches of streams that are ephemeral or intermittent based on FCode attribute of the flowline layer in the USGS National Hydrography Dataset or information from peer review and public comments.

5. We identified native and nonnative prey species along each stream using geospatial datasets, literature, peer review, and public comments. We removed stream reaches that did not have prey species.

6. We identified and removed stream reaches with an abundance of nonnative aquatic predators including fish, crayfish, or bullfrogs. (We used a combination of factors to determine nonnative presence and impact to the species. This evaluation included records from 1980 by looking at subsequent negative survey data for narrow-headed gartersnakes along with how the nonnative aquatic predator community had changed since those gartersnakes were found, in addition to the habitat condition and complexity. Most of the areas surveyed in the 1980s that had been re-surveyed with negative results for gartersnakes had significant changes to the nonnative aquatic predator community, which also decreased prey availability for the gartersnakes.) These areas were removed in our revised proposed critical habitat rule (85 FR 23608; April 28, 2020).

7. We identified and removed stream reaches where stocking or management of nonnative fish species of the families Centrarchidae and Ictaluridae is a priority and is conducted on a regular basis.

8. We identified and included those stream reaches on private land without public access that lack survey data but that have positive narrow-headed gartersnake survey records from 1998 forward both upstream and downstream of the private land and have stream reaches with PBFs 1 and 2.

9. We used a surrogate species to determine potential neonate dispersal along a stream, which is 2.2 mi (3.6 km). We then identified the most upstream and downstream records of narrow-headed gartersnake along each continuous stream reach determined by criteria 1 through 8, above, and extended the reach to include this dispersal distance.

10. After identifying the stream reaches that met the above parameters, we then connected those reaches between that have the PBFs. We consider these areas between survey records occupied because the species occurs upstream and downstream and multiple PBFs are present that allow the species to move through these stream reaches.

11. We identified the range of the maximum distance that narrow-headed gartersnakes have been documented from the water's edge in streams, which is 98 to 328 ft (30 to 100 m), to capture the upper limit of terrestrial habitat needed by the species for brumation, thermoregulation, and protection from predators. We used the USGS National Hydrography Dataset, wetland layer of the Service's National Wetlands Inventory dataset, and aerial photography in Google Earth Pro to identify the water's edge in streams (active channel).

12. We removed terrestrial areas between 30 m and 100 m lateral extent of the active channel that do not contain

PBFs and areas beyond steep walled canyons that are not accessible to the species.

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack PBFs necessary for the narrow-headed gartersnake. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action will affect the PBFs in the adjacent critical habitat. However, constructed fish barriers in streams within the designated critical habitat are part of the designation and are needed to manage the exclusion of nonnative species. Accordingly, section 7 consultation applies to actions involving such fish barriers.

We are designating as critical habitat lands that we have determined were occupied at the time of listing in 2014 and that contain one or more of the PBFs that are essential to support life-history processes of the species. As described above, we are not designating any areas outside the geographical area occupied by the species at the time of listing.

Units are designated based on one or more of the PBFs being present to support the narrow-headed gartersnake's life-history processes. Some units contain all of the identified PBFs and support multiple life-history processes. Some units contain only some of the PBFs necessary to support the narrow-headed gartersnake's use of that habitat.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0011, on our internet site *https://www.fws.gov/southwest/es/Arizona/,* and upon request from the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**).

Final Critical Habitat Designation

We are designating eight units as critical habitat for the narrow-headed gartersnake. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the narrow-headed gartersnake.

The eight areas we designate as critical habitat for the narrow-headed gartersnake are: (1) Upper Gila River Subbasin; (2) San Francisco River Subbasin; (3) Blue River Subbasin; (4) Eagle Creek; (5) Black River Subbasin; (6) Canyon Creek; (7) Tonto Creek Subbasin; and (8) Verde River Subbasin. Table 1 shows the critical habitat units and the approximate area of each unit. All units are considered occupied at the time of listing.

TABLE 1—CRITICAL HABITAT UNITS FOR NARROW-HEADED GARTERSNAKE

[Area estimates reflect all land within critical habitat unit boundaries]

Unit	Subunit	Land ownership by type acres (hectares)				Size of unit
		Federal	State	Tribal	Private	
1. Upper Gila River Subbasin.	Gila River	1,191 (482)	315 (127)		2,267 (917)	3,773 (1,527)
	West Fork Gila River	615 (249)	228 (92)		21 (8)	864 (350)
	Little Creek	281 (114)	9 (4)			291 (118)
	Middle Fork Gila River	978 (396)				978 (396)
	Iron Creek	111 (45)				111 (45)
	Gilita Creek	376 (152)				376 (152)
	Black Canyon	300 (121)			8 (3)	308 (125)
	Diamond Creek	231 (93)			73 (29)	303 (123)
Unit Total		4,084 (1,653)	553 (224)		2,368 (958)	7,005 (2,835)
2. San Francisco River Subbasin.	San Francisco River	2,128 (861)			1,194 (483)	3,322 (1,344)
	Whitewater Creek	254 (103)	3 (1)		125 (51)	382 (155)
	Saliz Creek	194 (78)			68 (27)	261 (106)
	Tularosa River	444 (180)			471 (191)	915 (370)
	Negrito Creek	543 (220)			90 (36)	632 (256)
	South Fork Negrito Creek.	362 (147)			20 (8)	382 (155)
Unit Total		3,924 (1,588)	3 (1)		1,967 (796)	5,895 (2,386)
3. Blue River Subbasin	Blue River	2,595 (1,050)			430 (174)	3,025 (1,224)
	Campbell Blue Creek	200 (81)			21 (8)	220 (89)
	Dry Blue Creek	122 (50)				122 (50)
Unit Total		2,918 (1,181)			450 (182)	3,368 (1,363)
4. Eagle Creek		84 (34)			0.4 (0.2)	84 (34)
Unit Total		84 (34)			0.4 (0.2)	84 (34)
5. Black River Subbasin	Black River	796 (322)				796 (322)
	Bear Wallow Creek	183 (74)				183 (74)
	North Fork Bear Wallow Creek.	80 (32)				80 (32)
	Reservation Creek	149 (60)				149 (60)
	Fish Creek	135 (55)				135 (55)
	East Fork Black River	436 (176)				436 (176)

TABLE 1—CRITICAL HABITAT UNITS FOR NARROW-HEADED GARTERSNAKE—Continued

[Area estimates reflect all land within critical habitat unit boundaries]

Unit	Subunit	Land ownership by type acres (hectares)				Size of unit
		Federal	State	Tribal	Private	
Unit Total		1,780 (720)				1,780 (720)
6. Canyon Creek		204 (82)				204 (82)
Unit Total		204 (82)				204 (82)
7. Tonto Creek Subbasin.	Tonto Creek	1,673 (677)			91 (37)	1,764 (714)
	Houston Creek	30 (12)			1 (0.4)	31 (12)
	Haigler Creek	473 (191)			26 (10)	499 (202)
Unit Total		2,176 (881)			117 (47)	2,293 (928)
8. Verde River Subbasin	Verde River	1,439 (583)			180 (73)	1,619 (655)
	Oak Creek	634 (256)	109 (44)		422 (171)	1,165 (471)
	West Fork Oak Creek	372 (151)				372 (151)
Unit Total	2,446 (990)	109 (44)		602 (244)	3,156 (1,277)	
Total		17,614 (7,128)	665 (269)		5,505 (2,228)	23,785 (9,625)

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the narrow-headed gartersnake, below.

Unit 1: Upper Gila River Subbasin Unit

Unit 1 consists of 7,005 ac (2,835 ha) in eight subunits along 104 stream mi (167 km): 46 stream mi (74 km) of the Gila River, 12 stream mi (20 km) of West Fork Gila River, 7 stream mi (11 km) of Little Creek, 14 stream mi (23 km) of Middle Fork Gila River, 6 stream mi (10 km) of Gilita Creek, 2 stream mi (3 km) of Iron Creek, 10 stream mi (16 km) of Black Canyon, and 6 stream mi (9 km) of Diamond Creek. The Upper Gila River Subbasin Unit is located in southwestern New Mexico, east of the town of Glenwood, and west and north of Silver City in Grant and Hidalgo Counties. The Upper Gila River Subbasin Unit occurs on lands managed by the USFS on Gila National Forest; Bureau of Land Management (BLM) within Lower Box and Middle Gila Box Areas of Critical Environmental Concern and Gila Lower Box Wilderness Study Area; National Park Service (NPS) on Gila Cliff Dwellings National Monument; New Mexico Department of Game and Fish on Bill Evans Fishing Area, Heart Bar Wildlife Area, Redrock State Wildlife Experimental Area, and Gila Bird Area; State Trust lands; and private entities.

Unit 1 is designated as critical habitat because it was occupied at the time of listing and as a whole, this unit contains PBFs 1, 2 and 5, with PBFs 3 and 4 may be in degraded condition. The Gila River, West Fork Gila River, Little Creek, Iron Creek, Black Canyon, and Diamond Creek subunits have PBFs 1, 2, 3, and 5, but PBF 4 is in degraded condition. The Middle Fork Gila River Subunit has PBF 1, 2, 4, and 5 with PBF 3 in degraded condition. Gilita Creek Subunit has all PBFs.

This unit requires special management to address the threats; some reaches of the Gila River have been adversely affected by channelization and water diversions. Populations of bullfrogs and nonnative, spiny-rayed fish dominate the aquatic community in some reaches of the West Fork and Middle Fork Gila River. Fish barriers on many streams are in place to limit upstream movement of some nonnative fish into areas that are managed for native fish. Crayfish densities are currently high in Diamond Creek. Wildfires have burned at both moderate and high severity within the unit and resulted in significant flooding with excessive ash and sediment loads in Middle Fork Gila River. These sediment and ash-laden floods can temporarily reduce populations of both nonnative aquatic predatory species and native prey species for narrow-headed gartersnakes in affected streams. The PBFs in this unit may require special management due to competition with, and predation by, nonnative species that are present in this unit; water diversions; channelization; potential for high-intensity wildfires; and human development of areas adjacent to critical habitat.

Unit 2: San Francisco River Subbasin Unit

Unit 2 consists of 5,895 ac (2,386 ha) in six subunits along 129 stream mi (207 km): 71 stream mi (115 km) of San Francisco River, 9 stream mi (14 km) of Whitewater Creek, 8 stream mi (13 km) of Saliz Creek, 20 stream mi (33 km) of Tularosa River, 13 stream mi (20 km) of Negrito Creek, and 8 stream mi (13 km) of South Fork Negrito Creek. The San Francisco River Subbasin Unit is generally located in southwestern New Mexico near the towns of Glenwood and Reserve, and east of Luna, in Catron County. The San Francisco River Subbasin Unit consists of lands managed primarily by the U.S. Forest Service on Gila National Forest and private landowners.

Unit 2 is designated as critical habitat because it was occupied at the time of listing and as a whole, this unit contains PBFs 1, 2, and 5, but PBFs 3 and 4 may be in degraded condition. San Francisco River Subunit has PBFs 1, 2, and 5, but PBFs 3 and 4 are in degraded condition. Whitewater Creek Subunit has PBFs 1, 2, 4, and 5, but PBF 3 is in degraded condition. Tularosa River, Saliz Creek, and Negrito Creek subunits have PBFs 1, 2, 3, and 5, but PBF 4 is in degraded condition. South Fork Negrito Creek Subunit has adequate PBFs. Water diversions have dewatered sections of the San Francisco River Subunit in the upper Alma Valley and at Pleasanton, New Mexico. The San Francisco River Subunit also has populations of bullfrogs, crayfish, and nonnative, spiny-rayed fish at various densities along its course. Wildfires have burned at both moderate and high severity within the unit and likely resulted in significant flooding with excessive ash and sediment loads. These sediment and ash-laden floods can temporarily reduce populations of both nonnative aquatic predatory species and native prey species for narrow-headed gartersnakes in affected streams. The PBFs in this unit may require special management due to competition with,

and predation by, nonnative species that are present in this unit; water diversions; potential for high-intensity wildfires; and human recreation and development of areas adjacent to critical habitat.

Unit 3: Blue River Subbasin Unit

Unit 3 consists of a total of 3,368 ac (1,363 ha) in three subunits along 64 stream mi (102 km): 52 stream mi (84 km) of Blue River, 7 stream mi (12 km) of Campbell Blue Creek, and 4 stream mi (7 km) of Dry Blue Creek. The Blue River Subbasin Unit is generally located near the east-central border of Arizona northeast of Clifton in Greenlee County, and just into west-central New Mexico in Catron County. Blue River Subbasin Unit consists of lands managed primarily by the U.S. Forest Service on Gila and Apache-Sitgreaves National Forests, and private landowners.

Unit 3 is designated as critical habitat because it was occupied at the time of listing and as a whole, this unit contains PBFs 1, 2, and 5, but PBFs 3 and 4 may be in degraded condition. The Blue River and Dry Blue Creek subunits have PBFs 1, 2, 3, and 5, but PFB 4 is in degraded condition. Campbell Blue Creek Subunit has PBFS 1, 2, 4, and 5, but PBF 3 may be in degraded condition. The fish community of the Blue River is highly diverse and largely native, but nonnative fish are present. Native fish restoration is actively occurring in the Blue River, including construction of a fish barrier, mechanical removal of nonnative fish, and repatriation and monitoring of federally listed warm-water fishes (Robinson and Crowder 2015, p. 24; Robinson and Love-Chezem 2015, entire). Native fish species persist in Campbell Blue Creek and Dry Blue Creek (Riley and Clarkson 2005, p. 10; Humphrey *et al.* 2015, Table 2). Crayfish and brown trout are present in Campbell Blue Creek (Humphrey *et al.* 2015, Table 2; Bergamini *et al.* 2016a, p. 1; Nowak *et al.* 2017, Table 3; Pittenger 2017, Table 3). Wildfires have burned at both moderate and high severity within the unit and likely resulted in significant flooding with excessive ash and sediment loads. These sediment and ash-laden floods can temporarily reduce populations of both nonnative aquatic predatory species and native prey species for narrow-headed gartersnakes in affected streams. The PBFs in this unit may require special management to prevent reinvasion of nonnative species and continue to reestablish native prey species.

Unit 4: Eagle Creek Unit

Unit 4 consists of a total of 84 ac (34 ha) along 2 stream mi (4 km) of Eagle Creek. The Eagle Creek Unit is generally located in eastern Arizona near Morenci and includes portions of Greenlee County. The majority of lands within this unit are managed by the U.S. Forest Service on the Gila National Forest.

Unit 4 is designated as critical habitat because it was occupied at the time of listing and as a whole, this unit contains PBFs 1, 2, 3, 4, and 5, but PBF 4 is in degraded condition. Narrow-headed gartersnakes have been found in Eagle Creek at its confluence with Sheep Wash in 2013 (Ehlo *et al.* 2013, p. 3; Holycross *et al.* 2020, p. 717). The PBFs in this unit may require special management to eliminate or reduce crayfish and nonnative, spiny-rayed fish, as well as maintain adequate base flow in Eagle Creek.

We have excluded 236 ac (96 ha) of lands owned by the San Carlos Apache Tribe in the Eagle Creek Unit (see Consideration of Impacts under Section 4(b)(2) of the Act, below).

Unit 5: Black River Subbasin Unit

Unit 5 consists of a total of 1,780 ac (720 ha) in six subunits along 45 stream mi (72 km): 19 stream mi (30 km) of Black River, 5 stream mi (7 km) of Bear Wallow Creek, 2 stream mi (3 km) of North Fork Bear Wallow Creek, 3 stream mi (6 km) of Reservation Creek, 4 stream mi (6 km) of Fish Creek, and 12 stream mi (19 km) of East Fork Black River. The Black River Subbasin Unit is generally located along the Mogollon Rim in east-central Arizona, east of Maverick and west of Hannigan Meadow, and includes portions of Apache and Greenlee Counties. All lands within this unit are managed by the U.S. Forest Service on Apache-Sitgreaves National Forest.

Unit 5 is designated as critical habitat because it was occupied at the time of listing and as a whole, this unit contains PBFs 1, 2, 3, and 5, but PBF 4 is in degraded condition. Crayfish, bullfrogs, and nonnative, spiny-rayed fish are present in some of this unit, and crayfish persist at high densities in the Black River (Lopez 2014d, p. 4; Nowak and Drost 2015, p. 5; Nowak *et al.* 2017, p. 8). Water in the Black River Subbasin is diverted for use at the Morenci Mine, which may affect base flow. Wildfires have burned at both moderate and high severity within the unit and have likely resulted in significant flooding with excessive ash and sediment loads (Lopez 2014d, p. 5). These sediment and ash-laden floods can temporarily reduce populations of both nonnative aquatic predatory species and native prey species for narrow-headed gartersnakes in affected streams. The PBFs in this unit may require special management due to competition with, and predation by, nonnative species that are present in this unit; water diversions; potential for high-intensity wildfires; and human development of areas adjacent to critical habitat.

We have excluded 195 ac (79 ha) of lands owned by the White Mountain Apache and San Carlos Apache Tribes along the Black River, Bear Wallow Creek, and Reservation Creek of the Black River Subbasin Unit (see Consideration of Impacts under Section 4(b)(2) of the Act, below).

Unit 6: Canyon Creek Unit

Unit 6 consists of 204 ac (82 ha) along 5 stream mi (8 km) of Canyon Creek. The Canyon Creek Unit is generally located along the Mogollon Rim in east-central Arizona, and falls within Gila County. The Tonto National Forest manages all lands within this unit.

Unit 6 is designated as critical habitat because it was occupied at the time of listing and as a whole, this unit contains all PBFs. The fish community is primarily native and includes specked dace (*Rhinichthys osculus*), desert sucker (*Catostomus clarkii*), and brown trout (Burger 2015a, p. 4). The PBFs in this unit may require special management due to potential invasion by nonnative aquatic predatory species as well as the potential for high-intensity wildfires.

We have excluded 77 ac (31 ha) of lands owned by the White Mountain Apache Tribe in the Canyon Creek Unit (see Consideration of Impacts under Section 4(b)(2) of the Act, below).

Unit 7: Tonto Creek Subbasin Unit

Unit 7 consists of a total of 2,293 ac (928 ha) in three subunits along 41 stream mi (66 km): 28 stream mi (46 km) of Tonto Creek, 0.7 stream mi (1.2 km) of Houston Creek, and 12 stream mi (19 km) of Haigler Creek. The Tonto Creek Subbasin Unit is generally located southeast of Payson, Arizona, and northeast of the Phoenix metropolitan area, in Gila County. Land ownership or land management within this unit consists of lands managed by the U.S. Forest Service on Tonto National Forest in the Hellsgate Wilderness and privately owned lands.

Unit 7 is designated as critical habitat because it was occupied at the time of listing and as a whole, this unit contains PBFs 1, 2, 3, and 5, but PBF 4 is in degraded condition. The PBFs in this unit may require special management due to competition with, and predation

by, nonnative species that are present in this unit; water diversions; flood-control projects; potential for high-intensity wildfires; and development of areas adjacent to or within critical habitat.

Unit 8: Verde River Subbasin Unit

Unit 8 consists of 3,156 ac (1,277 ha) in three subunits along 58 stream mi (93 km): 27 stream mi (43 km) of Verde River, 24 stream mi (39 km) of Oak Creek, and 7 stream mi (11 km) of West Fork Oak Creek. The Verde River Subbasin Unit is generally located near Perkinsville and Sedona, Arizona, west of Paulden, Arizona, in Coconino and Yavapai Counties. Verde River Subbasin Unit occurs on lands managed by the U.S. Forest Service on Prescott and Coconino National Forests, Arizona State Parks at Redrock State Park, and private entities.

Unit 8 is designated as critical habitat because it was occupied at the time of listing and as a whole, this unit contains PBFs 1, 2, 3, and 5, but PBF 4 is in degraded condition. The PBFs in this unit may require special management due to competition with, and predation by, nonnative species that are present; water diversions; groundwater pumping potentially resulting in drying of habitat; potential for high-intensity wildfires; and human recreation and human development of areas adjacent to critical habitat.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation: (1) If the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action.

In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinitiate consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the narrow-headed gartersnake. Some of these activities may have short-term negative effects to designated critical habitat but may also result in long-term benefits to the gartersnake.

These activities include, but are not limited to:

(1) Actions that would alter the amount, timing, or frequency of flow within a stream or the quantity of available water within aquatic or wetland habitat such that the prey base for the narrow-headed gartersnake, or the gartersnake itself, are appreciably

diminished or threatened with extirpation. Such activities could include, but are not limited to: Water diversions; channelization; construction of any barriers or impediments within the active river channel; removal of flows in excess of those allotted under a given water right; construction of permanent or temporary diversion structures; groundwater pumping within aquifers associated with the river; or dewatering of isolated within-channel pools or stock tanks. These activities could result in the reduction of the distribution or abundance of important gartersnake prey species, as well as reduce the distribution and amount of suitable physical habitat on a regional landscape for the gartersnake itself.

(2) Actions that would significantly increase sediment deposition or scouring within the stream channel or pond that is habitat for the narrow-headed gartersnake, or one or more of their prey species within the range of the narrow-headed gartersnake. Such activities could include, but are not limited to: Livestock grazing that results in erosion contaminating waters; road construction; commercial or urban development; channel alteration; timber harvest; prescribed fires or wildfire suppression; off-road vehicle or recreational use; and other alterations of watersheds and floodplains. These activities could adversely affect the potential for gartersnake prey species to survive or breed. They may also reduce the likelihood that the gartersnake's prey species (*i.e.,* native fish) could move among subpopulations in a functioning metapopulation. This would, in turn, decrease the viability of metapopulations and their component local populations of prey species.

(3) Actions that would alter water chemistry beyond the tolerance limits of a gartersnake prey base. Such activities could include, but are not limited to: Release of chemicals, biological pollutants, or effluents into the surface water or into connected groundwater at a point source or by dispersed release (non-point source); aerial deposition of known toxicants, such as mercury, that are positively correlated to regional exceedances of water quality standards for these toxicants; livestock grazing that results in waters heavily polluted by feces; runoff from agricultural fields; roadside use of salts; aerial pesticide overspray; runoff from mine tailings or other mining activities; and ash flow and fire retardants from fires and fire suppression. These actions could adversely affect the ability of the habitat to support survival and reproduction of gartersnake prey species.

(4) Actions that would remove, diminish, or significantly alter the structural complexity of key natural structural habitat features in and adjacent to aquatic habitat. These features may be organic or inorganic, may be natural or constructed, and include (but are not limited to) boulders and boulder piles, cliff faces, rocks such as river cobble, downed trees or logs, debris jams, small mammal burrows, or leaf litter. Such activities could include, but are not limited to: Construction projects; flood control projects; vegetation management projects; or any project that requires a 404 permit from the U.S. Army Corps of Engineers. These activities could result in a reduction of the amount or distribution of these key habitat features that are important for gartersnake thermoregulation, shelter, protection from predators, and foraging opportunities.

(5) Actions and structures that would physically block movement of gartersnakes or their prey species within or between regionally proximal populations or suitable habitat. Such actions and structures include, but are not limited to: Urban, industrial, or agricultural development; reservoirs stocked with predatory fishes, bullfrogs, or crayfish; highways that do not include reptile and amphibian fencing and culverts; and walls, dams, fences, canals, or other structures that could physically block movement of gartersnakes. These actions and structures could reduce or eliminate immigration and emigration among gartersnake populations, or that of their prey species, reducing the long-term viability of populations.

(6) Actions that would directly or indirectly result in the introduction, spread, or augmentation of predatory nonnative species in gartersnake habitat, or in habitat that is hydrologically connected, even if those segments are occasionally intermittent, or introduction of other species that compete with or prey on the narrow-headed gartersnake or its prey base, or introduce pathogens. Possible actions could include, but are not limited to: Introducing or stocking nonnative, spiny-rayed fishes, bullfrogs, crayfish, or other predators of the prey base of narrow-headed gartersnakes; creating or sustaining a sport fishery that encourages use of nonnative live fish or crayfish as bait; maintaining or operating reservoirs that act as source populations for predatory nonnative species within a watershed; constructing water diversions, canals, or other water conveyances that move water from one place to another and through which inadvertent transport of predatory nonnative species into narrow-headed gartersnake habitat may occur; and moving water, mud, wet equipment, or vehicles from one aquatic site to another, through which inadvertent transport of pathogens may occur. These activities directly or indirectly cause unnatural competition with and predation from nonnative aquatic predators on the narrow-headed gartersnake, leading to reduced recruitment within gartersnake populations and diminishment or extirpation of their prey base.

(7) Actions that would deliberately remove, diminish, or significantly alter the native or nonnative, soft-rayed fish component of the narrow-headed gartersnake prey base within occupied habitat. In general, these actions typically occur in association with fisheries management, such as the application of piscicides in conjunction with fish barrier construction.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. There are no Department of Defense (DoD) lands with a completed INRMP within the final critical habitat designation.

Consideration of Impacts and Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to

exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

On December 18, 2020, we published a final rule in the **Federal Register** (85 FR 82376) revising portions of our regulations concerning excluding areas of critical habitat under section 4(b)(2) of the Act. These final regulations became effective on January 19, 2021, and apply to critical habitat rules for which a proposed rule was published after January 19, 2021. Consequently, these new regulations do not apply to this final rule.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

As discussed below, based on the information provided by entities seeking exclusion, as well as any additional public comments received, we evaluated whether certain lands in the proposed critical habitat were appropriate for exclusion from this final designation pursuant to section 4(b)(2) of the Act. The Act affords a great degree of discretion to the Service in implementing section 4(b)(2). This discretion is applicable to a number of aspects of section 4(b)(2) including whether to enter into the discretionary 4(b)(2) exclusion analysis and the weights assigned to any particular factor used in the analysis. Most significant is that the decision to exclude is always discretionary, as the Act states that the Secretary ''may'' exclude any areas. Under no circumstances is exclusion required under the second sentence of section 4(b)(2). There is no requirement to exclude, or even to enter into a discretionary 4(b)(2) exclusion analysis for any particular area identified as critical habitat. Accordingly, per our discretion, we have only done a full discretionary exclusion analysis when we received clearly articulated and reasoned rationale to exclude the area from this critical habitat designation.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects, we consider our draft economic analysis (DEA) of the critical habitat designation and related factors (IEc 2019, entire). The analysis, dated October 10, 2019, was made available for public review from April 28, 2020, through June 29, 2020 (see 85 FR 23608; April 28, 2020). The DEA addressed probable economic impacts of critical habitat designation for the narrow-headed gartersnake. Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. The DEA was updated in March 2021 to reflect changes made to critical habitat units from the revised proposed rule; however, the total incremental costs are not expected to change (IEc 2021, entire). Additional information relevant to the probable incremental economic impacts of the critical habitat designation for the narrow-headed gartersnake is summarized below and available in the screening analysis for the narrow-headed gartersnake (IEc 2021, entire), available at *http://www.regulations.gov.*

In our IEM, we attempted to clarify the distinction between the effects that will result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the narrow-headed gartersnake's critical habitat. The following specific circumstances help to inform our evaluation: (1) The essential PBFs identified for critical habitat are the same features essential for the life requisites of the species; and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the narrow-headed gartersnake would also likely adversely affect the essential PBFs of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this designation of critical habitat.

The critical habitat designation for the narrow-headed gartersnake totals 23,784 ac (9,625 ha) comprising eight units. Land ownership within critical habitat for the narrow-headed gartersnake in acres is broken down as follows: Federal (74 percent), State (Arizona and New Mexico) (3 percent), and private (23 percent) (see Table 1, above). All units are occupied.

In these areas, any actions that may affect the species would also affect designated critical habitat because the species is so dependent on habitat to fulfill its life-history functions. Therefore, any conservation measures to address impacts to the species would be the same as those to address impacts to critical habitat. Consequently, it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the narrow-headed gartersnake. Further, every unit of critical habitat overlaps with the ranges of a number of currently listed species and designated critical habitats. Therefore, the actual number of section 7 consultations is not expected to increase. The consultation would simply have to consider an additional species or critical habitat unit. While this additional analysis will require time and resources by the Federal action agency, the Service, and third parties, the probable incremental economic impacts of the critical habitat designation are expected to be limited to additional administrative costs and would not be significant (IEc 2021, entire). This is due to all units being occupied by the narrow-headed gartersnake.

Based on consultation history for the gartersnake, the number of future consultations, including technical assistances, is likely to be no more than 21 per year. The additional administrative cost of addressing adverse modification in these consultations is likely to be less than $61,000 in a given year, including costs to the Service, the Federal action agency, and third parties (IEc 2021, p. 14), with approximately $28,000 for formal consultations, $32,000 for informal consultations, and $1,100 for technical assistances. This is based on an individual technical assistance costing $410, informal consultation costing $2,500, and formal consultation

costing $9,600. Therefore, the incremental costs associated with critical habitat are unlikely to exceed $100 million in any single year and, therefore, would not be significant (see Executive Order (E.O.) 12866 Regulatory Planning and Review).

Exclusions Based on Economic Impacts

The Service considered the economic impacts of the critical habitat designation. We are not exercising our discretion to exclude any areas from this designation of critical habitat for the narrow-headed gartersnake based on economic impacts.

Consideration of Impacts on National Security and Homeland Security

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i), because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, it must provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If we conduct an exclusion analysis because the agency provides a reasonably specific justification or because we decide to exercise the discretion to conduct an exclusion analysis, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

Exclusions Based on Impacts on National Security and Homeland Security

We have determined that the lands within the designation of critical habitat for the narrow-headed gartersnake are not owned or managed by DoD or DHS. We did not receive any requests for exclusion based on impacts to national security or homeland security. Therefore, we anticipate no impact on national security or homeland security, and we are not exercising our discretion to exclude any lands based on impacts to national security or homeland security.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. Other relevant impacts may include, but are not limited to, impacts to Tribes, States, local governments, public health and safety, community interests, the environment (such as increased risk of wildfire or pest and invasive species management), Federal lands, and conservation plans, agreements, or partnerships. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the species in the area—such as HCPs, safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs)—or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, public-health, community-interest, environmental, or social impacts that might occur because of the designation.

When analyzing other relevant impacts of including a particular area in a designation of critical habitat, we weigh those impacts relative to the conservation value of the particular area. To determine the conservation value of designating a particular area, we consider a number of factors, including, but not limited to, the additional regulatory benefits that the area would receive due to the protection from destruction or adverse modification as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

In the case of the narrow-headed gartersnake, the benefits of critical habitat include public awareness of the presence of the species and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the gartersnake due to the protection from destruction or adverse modification of critical habitat. Continued implementation of an ongoing management plan that provides conservation equal to or more than the protections that result from a critical habitat designation would reduce those benefits of including that specific area in the critical habitat designation.

Exclusions Based on Other Relevant Impacts

Based on the information provided by entities seeking exclusion, any additional public comments we received, and the best scientific data available, we evaluated whether certain lands in the critical habitat were appropriate for exclusion from this final designation under section 4(b)(2) of the Act. If the analysis indicated that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then we identified those areas for the Secretary to exercise her discretion to exclude the lands from the final designation, unless exclusion would result in extinction.

In the paragraphs below, we provide a detailed balancing analysis of the areas we evaluated for exclusion from critical habitat under section 4(b)(2) of the Act.

Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General

We sometimes exclude specific areas from critical habitat designations based in part on the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat, and may include actions to reduce or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no Service involvement, or in partnership with the Service, sometimes through the permitting process under Section 10 of the Act.

When we undertake a discretionary section 4(b)(2) analysis, we evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary section 4(b)(2) exclusion analysis. A non-exhaustive list of factors that we will consider for non-permitted plans or agreements is shown below (see Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016)). These factors are not required elements of plans or agreements, and all items may not apply to every plan or agreement.

(i) The degree to which the plan or agreement provides for the conservation of the species or the essential physical or biological features (if present) for the species.

(ii) Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented.

(iii) The demonstrated implementation and success of the chosen conservation measures.

(iv) The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.

(v) The extent of public participation in the development of the conservation plan.

(vi) The degree to which there has been agency review and required determinations (*e.g.,* State regulatory requirements), as necessary and appropriate.

(vii) Whether NEPA compliance was required.

(viii) Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

Non-Permitted Conservation Plans, Agreements, or Partnerships

I. Gila River Subunit Within the Upper Gila River Subbasin Unit—Freeport-McMoRan Management Plan

Critical habitat for gartersnakes was identified for the Gila River (563 ac (228 ha)) on Freeport-McMoRan privately owned lands where the narrow-headed gartersnake occurs.

FMC completed their Spikedace and Loach Minnow Management Plan for the Upper Gila River (FMC management plan), including Bear Creek and Mangas Creek in Grant County, New Mexico, in 2011. The FMC management plan was created in response to a proposed rule to designate critical habitat for the spikedace and loach minnow along reaches of the Gila River, Mangas Creek, and Bear Creek (75 FR 66482; October 28, 2010) owned by FMC. Water rights are also included in these land holdings. The majority of these lands are owned by Pacific Western Land Company (PWLC) and included the U-Bar Ranch, which has been managed under a rest-rotation livestock grazing strategy since approximately 1992. The focus of management actions pertaining to spikedace and loach minnow occur along the middle section of the upper Gila River, the perennial portion of Mangas Creek, and lower portion of Bear Creek near the village of Gila within the Gila-Cliff Valley of New Mexico. Collectively and through existing water diversions, these lands and associated water rights support mining operations at the Tyrone Mine as well as livestock operations along the Gila River.

Livestock operations within the U-Bar Ranch consider the needs of the southwestern willow flycatcher and are considered to provide indirect benefits to spikedace and loach minnow under the FMC management plan. For the purposes of this analysis, we reviewed the commitments made in the FMC management plan that pertain to spikedace and loach minnow, not the southwestern willow flycatcher, due to their ecological needs, which more closely overlap those of the narrow-headed gartersnake. In the past, FMC has funded fish surveys within the U-Bar Ranch along the Gila River, as well as Mangas and Bear Creeks. The FMC management plan established a framework for cooperation and coordination with the Service in connection with future resource management activities based on adaptive management principles. FMC lands are closed to public use, which eliminates potential concerns for effects to riparian and streambed habitat from off-highway vehicle use, camping, and hiking. Access to FMC lands are provided for wildlife survey needs.

The FMC management plan also commits to maintaining base flow in the Gila River within its planning area, through a cessation of water diversions at the Bill Evans Reservoir diversion, provided two conditions are met: (1) The Gila River is flowing at less than 25 cubic feet per second (cfs) per day at USGS Gage 09431500, near Redrock, New Mexico (the nearest gage downstream from FMC's point of diversion); and (2) the water level in Bill Evans Reservoir is at least 4,672 ft above sea level. In the event that the first condition is satisfied but the reservoir level is below 4,672 ft above sea level, FMC will confer with NMDGF (which owns Bill Evans Reservoir) regarding temporary curtailment of water diversions. Therefore, maintaining minimum flow in the Gila River is not under the sole discretion of FMC. In the event water use changes become necessary, FMC provides us with notice of any significant changes in its water uses and diversions and will confer about impacts of such changes on spikedace and loach minnow habitat.

FMC has also committed to funding biennial fish surveys and the maintenance of survey locations, fisheries biologists, techniques, and protocols along the lands associated with the Gila River and to providing subsequent data to us. Lastly, FMC committed to make reasonable efforts to coordinate and encourage adjacent landowners, as well as confer with us on opportunities to increase local public awareness, to assist in their conservation management and, when appropriate, assist other landowners to these ends. The FMC management plan considers adaptive management, which includes, if necessary, the development of alternative conservation measures at a total cost of $500,000, for habitat protection. Summarized, the FMC management plan commits to ongoing grazing using rest-rotation at moderate levels, the prohibition of public trespass unless for the purposes of surveys and

monitoring for covered species (the narrow-headed gartersnake is not covered), limiting water diversion withdrawals from the Gila River provided certain criteria are met (dependent upon discretion of a third party), and a commitment to make reasonable efforts to coordinate with other landowners in the area on voluntary implementation of conservation measures.

Benefits of Inclusion—FMC Management Plan

As discussed above under Effects of Critical Habitat Designation, *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. It is possible that in the future, Federal funding or permitting could occur on this privately owned land where a critical habitat designation may benefit narrow-headed gartersnake habitat. The implementation of potential conservation measures or conservation recommendations could provide important benefits to the continued conservation and recovery of the species in this area.

Because the narrow-headed gartersnake occurs in this area, the benefits of a critical habitat designation are reduced to the possible incremental benefit of critical habitat because the designation would not be the sole catalyst for initiating section 7 consultation. However, should a catastrophic event such as disease, drought, wildfire, chemical spill, etc., result in potential or actual extirpation of the gartersnake population in this area, designation of critical habitat will ensure future Federal actions do not result in adverse modification of critical habitat, allowing for future recovery actions to occur.

Another important benefit of including lands in a critical habitat designation is that it can serve to educate landowners, agencies, Tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high value for certain species. Any information about the narrow-headed gartersnake that reaches a wide audience, including parties engaged in conservation activities, is valuable. The designation of critical habitat may also affect the implementation of Federal laws, such as the Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of important sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Despite its benefits to the spikedace and loach minnow, the FMC management plan does not provide adequate conservation of the narrow-headed gartersnake because:

- The management plan does not commit to any conservation measures that directly address the leading threat facing the narrow-headed gartersnake across its range: The presence of predatory nonnative aquatic species.
- Within the FMC management plan area, livestock have sustained access to the riparian corridor, which negatively impacts narrow-headed gartersnakes because gartersnakes require adequate cover for protection from predators and to assist with thermoregulation.
- The decision to change the amount of diverted Gila River water in the event of flows reaching 25 cfs or below are contingent upon an external entity to the FMC management plan and their desires for management of the Bill Evans Reservoir, adding uncertainty to this measure in terms of its implementation.
- Benefits of an unquantifiable and therefore unknown effort associated with enhancing cooperative conservation with adjacent landowners yields high uncertainty pertaining to both implementation of the measure and potential benefits realized by its implementation.

Benefits of Exclusion—FMC Management Plan

One benefit from excluding FMC-owned lands as narrow-headed gartersnake critical habitat is the maintenance and strengthening of ongoing conservation partnerships. FMC has demonstrated a willingness to partner with the Service in conservation planning for several species in Arizona and New Mexico. Examples include becoming a conservation partner in the development and implementation of the Southwestern Willow Flycatcher Recovery Plan, and by solidifying their conservation actions in management plans submitted to us for the southwestern willow flycatcher, and for the spikedace and loach minnow (2007 and 2011). They have also demonstrated a willingness to conserve southwestern willow flycatcher and western yellow-billed cuckoo (*Coccyzus americanus*) habitat at Pinal Creek and to partner with us by exploring the initial stages of a habitat conservation plan.

Our collaborative relationship with FMC in the conservation arena makes a difference in our partnership with the numerous stakeholders involved in aquatic species recovery and management and influences our ability to form partnerships with others. Concerns over perceived, added regulation potentially imposed by critical habitat could harm this collaborative relationship.

Because important areas for gartersnake conservation can occur on private lands, collaborative relationships with private landowners can be important in order to further recovery. The narrow-headed gartersnake and its habitat could benefit in some cases, from voluntary landowner management actions that implement appropriate and effective conservation strategies. Where consistent with the discretion provided by the Act, it is beneficial to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996, pp. 1–15; Bean 2002, pp. 1–7). Thus, it is important for narrow-headed gartersnake conservation to seek out continued conservation partnerships such as these with a proven partner, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities, but who have concerns about incurring incidental regulatory or economic impacts should a Federal nexus occur.

Benefits of Inclusion Outweigh the Benefits of Exclusion—FMC Management Plan

We have determined that the benefits of inclusion of the Gila River on private lands managed by FMC outweigh the benefits of exclusion based on several factors. Above, we outlined several instances where management actions set forth in the plan either do not pertain directly to the needs of narrow-headed gartersnake critical habitat, do not have the necessary assurances that beneficial actions will indeed occur, or provide minimal benefits to gartersnake conservation and recovery in general. However, we will continue to work with FMC in the conservation arena as they are an important partner of the Service in conservation planning for several species in Arizona and New Mexico.

After weighing the benefits of inclusion as narrow-headed gartersnake critical habitat against the benefits of exclusion, we have concluded that the

benefits of including FMC privately owned lands on the Gila River (563 ac (228 ha)) outweigh those that would result from excluding these areas from critical habitat designation. Therefore, we did not exclude these lands from the final designation.

II. Whitewater Creek Subunit—NMDGF's Glenwood State Fish Hatchery Management

Critical habitat for the narrow-headed gartersnake was identified for Whitewater Creek that includes 2.9 ac (1.2 ha) of lands that are part of the Glenwood State Fish Hatchery owned by NMDGF. NMDGF established the Glenwood State Fish Hatchery adjacent to Whitewater Creek in 1938. The hatchery currently raises female sterile rainbow trout (*Oncorhynchus mykiss*) and a renovation to the facility to propagate Gila trout (*O. gilae*) is planned. The portion of Whitewater Creek that flows through the hatchery property is considered dispersal habitat for narrow-headed gartersnakes moving between the Catwalk Recreation Area upstream of the hatchery to the San Francisco River.

We received a comment from NMDGF requesting that this area within the Glenwood State Fish Hatchery be excluded from the final designation of critical habitat. NMDGF's rationale for requesting exclusion was that there are no records of the species within the hatchery boundary and Whitewater Creek is not perennial at the hatchery. NMDGF further explains that the Service's Memorandum for the Intra-Service Section 7 Endangered Species Act Consultation for the Proposed Operation and Maintenance of Hatchery Facilities NM F–66 Project concurred with a ''no effect'' determination for the narrow-headed gartersnake because the snake is not currently present.

In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020), we reviewed narrow-headed gartersnake occupancy to determine that a stream or stream reach was occupied at the time of listing for narrow-headed gartersnake if it is within the historical range of the species, contains PBFs for the species (although the PBFs concerning prey availability and presence of nonnative aquatic predators are often in degraded condition), and has a last known record of occupancy between 1998 and 2019 (see Occupancy Records, 85 FR 23608, p. 23617–23619) (see Criteria Used To Identify Critical Habitat). Although narrow-headed gartersnakes have not been detected at the hatchery, the segment of Whitewater Creek included in the critical habitat designation for the narrow-headed gartersnake, including where the creek flows through the hatchery, meets this definition.

In the revised proposed critical habitat rule (85 FR 23608; April 28, 2020) and this rule, we also define perennial, intermittent, and ephemeral as related to stream flow included in PBF 1 for the narrow-headed gartersnake and clarify the spectrum of stream flow regimes that provide stream habitat for the species based on scientifically accepted stream flow definitions (Levick *et al.* 2008, p. 6; Stromberg *et al.* 2009, p. 330) (see ''Stream Flow'' in 85 FR 23608, April 28, 2020, p. 23613; see also Physical or Biological Features Essential to the Conservation of the Species, below). Although Whitewater Creek is ephemeral at the Glenwood State Fish Hatchery, it is perennial upstream of the hatchery and downstream at its confluence with the San Francisco River, so the entire stream segment meets our definition of critical habitat.

In regard to NMDGF's assertion that the hatchery should not be listed as critical habitat because of the Service's previous concurrence with a ''no effect'' determination under a Section 7 Intra-Service consultation, a critical habitat determination is not synonymous with a determination that an area is occupied for the purposes of a jeopardy analysis under Section 10 of the Act. Under section 7 of the Act, Federal agencies are required to consult with the Service to ensure that the actions they carry out, fund, or authorize are not likely to jeopardize the continued existence of the species, or destroy or adversely modify critical habitat. For a jeopardy or ''take'' analysis, we analyze effects to a species if the species is present in the action area during the time of the action. For an adverse modification analysis, we analyze effects to critical habitat if critical habitat for a species is present in the action area. Therefore, an effect determination is different than a critical habitat designation. A critical habitat determination depends on the best available information at the time of the analysis, and the likely effects and likelihood of take depend on the action under consideration. NMDGF does not have a management plan for the narrow-headed gartersnake at the hatchery, but has stated that if a population became established at the hatchery in the future, they would implement conservation actions such as identifying and protecting hibernacula, foraging sites, and corridors within the limits of hatchery operations; maintaining or improving existing habitat for the species; and conducting regular monitoring of the population (NMDGF 2020, p. 1). Regardless of the absence of narrow-headed gartersnake on a very small portion of Whitewater Creek in the hatchery boundary, as discussed above, Whitewater Creek, including the hatchery property, meets the Service's definition of critical habitat. There are no current management actions set forth that pertain directly to the needs of narrow-headed gartersnake critical habitat, and without a plan we lack the necessary assurances that beneficial actions will occur. We are committed to working with the NMDGF to further narrow-headed gartersnake conservation, and we expect the continuation of our conservation partnership help foster the maintenance and development of narrow-headed gartersnake habitat in the vicinity of the Glenwood State Fish Hatchery.

Under section 4(b)(2) of the Act, we can exclude specific areas from critical habitat designations based in part on the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat, and may include actions to reduce or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. However, there are no current management actions set forth that pertain directly to the needs of narrow-headed gartersnake critical habitat.

With respect to NMDGF's request to exclude the Glenwood State Fish Hatchery along Whitewater Creek, we are not excluding the area from this final rule for the reasons mentioned above. NMDGF has demonstrated a willingness to partner with the Service in conservation planning for several species in New Mexico, including recovery actions for listed fish species that occur in the Gila River subbasin. Our collaborative relationship with NMDGF in the conservation arena makes a difference in our partnership with the numerous stakeholders involved in aquatic species recovery and management, and influences our ability to form partnerships with others, and we will continue to collaborate on conservation efforts now and into the future.

Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act

HCPs for incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and

their habitat. In some cases, HCP permittees agree to do more for the conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

CCAAs and SHAs are voluntary agreements designed to conserve candidate and listed species, respectively, on non-Federal lands. In exchange for actions that contribute to the conservation of species on non-Federal lands, participating property owners are covered by an ''enhancement of survival'' permit under section 10(a)(1)(A) of the Act, which authorizes incidental take of the covered species that may result from implementation of conservation actions, specific land uses, and, in the case of SHAs, the option to return to a baseline condition under the agreements. The Service also provides enrollees assurances that we will not impose further land-, water-, or resource-use restrictions, or require additional commitments of land, water, or finances, beyond those agreed to in the agreements.

When we undertake a discretionary section 4(b)(2) exclusion analysis based on permitted conservation plans such as CCAAs, SHAs, and HCPs, we consider the following three factors:

(i) Whether the permittee is properly implementing the conservation plan or agreement;

(ii) Whether the species for which critical habitat is being designated is a covered species in the conservation plan or agreement; and

(iii) Whether the conservation plan or agreement specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

We are not excluding any areas under private or other non-Federal conservation plans related to permits under section 10 of the Act.

Tribal Lands

Several Executive Orders, Secretarial Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Service to consult with Tribes on a government-to-government basis. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider exclusion of Tribal lands, and give great weight to Tribal concerns in analyzing the benefits of exclusion. However, Tribal concerns are not a factor in determining what areas, in the first instance, meet the definition of ''critical habitat.''

A joint Secretarial Order that applies to both the Service and the National Marine Fisheries Service (NMFS)—Secretarial Order 3206, *American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206)—is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, the Appendix to S.O. 3206 explicitly recognizes the right of Tribes to participate fully in any listing process, including designation of critical habitat. S.O. 3206 also states that critical habitat shall not be designated on Indian lands unless such areas are determined essential to conserve a listed species. In designating critical habitat, the Service and NMFS shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands. In light of this instruction, when we undertake a discretionary section 4(b)(2) exclusion analysis, we will always consider exclusions of Tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and will give great weight to Tribal concerns in analyzing the benefits of exclusion (see Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016)).

However, S.O. 3206 does not preclude us from designating Tribal lands or waters as critical habitat, nor does it state that Tribal lands or waters cannot meet the Act's definition of ''critical habitat.'' We are directed by the Act to identify areas that meet the definition of ''critical habitat'' (*i.e.,* areas occupied at the time of listing that contain the essential PBFs that may require special management or protection and unoccupied areas that are essential to the conservation of a species), without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries' statutory authority. Our Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016) similarly makes clear that while giving great weight to Tribal concerns, such concerns are not a factor in determining what areas, in the first instance, meet the definition of ''critical habitat.''

I. Eagle Creek Unit, Black River Subunit, and Bear Wallow Creek Subunit—San Carlos Apache Tribe Fishery Management Plan

We identified approximately 339 ac (137 ha) of narrow-headed gartersnake critical habitat that occurs on San Carlos Apache Tribe lands within portions of the Eagle Creek Unit (236 ac (96 ha)), Black River Subunit (55 ac (22 ha)), and Bear Wallow Creek Subunit (48 ac (19 ha)).

The San Carlos Apache Tribe manages a land area over 1.8 million ac (≤728,435 ha) in size, ranging in elevation from 2,400 ft (732 m) to 8,000 ft (2,440 m), in the east-central region of Arizona. In 2005, the San Carlos Apache Recreation and Wildlife Department finalized the San Carlos Apache Tribe Fishery Management Plan (SCAT FMP; San Carlos Apache Tribe 2005, entire), which prescribes fisheries management objectives across their reservation. The SCAT FMP addresses both management of nonnative sportfish (a source of revenue for the Tribe) in reservoirs, stock tanks, and streams, but also contains management objectives for native fish. With respect to nonnative sportfish, primary management areas include San Carlos Reservoir, Talkalai Lake, Seneca Lake, Point of Pines Lake, and Dry Lake (San Carlos Apache Tribe 2005, p. 4). Stock tanks of larger size are also managed for sportfish. Approximately 30 stock tanks on the reservation support recreational sport fishing activities. However, erosion and lack of maintenance of these tanks have rendered many tanks too shallow to support this use, and many tanks have gone dry (San Carlos Apache Tribe 2005, p. 5). Approximately 170 miles (273 kilometers) of perennial rivers occur on the reservation where sport fishing is managed, including the Black, Salt, Gila, San Carlos, and Blue Rivers, as well as Eagle, Willow, Bear Wallow, and Bonita Creeks (San Carlos Apache Tribe 2005, pp. 5–6). Of these streams on the reservation, narrow-headed gartersnakes are known to occur along the Black River, Eagle Creek, and Bear Wallow Creek.

In general, natural resource management on the San Carlos Apache Reservation is guided by a collection of resolutions and management plans that cover such topics as wildland fire, forest, and range, including specific management plans for southwestern willow flycatchers and Mexican spotted owls (*Strix occidentalis lucida*) (San Carlos Apache Tribe 2005, p. 50). The

SCAT FMP is tiered off the Tribe's integrated resource management plan, which is further tiered to their strategic plan (San Carlos Apache Tribe 2005, p. 50).

The SCAT FMP ''sets the framework to conserve, enhance, and restore nongame, threatened and endangered native fish and their habitats as part of the overall natural diversity found on the Reservation for the enjoyment by present and future generations'' (San Carlos Apache Tribe 2005, p. 63). The SCAT FMP has six goals relevant to native fish management, each of which has identified objectives, actions, and evaluations (San Carlos Apache Tribe 2005, pp. 63–71).

The first goal is to develop and implement integrated, watershed-based approaches to fishery resource management. The primary objective of this goal is to identify native fish management units within each of the six subbasins on the Reservation and develop initial management recommendations for each management unit (San Carlos Apache Tribe 2005, p. 64). Implementing this objective requires the identification of needs for native fish within each management unit. Evaluation for meeting this objective includes considering which native fish occur and where, developing decision-based criteria, comparing the value of native fish to that of its relative sport fish value, and determining future management recommendations for the best overall use of each management unit (San Carlos Apache Tribe 2005, p. 64).

The second goal under the SCAT FMP is to ''conserve, enhance, and maintain existing native fish populations and their habitats as part of the natural diversity of the Reservation as a home and abiding place for Tribal members'' (San Carlos Apache Tribe 2005, p. 65). Five objectives are identified to implement this goal: Developing a survey program, determining the status of natives fishes within streams on the Reservation and possible corrective actions to improve their status where necessary, prioritizing research needs, developing an ''Adopt a Stream'' program to facilitate monitoring and protection of aquatic and riparian resources, and developing a contingency plan to address catastrophic drought and wildfire events (San Carlos Apache Tribe 2005, p. 67).

The third goal of the SCAT FMP is to restore extirpated fishes and degraded natural habitats when appropriate and economically feasible. To accomplish this goal, the Tribe develops and implements guidelines for reintroduction, translocation, and reestablishment of native fishes and their habitats by completing a needs assessment for native fishes on the Reservation (San Carlos Apache Tribe 2005, pp. 67–68).

The fourth goal of the SCAT FMP is to prevent, minimize, or mitigate adverse impacts to all native fishes, particularly threatened or endangered species, and their habitats when consistent with the Reservations values as a home and abiding place for Tribal members. Five actions are listed to achieve this goal: Participation in section 7 consultations; participation in the Tribal integrated resource management planning process; literature reviews pertaining to best practices and alternative uses; education and demonstrations to benefit Tribal Cattle Association members; and the review and recommendation of land use practices, policies, and plans to minimize adverse impacts to native fish and their habitats (San Carlos Apache Tribe 2005, pp. 68–69).

The fifth goal of the SCAT FMP includes education to increase Tribal awareness of native fish conservation and values through identification of Tribal perceptions and attitudes regarding native fish. A minimum of once per year, the Tribe plans and participates in public workshops that discuss native fish biology, conservation, and management. In addition to these topics, at these workshops the Tribe discusses how to reduce impacts and improve status of native fishes (San Carlos Apache Tribe 2005, pp. 69–70).

The final goal of the SCAT FMP requires the Tribe to pursue funding to support all previously stated goals and objectives outlined in the SCAT FMP (San Carlos Apache Tribe 2005, p. 70).

Benefits of Inclusion—San Carlos Apache Tribe Fishery Management Plan

As discussed above under Effects of Critical Habitat Designation, *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the costs or outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Because the species occurs in Eagle Creek, Black River, and Bear Wallow Creek, the benefits of a critical habitat designation are reduced to the possible incremental benefit of critical habitat because the designation would not be the sole catalyst for initiating section 7 consultation. However, should a catastrophic event such as disease, drought, wildfire, chemical spill, etc., result in potential or statistically-proven, actual extirpation of the gartersnake population in this area, designation of critical habitat would ensure future Federal actions do not result in adverse modification of critical habitat, allowing for future recovery actions to occur.

Were we to designate critical habitat on these Tribal lands, our section 7 consultation history indicates that there may be some, but few, regulatory benefits to the narrow-headed gartersnake. As described above, even with narrow-headed gartersnakes occurring on these Tribal lands, no formal section 7 consultations have yet to occur. When we review future projects addressing the narrow-headed gartersnake pursuant to section 7 of the Act in Arizona, we will examine conservation measures associated with the project for their value in the conservation of narrow-headed gartersnakes or their habitat. Where there is consistency with managing habitat and implementing suitable conservation measures, it would be unlikely that a consultation would result in a determination of adverse modification of critical habitat. Therefore, when the threshold for adverse modification is not reached, only additional conservation recommendations could result from a section 7 consultation, but such measures would be discretionary on the part of the Federal agency.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to inform and educate landowners and the public regarding the potential conservation value of an area, and may help focus management efforts on areas of high value for certain species. The Tribe, through their Recreation and Wildlife Department, surveys all proposed home and construction projects, and provides information from the SCAT FMP for use in negotiating water exchanges and in determining mitigation measures for projects that may impact listed species or their habitat. Therefore, the Recreation and Wildlife Department has an opportunity to provide information regarding the species and its habitat across the Reservation. In addition, the Tribe has

adopted an interdisciplinary team approach to all natural resources matters. The team works together to provide an ecosystem management approach in developing strategic plans and management plans. Through this team, Tribal members can be informed of steps necessary to conserve native fish and their habitat as the prey base for narrow-headed gartersnakes.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as NEPA or the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Therefore, because of the development and implementation of a management plan, ongoing habitat conservation, the rare initiation of formal section 7 consultations, the occurrence of narrow-headed gartersnakes on Tribal lands, and the Service's coordination with Tribes on gartersnake-related issues, it is expected that there may be some, but limited, benefits from including these Tribal lands in a narrow-headed gartersnake critical habitat designation. The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat.

Benefits of Exclusion—San Carlos Apache Tribe Fishery Management Plan

The benefits of excluding San Carlos Apache Tribe lands from designated critical habitat in portions of Eagle Creek, Black River, and Bear Wallow Creek include: (1) Demonstrating our commitment to defer to the Tribe to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the narrow-headed gartersnake and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Tribe to promote conservation of narrow-headed gartersnakes through that of native fish and their habitat, as well as other federally listed species; and (3) promoting continued meaningful collaboration and cooperation in working toward recovering native aquatic communities, including narrow-headed gartersnake habitat.

Because the Tribe is the entity that enforces protective regulations on Tribal trust reservation land, and because we have a working relationship with them, we believe exclusion of these lands will yield a significant partnership benefit. The Tribe is coordinating with the AGFD and the Service on surveys and captive propagation plans for native fish, which furthers conservation of narrow-headed gartersnakes. We continue to work cooperatively with the Tribe on efforts to conserve spikedace and loach minnow on the Reservation, which benefits other native fish as the primary prey base for narrow-headed gartersnakes.

During this rulemaking process, we have communicated with the San Carlos Apache Tribe to discuss how they might be affected by the regulations associated with listing and designating critical habitat for the narrow-headed gartersnake. We have determined that the San Carlos Apache Nation should be the governmental entity to manage and promote narrow-headed gartersnake conservation on their lands. During our coordination efforts with the San Carlos Apache Tribe, we recognized and endorsed their fundamental right to provide for Tribal resource management activities, including those relating to aquatic habitat that supports narrow-headed gartersnakes. As outlined above, the San Carlos Apache Tribe has developed and implemented a fisheries management plan specific to needs of prey and habitat for narrow-headed gartersnakes. Overall, the commitments toward management of narrow-headed gartersnake habitat by the San Carlos Apache Tribe will likely accomplish greater conservation than would be available through a designation of critical habitat.

The designation of critical habitat would be viewed as an intrusion and impact the Tribe's sovereign ability to manage natural resources in accordance with their own policies, customs, and laws. These impacts include, but are not limited to: (1) Limiting the San Carlos Apache Tribe's ability to protect and control its own resources on its lands; (2) undermining the positive and effective government-to-government relationship between the Tribe and the Service—a relationship that serves to protect federally listed species and their habitat; and (3) hampering or confusing the Tribe's own long-standing protections for the Eagle Creek, Black River, and Bear Wallow Creek. The perceived restrictions of a critical habitat designation could have a damaging effect on coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the narrow-headed gartersnake and other species. We view this as a substantial benefit since we have developed a cooperative working relationship with the Tribe for the mutual benefit of the gartersnake and other endangered and threatened species.

In addition, we anticipate that future management plans, including additional conservation efforts for other listed species and their habitats, may be hampered if critical habitat is designated on Tribal lands already being managed for sensitive species conservation. We have determined that many Tribes are willing to work cooperatively with us and others to benefit other listed and sensitive species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntary management actions for other listed species may be compromised if these Tribal lands are designated as critical habitat for the narrow-headed gartersnake. Thus, a benefit of excluding these lands would be future conservation efforts that would benefit other listed or sensitive species.

Benefits of Exclusion Outweigh the Benefits of Inclusion—San Carlos Apache Tribe Fishery Management Plan

The benefits of including San Carlos Apache Tribal lands in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7, the consideration of the need to avoid adverse modification of critical habitat, and interagency and educational awareness. However, due to the rarity of Federal actions resulting in formal section 7 consultations, the benefits of a critical habitat designation are minimized. In addition, the benefits of consultation are further minimized because any conservation measures that may have resulted from consultation are already provided through the conservation benefits to the narrow-headed gartersnake and its habitat from implementation of the SCAT FMP.

The Tribe has indicated a commitment to traditional ecological knowledge (TEK), which uses an ecosystem-based approach to land and species management and preservation. In addition, they have developed the Fisheries Management Plan, which benefits spikedace and loach minnow specifically and, by extension, all native fish, by discontinuing nonnative fish stocking in areas important for their conservation. Further, the Tribe is working with both the Service and the AGFD to these ends.

The Tribe has focused on known areas of concern for the species' management and has discontinued stocking of nonnative fishes in some areas, including the Eagle Creek watershed. The Fisheries Management Plan contains goals of conserving and enhancing native fishes on the Reservation; restoring native fishes and their habitats; and preventing, minimizing, or mitigating impacts to native fishes, among others. In addition, the Tribe has indicated that, through TEK, they practice an ecosystem-based approach to land- and species-based management and preservation. We conclude that the benefits to be gained through the Fisheries Management Plan, coordination with the Service and AGFD, discontinuance of sportfish stocking, and proactive measures for native fish all indicate that the Tribe has committed to conservation measures that exceed benefits to be gained through a critical habitat designation. Collectively, these measures help secure native fish communities on the Reservation, which are critical to the continued survival of the narrow-headed gartersnake. As a result, we have determined that the benefits of excluding these Tribal lands from critical habitat designation outweigh the benefits of including these areas.

Exclusion Will Not Result in Extinction of the Species—San Carlos Apache Tribe Fisheries Management Plan

We have determined that exclusion of San Carlos Apache Tribe lands from the critical habitat designation will not result in the extinction of the narrow-headed gartersnake. We base this determination on several points. First, as discussed above under Effects of Critical Habitat Designation, *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of narrow-headed gartersnakes would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Second, the San Carlos Apache Tribe has a long-term record of conserving species and habitat and is committed to protecting and managing narrow-headed gartersnake habitat according to their cultural history, management plans, and natural resource management objectives. We have determined that this commitment accomplishes greater conservation than would be available through a designation of critical habitat. For these reasons, we have determined that our working relationships with the Tribe would be better maintained if we excluded their lands from the designation of narrow-headed gartersnake critical habitat. With the implementation of these conservation measures, based upon strategies developed in the SCAT FMP, we have concluded that the benefits of excluding the San Carlos Apache Tribe lands outweigh the benefits of their inclusion, and the exclusion of these lands from the designation will not result in the extinction of the species. As a result, we are excluding San Carlos Apache Tribe lands within the Eagle Creek Unit (236 ac (96 ha)), Black River Subunit (55 ac (22 ha)), and Bear Wallow Creek Subunit (48 ac (19 ha)).

II. Canyon Creek Unit, and Black River, Bear Wallow Creek, and Reservation Creek Subunits—White Mountain Apache Tribe Native Fishes Management Plan

We identified approximately 169 ac (68 ha) of narrow-headed gartersnake critical habitat that occurs on White Mountain Apache Tribe lands within portions of the Black River Subunit (56 ac (23 ha)), Bear Wallow Creek Subunit (<0.01 ac (<0.01 ha)), Reservation Creek Subunit (36 ac (15 ha)), and Canyon Creek Unit (77 ac (31 ha)).

The White Mountain Apache Tribe's Fort Apache Indian Reservation encompasses approximately 1,680,000 acres in east-central Arizona, ranging in elevation from 11,590 to 2,640 ft (White Mountain Apache Tribe 2014, p. 1). A total of 23 artificial reservoirs were created on the Reservation to provide recreational opportunities such as fishing, boating, and camping permits (White Mountain Apache Tribe 2014, p. 1). The White Mountain Apache Tribe Native Fishes Management Plan (WMAT NFMP) identified native fish species that are historically known from the Reservation and provides available information on their current status and distribution. The WMAT NFMP also identified significant stressors to native fish, which include dewatering, sedimentation, mechanical stream channel alteration, and interactions with nonnative aquatic species. The WMAT NFMP lists guidance- and direction-related documents, management plans, ordinances and codes, and Tribal resolutions that help address these issues and many others which could affect natural resources on the Reservation and are currently in effect (White Mountain Apache Tribe 2014, pp. 11–15). These guidance documents include the Tribe's 2000 Loach Minnow Management Plan and Resolution #89–149, which designates streams and riparian zones as Sensitive Fish and Wildlife areas, requiring that authorized programs ensure these zones remain productive for fish and wildlife.

The primary purpose of the WMAT NFMP is to ''promote the practical and effective long-term conservation of all native fish populations and their habitats found on the Reservation'' (White Mountain Apache Tribe 2014, p. 19). The WMAT NFMP ''sets the framework to conserve, enhance, and if possible, restore non-game, threatened and endangered native fish and their habitats as part of the overall natural diversity found on the Reservation for the enjoyment of present and future generations of Apache people'' (White Mountain Apache Tribe 2014, p. 19). To accomplish this, four primary goals are set forth in the WMAT NFMP.

The first goal of the WMAT NFMP is to conserve and maintain existing native fish populations and their habitats as part of the natural diversity of the Reservation when consistent with the Reservation as a homeland for White Mountain Apache Tribal members (White Mountain Apache Tribe 2014, p. 20). To accomplish this, via literature review and expert consultation, the Tribe developed a protocol for standardized sampling and data analysis specific to the inventory, survey, population modeling, monitoring, and other management techniques for all native fishes and their habitats. This protocol will be used to determine the current distribution and relative abundance of all native fishes and their habitats, with an emphasis on rare or sensitive species in order to identify native fish management units within each of the watersheds on the Reservation to develop initial management recommendations for each (White Mountain Apache Tribe 2014, p. 20). The Tribe has also committed to updating the Loach Minnow Management Plan as well as follow the management strategies in the Apache Trout Recovery Plan. These actions will help develop research needs and implement research in the field. Under this first goal, the Tribe also intends to develop an ''Adopt-a-Lake/Stream'' program, where Tribal members volunteer to help monitor and protect aquatic riparian resources (White Mountain Apache Tribe 2014, p. 23).

The second goal of the WMAT NFMP is to enhance native fish populations and degraded natural habitats when appropriate and economically feasible by: (1) Developing guidelines for enhancing native fish populations and their habitats; (2) investigating available funding opportunities and requirements to support all Tribal conservation and management activities for all native fishes, their habitats, and other listed

aquatic and riparian obligate species and their habitats; (3) developing proposals to secure funding necessary to continue conservation and management activities that will benefit all existing native fishes, their habitats, and other listed aquatic and riparian obligate species and their habitats; and (4) restoring and enhancing native fish habitats and populations according to guidance developed (White Mountain Apache Tribe 2014, pp. 24–25).

The third goal of the WMAT NFMP is to prevent, minimize, or mitigate adverse impacts to all native fishes, especially threatened or endangered, and their habitats when consistent with the purpose of the Reservation as a permanent homeland for White Mountain Apache Tribal members by: (1) Identifying species and habitat types that are declining or imperiled, or likely to become imperiled, in the foreseeable future and the threats causing decline; (2) identifying possible corrective actions needed to limit or mitigate adverse impacts to native fish and their habitats where appropriate and economically feasible, including consideration of threats and mitigation measures to multiple listed candidate or proposed aquatic or riparian obligate species; and (3) collaborating with others to maintain or enhance native fish populations and their habitats or prevent avoidable and mitigate unavoidable losses (White Mountain Apache Tribe 2014, pp. 25–27).

The fourth and final goal of the WMAT NFMP focuses on increasing Tribal awareness of native fish conservation and values. The WMAT NFMP proposes to accomplish this by: (1) Identifying Tribal perceptions and attitudes regarding nongame, threatened, and endangered native fishes; (2) annually developing, sponsoring, and participating in educational workshops and presentations pertaining to the biology, conservation, and management of nongame, threatened, or endangered native fishes and their habitats; and (3) informing the Tribe of the status of nongame, threatened, and endangered native fishes and threats to their protection and maintenance, and Tribal actions to reduce or eliminate such adverse impacts (White Mountain Apache Tribe 2014, pp. 28–29).

The White Mountain Apache Tribe has a process to review and approve all development activities on the Reservation. The Tribal Plan and Project Review Panel, among other things, investigates impacts to sensitive habitats and species, and provides for the implementation of mitigation measures to avoid adverse impacts to those resources. To assist, the White Mountain Apache Tribe has a full-time Sensitive Species Coordinator and Technician who coordinates and participates in protection, research, management, and administrative activities involving Federally listed sensitive species on the Reservation.

The White Mountain Apache Tribe's Loach Minnow Management Plan also provides transitory benefits to narrow-headed gartersnake conservation. The goals of the Loach Minnow Management Plan are to determine and quantify the full extent of loach minnow distribution on the Reservation; continue to develop and strengthen management actions that effectively address species threats and that provide adequate protection for, and sustainability of, existing Reservation loach minnow populations and habitats; complete the development and ongoing maintenance of Tribal data, information, and mapping for this and other native fish species; and evaluate and refine the application of Plan management practices, over time, in a manner that promotes the practical and effective long-term conservation of all Reservation native fish populations and assemblages, including those of loach minnow (White Mountain Apache Tribe 2000).

The Loach Minnow Management Plan provides an action and strategy outline with eight steps that provide additional detail on how they will be carried out. The eight steps of the management plan that may affect PBFs of the narrow-headed gartersnake include:

- Determining the distribution of loach minnow within Reservation boundaries;
- Continuing routine surveys and expanding efforts to include habitat assessment;
- Continuing to monitor and refine existing management treatments involving irrigation uses and activities to develop adequate mitigation against related threats;
- Continuing to apply and refine existing monitoring and mitigation protocols involving low water and/or drought conditions to provide sustainable protection of loach minnow populations;
- Developing contingency plans with responses to potential catastrophic events;
- Evaluating and refining existing nonnative fish management and mitigation practices to provide sustainable protection of loach minnow populations and habitat;
- Organizing data collection, handling, storage, and maintenance among partners; and
- Continuing to monitor and refine existing Tribal Plan and Project Review Process, management plans, and practices to meet loach minnow and native fish management goals.

Benefits of Inclusion—White Mountain Apache Tribe Native Fishes Management Plan

As discussed above under Effects of Critical Habitat Designation, *Section 7 Consultation,* Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the costs or outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit of critical habitat. A critical habitat designation requires Federal agencies to consult on whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Because the species occurs in the area, the benefits of a critical habitat designation are reduced to the possible incremental benefit of critical habitat because the designation would not be the sole catalyst for initiating section 7 consultation. However, should a catastrophic event such as disease, drought, wildfire, chemical spill, etc., result in potential or statistically-proven, actual extirpation of the gartersnake population in this area, designation of critical habitat would ensure future Federal actions do not result in adverse modification of critical habitat, allowing for future recovery actions to occur.

Were we to designate critical habitat on these Tribal lands, our section 7 consultation history indicates that there may be some, but few, regulatory benefits to the narrow-headed gartersnake. As described above, even with narrow-headed gartersnakes occurring on these Tribal lands, formal section 7 consultations have yet to occur. When we review future projects addressing the narrow-headed gartersnake pursuant to section 7 of the Act in Arizona, we examine conservation measures associated with the project for their value in the conservation of narrow-headed gartersnakes or their habitat. Where there is consistency with managing habitat and implementing suitable conservation measures, it would be unlikely that a consultation would result in a determination of adverse modification of critical habitat. Therefore, when the threshold for

adverse modification is not reached, only additional conservation recommendations could result from a section 7 consultation, but such measures would be discretionary on the part of the Federal agency.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to inform and educate landowners and the public regarding the potential conservation value of an area, and may help focus management efforts on areas of high value for certain species. The White Mountain Apache Tribe has developed management plans for the loach minnow and native fish in general, and currently employs a Sensitive Species Coordinator through which education of Tribal members can occur without critical habitat designation. In addition, Tribal fisheries biologists participate in review of development projects and timber sales and can work to educate project proponents of the species' needs.

Another possible benefit of the designation of critical habitat is that it may also affect the implementation of Federal laws, such as NEPA or the Clean Water Act. These laws require analysis of the potential for proposed projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Therefore, because of the development and implementation of a native fish management plan, ongoing habitat conservation, the rare initiation of formal section 7 consultations, the occurrence of narrow-headed gartersnakes on Tribal lands, and the Service's coordination with Tribes on gartersnake-related issues, it is expected that there may be some, but limited, benefits from including these Tribal lands in a narrow-headed gartersnake critical habitat designation. The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat.

Benefits of Exclusion—White Mountain Apache Tribe Native Fishes Management Plan

The benefits of excluding White Mountain Apache Tribe lands from designated critical habitat in portions of Black River, Bear Wallow Creek, and Reservation Creek subunits, and in Canyon Creek Unit include: (1) Our deference to the Tribe to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the narrow-headed gartersnake and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationships with the Tribe to promote conservation of narrow-headed gartersnakes through that of native fish and their habitat, as well as other federally listed species; and (3) promoting continued meaningful collaboration and cooperation in working toward recovering native aquatic communities, including narrow-headed gartersnake habitat.

Taken individually or collectively, the White Mountain Apache Tribe's commitments to the conservation of riparian and aquatic habitats and the native fishes that depend on them offers a strong foundation for future conservation of the narrow-headed gartersnake. As we have carefully detailed in this and previous rulemakings pertaining to the narrow-headed gartersnake, the protection, conservation, and recovery of native fish communities is of utmost importance to the continued existence of the narrow-headed gartersnake because this species is a predatory specialist which preys only on fish. Therefore, the conservation of native fish communities will provide the suite of protections required to sustain its prey base and maintain gartersnake populations on the Reservation and elsewhere such protections are afforded.

During this rulemaking process, we have communicated with the White Mountain Apache Tribe to discuss how they might be affected by the regulations associated with listing and designating critical habitat for the narrow-headed gartersnake. We have determined that the White Mountain Apache Tribe should be the governmental entity to manage and promote narrow-headed gartersnake conservation on their lands. During our coordination efforts with the White Mountain Apache Tribe, we recognized and endorsed their fundamental right to provide for Tribal resource management activities, including those relating to aquatic habitat that supports narrow-headed gartersnakes. As outlined above, the White Mountain Apache Tribe has developed and implemented a native fishes management plan specific to needs of prey and habitat for narrow-headed gartersnakes. Overall, the commitments toward management of narrow-headed gartersnake habitat by the White Mountain Apache Tribe will likely accomplish greater conservation than would be available through a designation of critical habitat.

The designation of critical habitat would be viewed as an intrusion and impact their sovereign abilities to manage natural resources in accordance with the Tribe's own policies, customs, and laws. These impacts include, but are not limited to: (1) Limiting the White Mountain Apache Tribe's ability to protect and control its own resources on its lands; (2) undermining the positive and effective government-to-government relationship between the Tribe and the Service—a relationship that serves to protect federally listed species and their habitat; and (3) hampering or confusing the Tribe's own long-standing protections for the Black River, Reservation Creek, Bear Wallow Creek, and Canyon Creek. The perceived restrictions of a critical habitat designation could have a damaging effect on coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the narrow-headed gartersnake and other species. Our working relationships with the Tribe would be better maintained if we excluded their lands from the designation of narrow-headed gartersnake critical habitat. We view this as a substantial benefit since we have developed a cooperative working relationship with the White Mountain Apache Tribe for the mutual benefit of the narrow-headed gartersnake and other endangered and threatened species.

Benefits of Exclusion Outweigh the Benefits of Inclusion—White Mountain Apache Tribe Native Fishes Management Plan

The benefits of including White Mountain Apache Tribal lands in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7, the consideration of the need to avoid adverse modification of critical habitat, and interagency and educational awareness. However, due to the rarity of Federal actions resulting in formal section 7 consultations, the benefits of a critical habitat designation are minimized. In addition, the benefits of consultation are further minimized because any conservation measures that may have resulted from consultation are already provided through the conservation benefits to the narrow-headed gartersnake and its habitat from implementation of the White Mountain Apache Tribe Native Fishes Management Plan.

The White Mountain Apache Tribe clearly explained their sovereign

authority to promulgate regulations and management plans to protect and manage Tribal trust lands, wildlife, forests, and other natural resources, and cited numerous authorities that confirm their authority over wildlife and other natural resources existing within their ancestral lands. In addition, they have shown a commitment to other federally listed species, such as the loach minnow and Mexican spotted owl.

Based on our working relationship with the White Mountain Apache Tribe, their demonstration of conservation through past efforts, and the protective provisions of the WMAT NFMP and Loach Minnow Management Plan, we have determined that the benefits of excluding these Tribal lands from critical habitat designation outweigh the benefits of including these areas.

Exclusion Will Not Result in Extinction of the Species—White Mountain Apache Tribe Native Fishes Management Plan

We have determined that exclusion of White Mountain Apache Tribe lands from the critical habitat designation will not result in the extinction of the narrow-headed gartersnake. We base this determination on several points. First, as discussed above under Effects of Critical Habitat Designation, *Section 7 Consultation,* if a Federal action or permitting occurs, the known presence of narrow-headed gartersnakes would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the species against extinction. Second, the White Mountain Apache Tribe has a long-term record of conserving species and habitat and is committed to protecting and managing narrow-headed gartersnake habitat according to their cultural history, management plans, and natural resource management objectives. We have determined that this commitment accomplishes greater conservation than would be available through a designation of critical habitat. With the implementation of these conservation measures, based upon strategies developed in the WMAT NFMP and Loach Minnow Management Plan, we have determined that the benefits of excluding the White Mountain Apache Tribe lands outweigh the benefits of their inclusion, and the exclusion of these lands from the designation will not result in the extinction of the species. As a result, we are excluding White Mountain Apache Tribe lands within the Black River Subunit (56 ac (23 ha)), Bear Wallow Creek Subunit (<0.01 ac (<0.01 ha)), Reservation Creek Subunit (36 ac (15 ha)), and Canyon Creek Unit (77 ac (31 ha)).

Summary of Exclusions Under 4(b)(2) of the Act

Table 2 below presents areas of lands that meet the definition of critical habitat but for which we are excluding from this final critical habitat designation for the narrow-headed gartersnake.

TABLE 2—AREAS EXCLUDED FROM CRITICAL HABITAT DESIGNATION BY CRITICAL HABITAT UNIT FOR THE NARROW-HEADED GARTERSNAKE

Unit subunit	Landowner, property name	Proposed critical habitat (ac (ha))	Area excluded (ac (ha))	Final critical habitat (ac (ha))
Eagle Creek Unit				
Eagle Creek	San Carlos Apache Tribe	336 (136)	236 (96)	100 (41)
Unit total being excluded			236 (96)	
Black River Subbasin Unit				
Black River	San Carlos Apache Tribe	763 (309)	55 (22)	652 (264)
	White Mountain Apache Tribe		56 (23).	
Bear Wallow Creek	San Carlos Apache Tribe	174 (71)	48 (19)	126 (51)
	White Mountain Apache Tribe		<.01 (<.01)	
Reservation Creek	White Mountain Apache Tribe	132 (54)	36 (15)	96 (39)
Unit total being excluded			195 (79)	
Canyon Creek Unit				
Canyon Creek	White Mountain Apache Tribe	232 (94)	77 (31)	155 (63)
Unit total being excluded			77 (31)	
Grand Total			508 (206).	

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

Executive Order 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 executive order 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.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that

describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate only the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities will be directly regulated by this rulemaking, the Service certifies that this final critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this final critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we did not find that this critical habitat designation will significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because the lands being designated for critical habitat are owned by private landowners, the States of New Mexico and Arizona, and the Federal Government (USFS, NPS, BLM, and Service). In addition, based in part on an analysis conducted for the previous proposed designation of critical habitat and extrapolated to this designation, we do not expect this rule to significantly or uniquely affect small governments. Small governments will be affected only to the extent that any

programs or actions requiring or using Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. Further, we do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the narrow-headed gartersnake in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes this designation of critical habitat for the narrow-headed gartersnake does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the final rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The final designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act will be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this rule identifies the physical or biological features essential to the conservation of the narrow-headed gartersnake. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

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 NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, when the range of the species includes States within the Tenth Circuit, such as that of the narrow-headed gartersnake, under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis for critical habitat designation.

We performed the NEPA analysis, and the draft environmental assessment was made available for public comment with publication of the revised proposed critical habitat designation (85 FR 23608; April 28, 2020). We invited the public to comment on the extent to which the proposed critical habitat designation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We received five comments during the comment period for the environmental assessment. Our environmental assessment found that the impacts of the revised proposed critical habitat designation would be minor and not rise to a significant level, so preparation of an environmental impact statement is not required. The final environmental assessment and finding of no significant impact has been completed and is available for review with the publication of this final rule. You may obtain a copy of the final environmental assessment online at *http://www.regulations.gov,* by contacting the Field Supervisor of the (see **FOR FURTHER INFORMATION CONTACT**), or on the Service's website at *https://www.fws.gov/southwest/es/arizona/.*

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. We directly contacted GRIC, the White Mountain Apache Tribe, and the San Carlos Apache Tribe during the rulemaking process. We will continue to work on a government-to-government basis with Tribal entities on conservation of habitat after the designation of critical habitat for the narrow-headed gartersnake.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* and upon request from the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Arizona Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we 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 § 17.11(h), the List of Endangered and Threatened Wildlife, by revising the entry for ''Gartersnake, narrow-headed'' under REPTILES to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
REPTILES				
*	*	*	*	*
Gartersnake, narrow-headed	*Thamnophis rufipunctatus*	Wherever found	T	79 FR 38678, 7/8/2014; 50 CFR 17.95(c).[CH]
*	*	*	*	*

■ 3. Amend § 17.95(c) by adding an entry for ''Narrow-headed Gartersnake (*Thamnophis rufipunctatus*)'' immediately following the entry for ''American Crocodile (*Crocodylus acutus*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(c) * * *

* * * * *

Narrow-headed Gartersnake (*Thamnophis rufipunctatus*)

(1) Critical habitat units are depicted for Greenlee, Apache, Yavapai, Gila, and Coconino Counties in Arizona, as well as in Grant, Hidalgo, and Catron Counties in New Mexico, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of narrow-headed gartersnake consist of the following components:

(i) Perennial streams or spatially intermittent streams that provide both aquatic and terrestrial habitat that allows for immigration, emigration, and maintenance of population connectivity of narrow-headed gartersnakes and contain:

(A) Pools, riffles, and cobble and boulder substrate, with a low amount of fine sediment and substrate embeddedness;

(B) Organic and natural inorganic structural features (*e.g.,* cobble bars, rock piles, large boulders, logs or stumps, aquatic vegetation, vegetated islands, logs, and debris jams) in the stream channel for basking, thermoregulation, shelter, prey base maintenance, and protection from predators;

(C) Water quality that meets or exceeds applicable State surface water quality standards; and

(D) Terrestrial habitat up to 328 feet (100 meters) from the active stream channel (water's edge) that includes flood debris, rock piles, and rock walls containing cracks and crevices, small mammal burrows, downed woody debris, and streamside vegetation (*e.g.,* alder, willow, sedges, and shrubs) for thermoregulation, shelter, brumation and protection from predators throughout the year.

(ii) Hydrologic processes that maintain aquatic and riparian habitat through:

(A) A natural flow regime that allows for periodic flooding, or if flows are modified or regulated, a flow regime that allows for the movement of water, sediment, nutrients, and debris through the stream network, as well as maintenance of native fish populations; and

(B) Physical hydrologic and geomorphic connection between the active stream channel and its adjacent terrestrial areas.

(iii) A combination of native fishes, and soft-rayed, nonnative fish species such that prey availability occurs across seasons and years.

(iv) An absence of nonnative aquatic predators, such as fish species of the families Centrarchidae and Ictaluridae, American bullfrogs (*Lithobates catesbeianus*), and/or crayfish (*Orconectes virilis, Procambarus clarki,* etc.), or occurrence of these nonnative species at low enough levels such that recruitment of narrow-headed gartersnakes is not inhibited and maintenance of viable prey populations is still occurring.

(v) Elevations of 2,300 to 8,200 feet (700 to 2,500 meters).

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on November 22, 2021.

(4) Data layers defining map units were created using the U.S. Geological Survey's 7.5' quadrangles, National Hydrography Dataset and National Elevation Dataset; the Service's National Wetlands Inventory dataset; and aerial imagery from Google Earth Pro. Line locations for lotic streams (flowing water) and drainages are depicted as the ''Flowline'' feature class from the National Hydrography Dataset geodatabase. The active channel along a stream is depicted as the ''Wetlands'' feature class from the Service's National Wetlands Inventory dataset. Any discrepancies between the ''Flowline'' and ''Wetlands'' feature classes were resolved using aerial imagery from Google Earth Pro. Elevation range is masked using the ''Elev_Contour'' feature class of the National Elevation Dataset. The administrative boundaries for Arizona and New Mexico were obtained from the Arizona Land Resource Information Service and New Mexico Resource Geographic Information System, respectively. This includes the most current (as of November 22, 2021) geospatial data available for land ownership, counties, States, and streets. Locations depicting critical habitat are expressed as decimal degree latitude and longitude in the World Geographic Coordinate System projection using the 1984 datum (WGS84). The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *http://www.fws.gov/southwest/es/arizona/,* at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0011, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Note: Index map follows:

Figure 1 to Narrow-headed Gartersnake paragraph (5)

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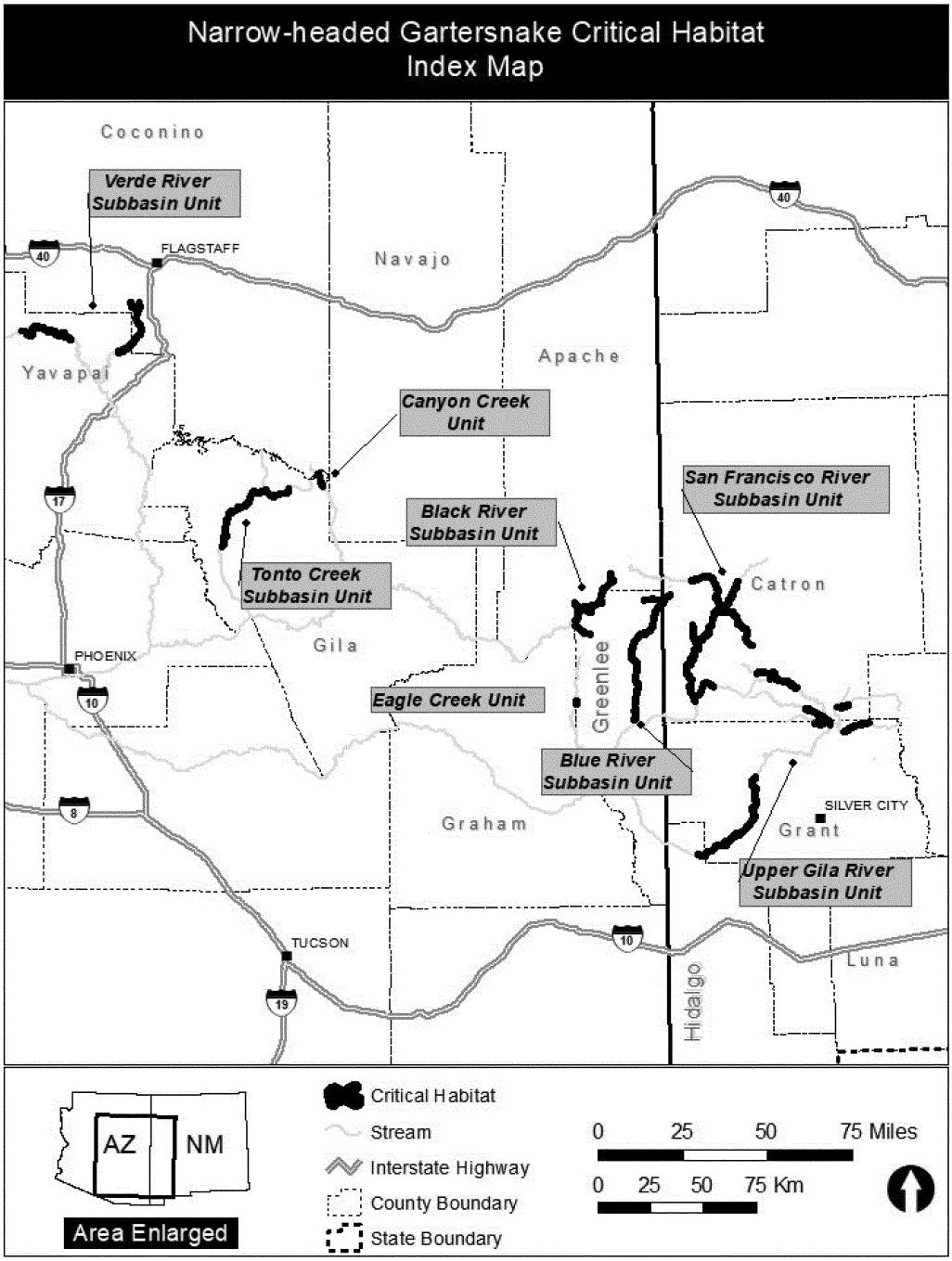
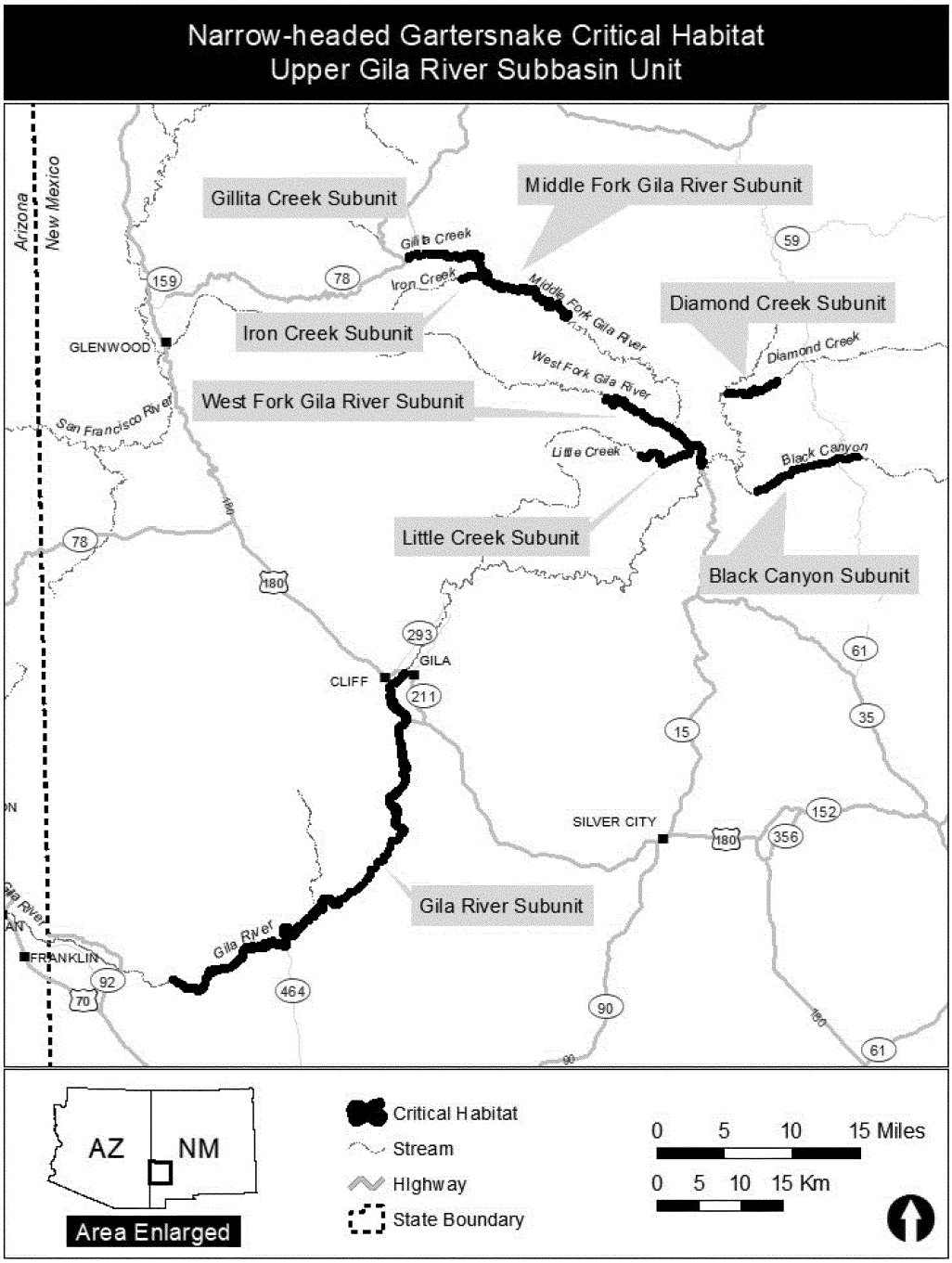


(6) Unit 1: Upper Gila River Subbasin Unit, Grant and Hidalgo Counties, New Mexico.

(i) Unit 1 consists of 7,005 acres (ac) (2,835 hectares (ha)) in Grant and Hidalgo Counties, and is composed of lands in Federal (4,084 ac (1,653 ha)), State (553 ac (224 ha)), and private (2,368 ac (958 ha)) ownership in eight subunits west of the town of Glenwood, north of Silver City, and South of Gila and Cliff.

(ii) Map of Unit 1 follows:

Figure 2 to Narrow-headed Gartersnake paragraph (6)(ii)

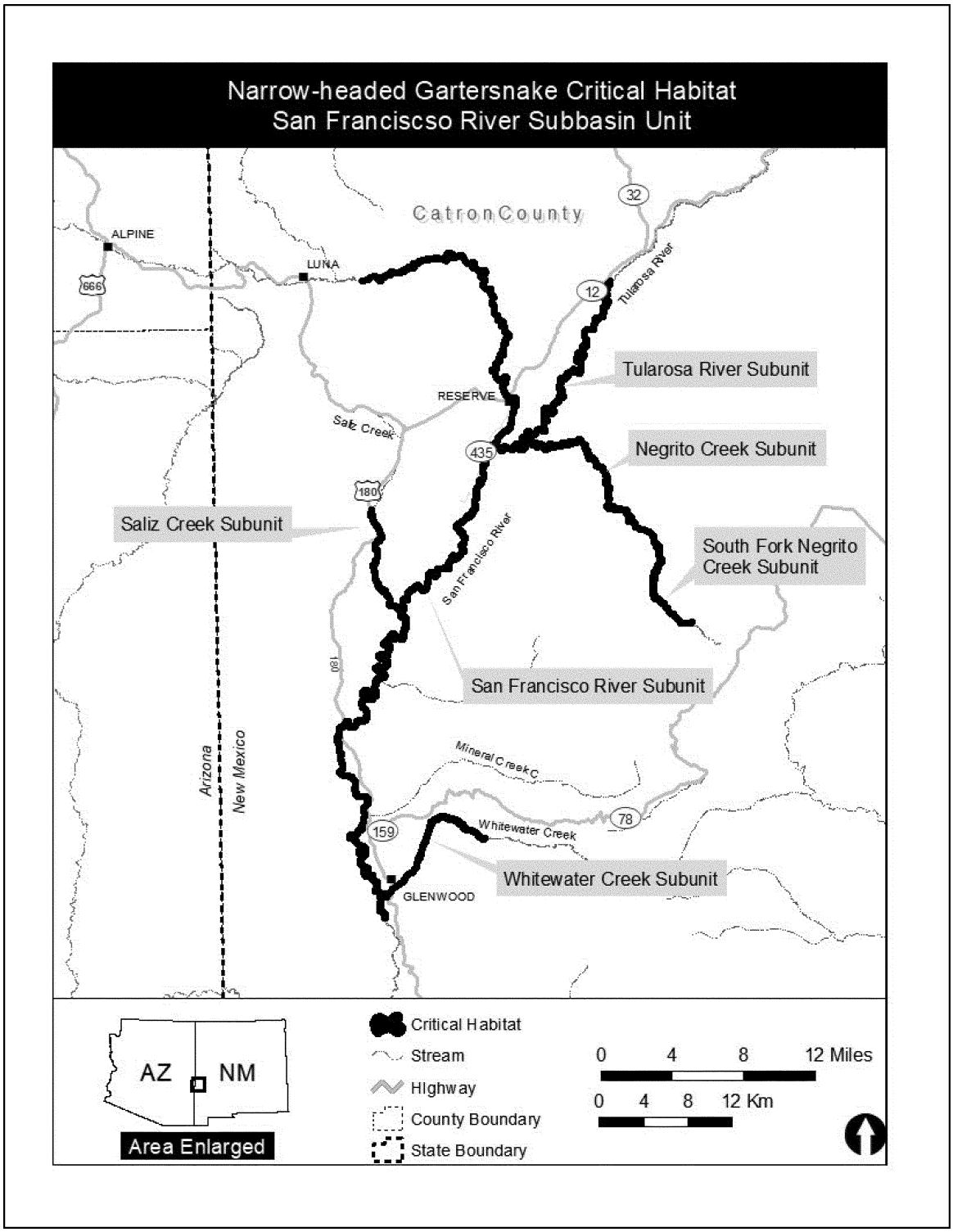


(7) Unit 2: San Francisco River Subbasin Unit, Catron County, New Mexico.

(i) Unit 2 consists of 5,895 ac (2,386 ha) in Catron County, and is composed of lands in Federal (3,924 ac (1,588 ha)), State (3 ac (1 ha)), and private (1,967 ac (796 ha)) ownership in six subunits near the towns of Glenwood and Reserve.

(ii) Map of Unit 2 follows:

Figure 3 to Narrow-headed Gartersnake paragraph (7)(ii)

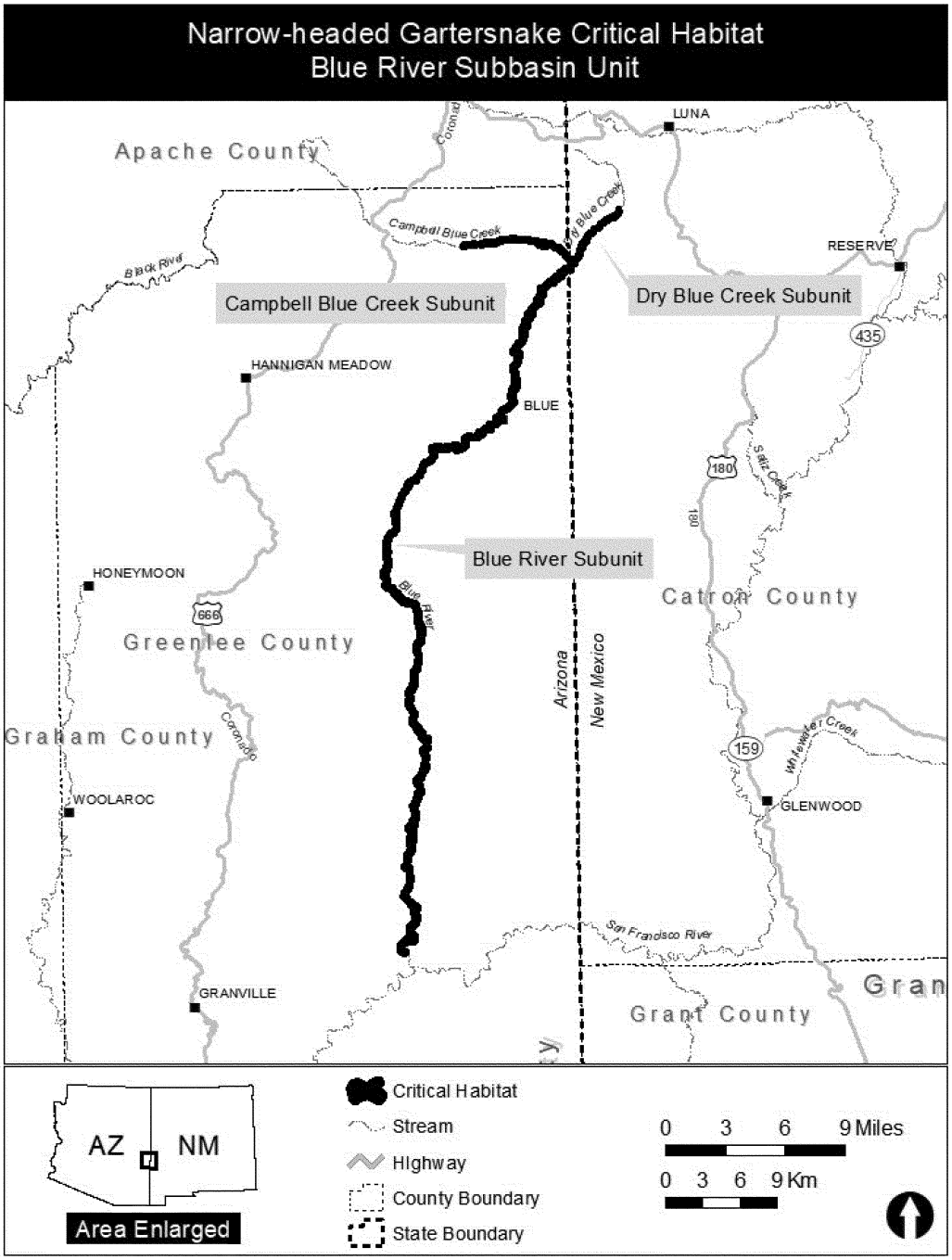


(8) Unit 3: Blue River Subbasin Unit, Greenlee County, Arizona, and Catron County, New Mexico.

(i) Unit 3 consists 3,368 ac (1,363 ha) in Greenlee County, Arizona, and Catron County, New Mexico, and is composed of lands in Federal (2,918 ac (1,181 ha)) and private (450 ac (182 ha)) ownership in three subunits near the towns of Blue, Arizona, and Luna, New Mexico.

(ii) Map of Unit 3 follows:

Figure 4 to Narrow-headed Gartersnake paragraph (8)(ii)

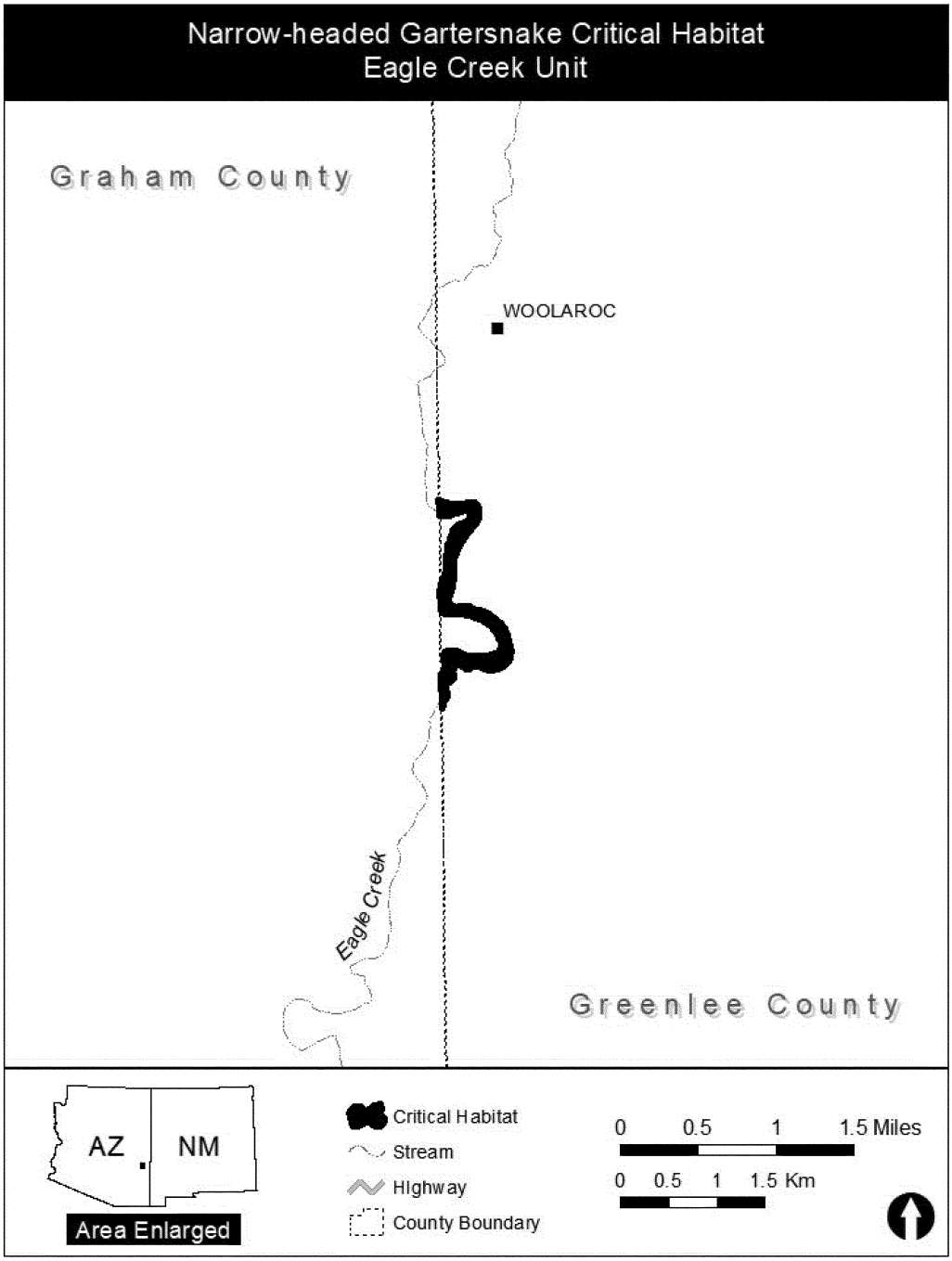


(9) Unit 4: Eagle Creek Unit, Greenlee County, Arizona.

(i) Unit 4 consists of 84 ac (34 ha) in Greenlee County, and is composed of lands in Federal (84 ac (34 ha)) and private (1 ac (<1 ha)) ownership near the town of Woolaroc.

(ii) Map of Unit 4 follows:

Figure 5 to Narrow-headed Gartersnake paragraph (9)(ii)

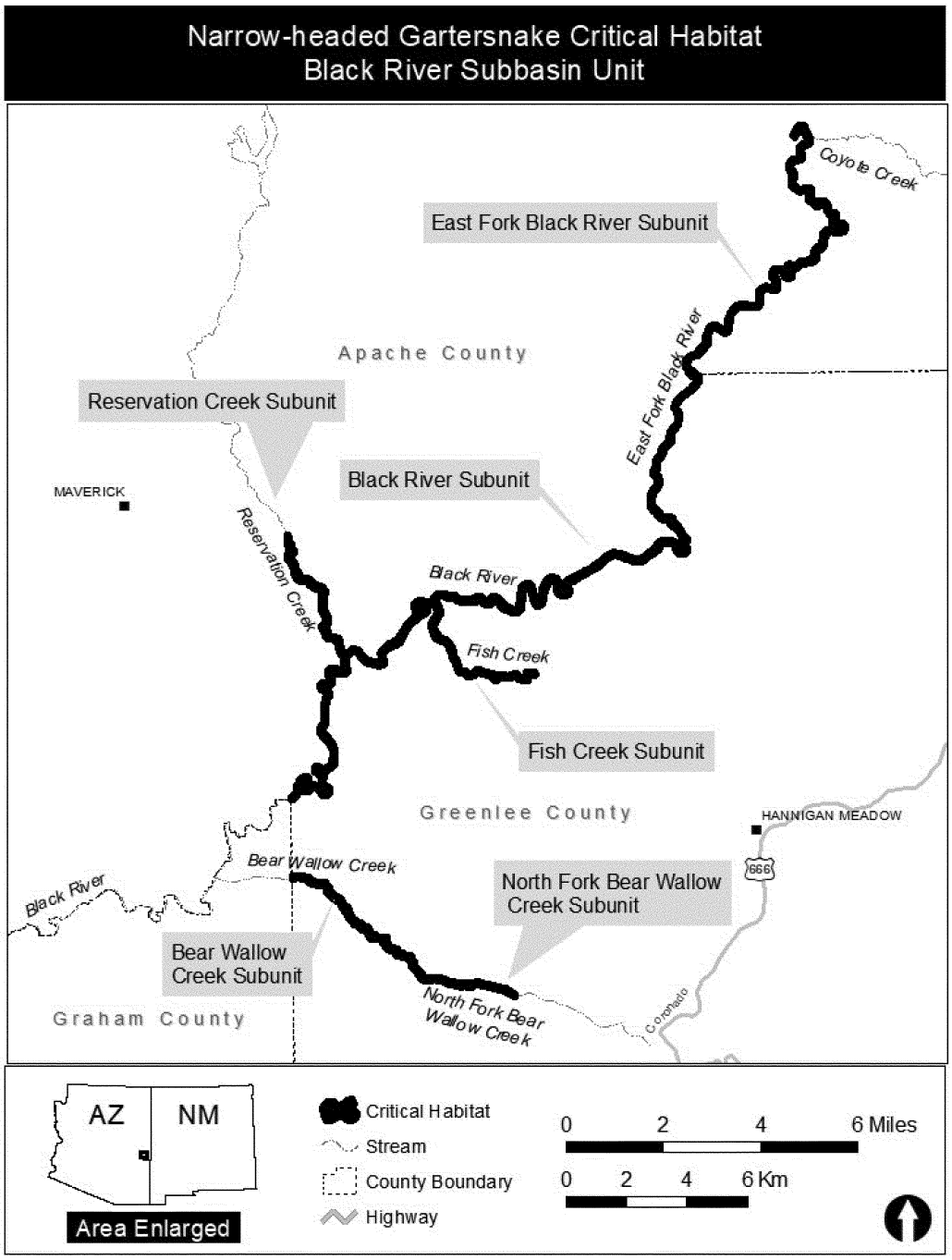


(10) Unit 5: Black River Subbasin Unit, Apache and Greenlee Counties, Arizona.

(i) Unit 5 consists of 1,780 ac (720 ha) in Apache and Greenlee Counties, and is composed of lands in Federal (1,780 ac (720 ha)) ownership in six subunits near the towns of Maverick and Hannigan Meadow.

(ii) Map of Unit 5 follows:

Figure 6 to Narrow-headed Gartersnake paragraph (10)(ii)

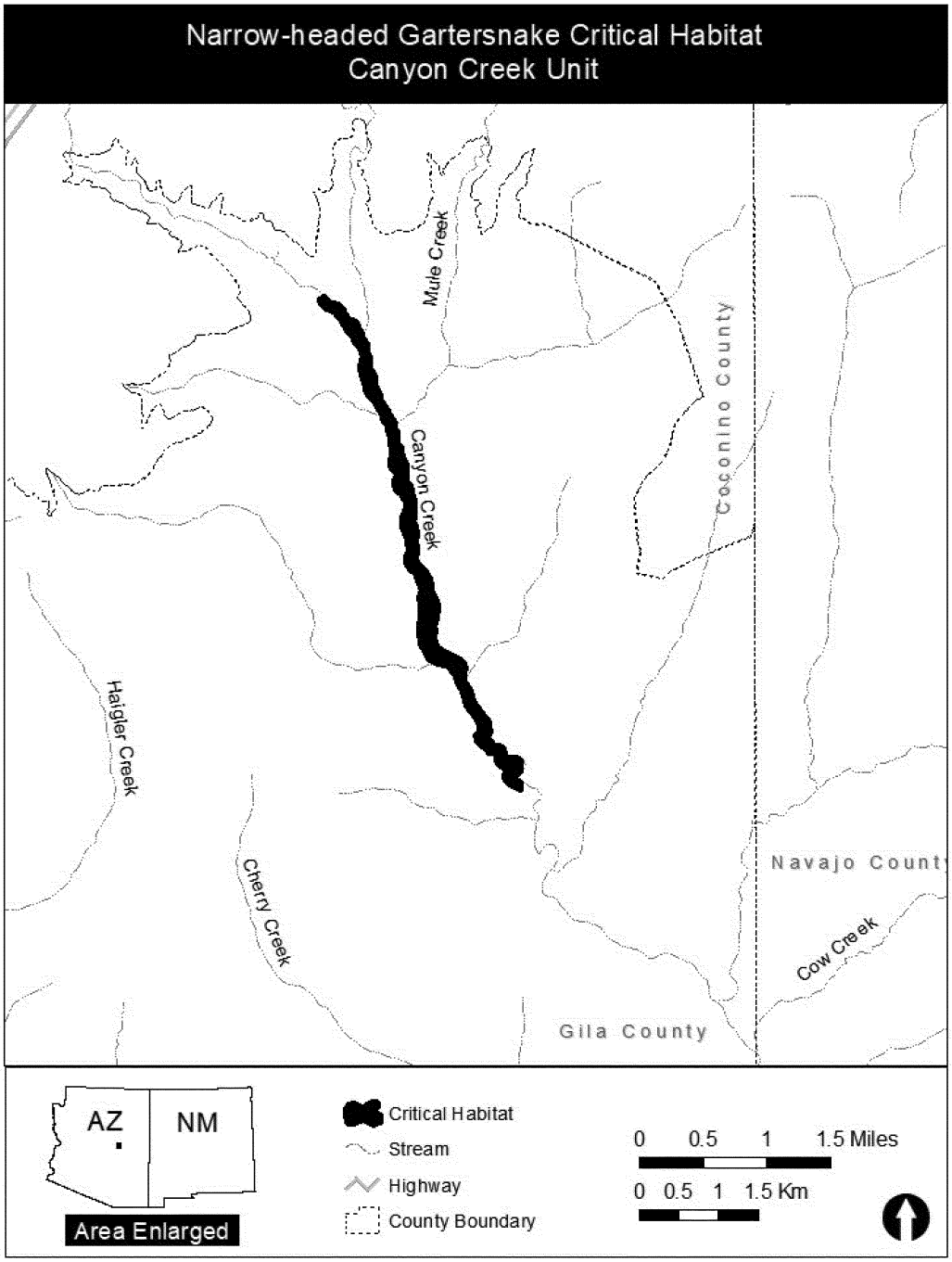


(11) Unit 6: Canyon Creek Unit, Gila County, Arizona.

(i) Unit 6 consists of 204 ac (82 ha) in Gila County, and is composed of lands in Federal (204 ac (82 ha)) ownership southwest of the town of Heber.

(ii) Map of Unit 6 follows:

Figure 7 to Narrow-headed Gartersnake paragraph (11)(ii)

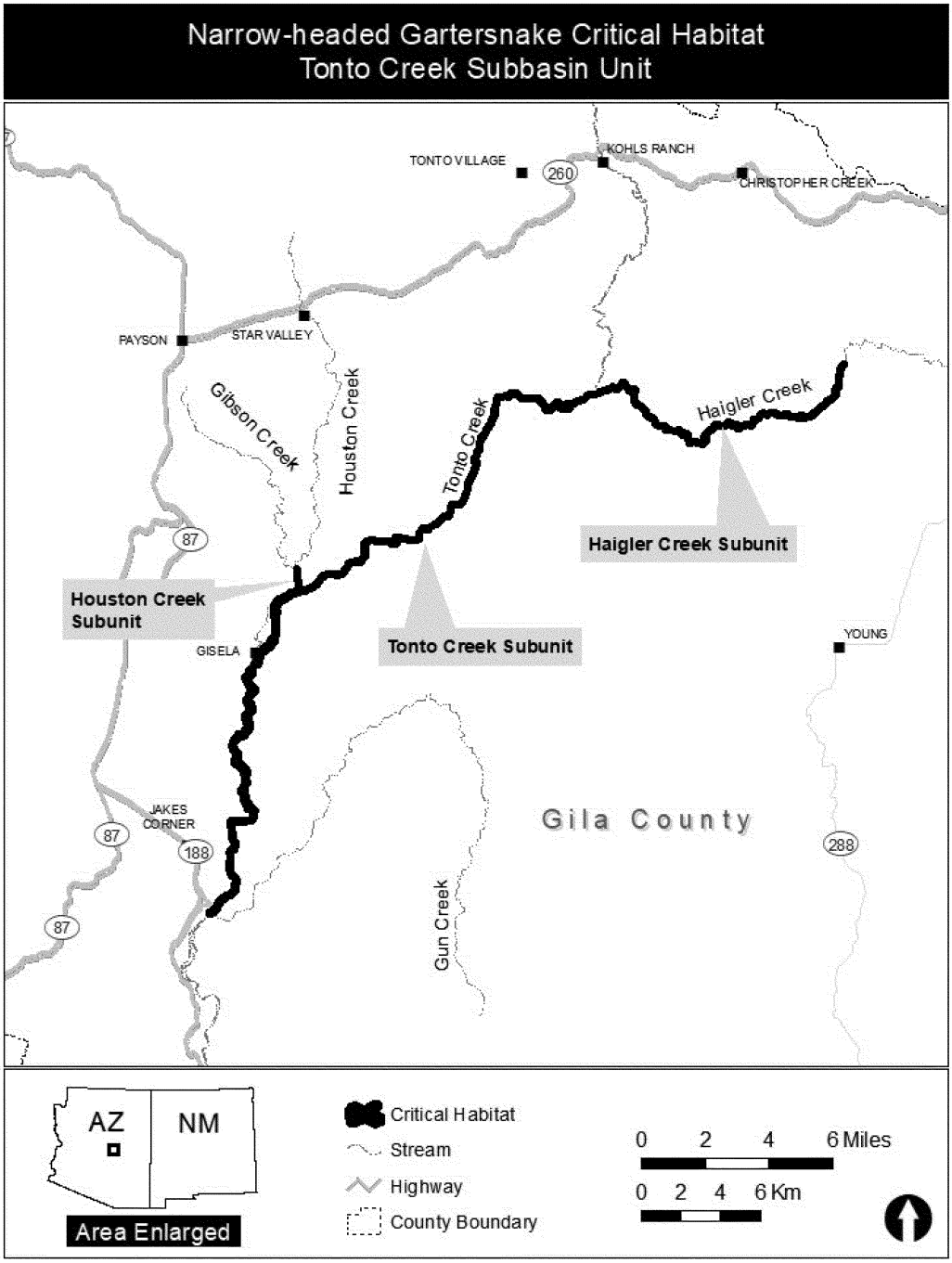


(12) Unit 7: Tonto Creek Subbasin Unit, Gila County, Arizona.

(i) Unit 7 consists of 2,293 ac (928 ha) in Gila County, and is composed of lands in Federal (2,176 ac (881 ha)) and private (117 ac (47 ha)) ownership in three subunits near the towns of Jakes Corner and Gisela.

(ii) Map of Unit 7 follows:

Figure 8 to Narrow-headed Gartersnake paragraph (12)(ii)

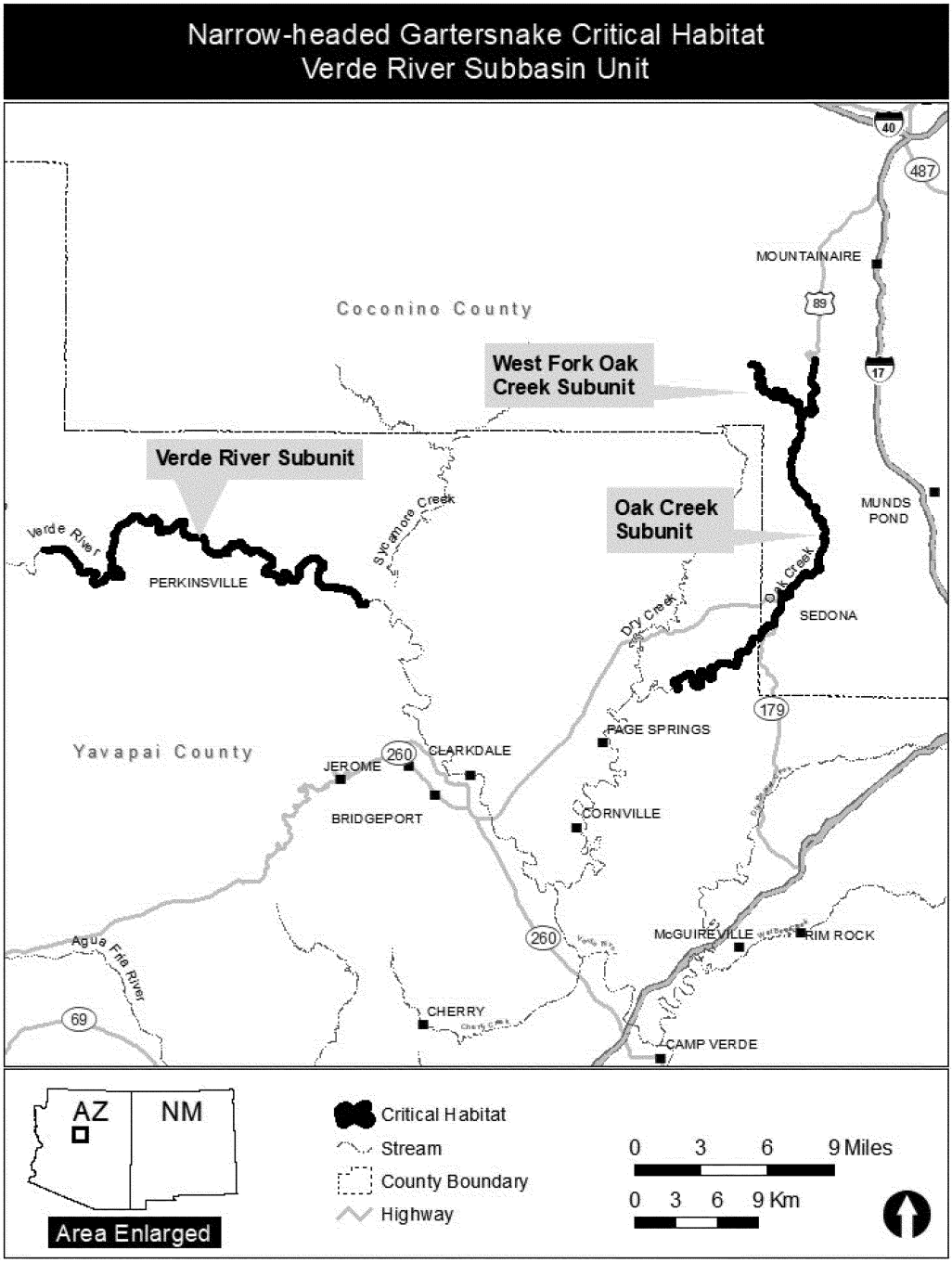


(13) Unit 8: Verde River Subbasin Unit, Coconino and Yavapai Counties, Arizona.

(i) Unit 8 consists of 3,156 ac (1,277 ha) in Coconino and Yavapai Counties, and is composed of lands in Federal (2,446 ac (990 ha)), State (109 ac (44 ha)), and private (602 ac (244 ha)) ownership in three subunits near the towns of Sedona and Perkinsville.

(ii) Map of Unit 8 follows:

Figure 9 to Narrow-headed Gartersnake paragraph (13)(ii)



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* * * * *

Martha Williams,

Principal Deputy Director, Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2021–20962 Filed 10–20–21; 8:45 am]

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FEDERAL REGISTER

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No. 201 October 21, 2021

Part V

Department of Justice

48 CFR Chapter 28

Streamlining of DOJ Acquisition Regulations (JAR); Proposed Rule

DEPARTMENT OF JUSTICE

48 CFR Chapter 28

[Docket No. JMD 155]

RIN 1105–AB54

Streamlining of DOJ Acquisition Regulations (JAR)

AGENCY: Justice Management Division, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice is proposing to revise the Justice Acquisition Regulations (JAR), in its entirety in order to update and streamline agency procurement actions consistent with the Federal Acquisition Reform Act, and the Federal Acquisition Streamlining Act. The JAR supplements the executive branch-wide Federal Acquisition Regulations (FAR) to address matters specific to the Department of Justice relating to its procurement of goods and services. It covers mostly internal policies and procedures, but also includes some rules governing private entities doing business with the Department.

DATES: Electronic comments must be submitted and written comments must be postmarked or otherwise indicate a shipping date on or before December 20, 2021.

ADDRESSES: If you wish to provide comment regarding this rulemaking, you must submit comments, identified by the agency name and reference Docket No. JMD 155, by one of the two methods below.

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the website instructions for submitting comments. The electronic Federal Docket Management System at *www.regulations.gov* will accept electronic comments until 11:59 p.m. Eastern Time on the comment due date.
- *Mail:* Paper comments that duplicate an electronic submission are unnecessary. If you wish to submit a paper comment in lieu of electronic submission, please direct the mail/shipment to: Tara M. Jamison, Director, Office of Acquisition Management, 145 N Street NE, Room 8W.210, Washington, DC 20530. To ensure proper handling, please reference the agency name and Docket No. JMD 155 on your correspondence. Mailed items must be postmarked or otherwise indicate a shipping date on or before the submission deadline.

FOR FURTHER INFORMATION CONTACT: Tara M. Jamison, Director, Office of Acquisition Management, Justice Management Division, 145 N Street NE, Room 8W.210, Washington, DC 20530, (202) 616–3754 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule via the one of the methods and by the deadline stated above. All comments must be submitted in English, or accompanied by an English translation. The Department of Justice (Department) also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Please note that all comments received are considered part of the public record and made available for public inspection at *www.regulations.gov.* Such information includes personally identifying information (PII) (such as your name, address, etc.). Interested persons are not required to submit their personally identifying information in order to comment on this rule. However, any PII that is submitted is subject to being posted to the publicly-accessible *www.regulations.gov* site without redaction.

Confidential business information identified and located as set forth above will not be placed in the public docket file. The Department may withhold from public viewing information provided in comments that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.* To inspect the agency's public docket file in person, you must make an appointment with the agency. Please see the **FOR FURTHER INFORMATION CONTACT** section above for agency contact information.

II. Discussion

A. Background—The FAR, the OFPP Act, and the JAR

When Federal agencies acquire supplies or services using appropriated funds, the purchase is governed by the Federal Acquisition Regulations (FAR), set forth at title 48 of the CFR, chapter 1, parts 1 through 53, and any agency regulations that implement or supplement the FAR.

The Office of Federal Procurement Policy Act (OFPP), as codified in 41 U.S.C. 1707, provides the authority for an agency to issue acquisition regulations that implement or supplement the FAR. This authority ensures that Government procurements are handled fairly and consistently, that the Government receives overall best value, and that the Government and contractors both operate under a known set of rules.

The Justice Acquisition Regulations (JAR) are set forth at title 48 CFR, chapter 28, parts 2801 through 2852, and provide procurement regulations that supplement the FAR to address matters specific to the Department of Justice (''the Department'' or ''DOJ'') relating to its acquisition of goods and services. As such, the JAR covers only those areas where agency implementation is required by the FAR, or where DOJ policies and procedures exist that supplement FAR coverage.

B. Purpose of the Proposed Regulatory Action

The revisions proposed in this rule will, when finalized, align internal departmental guidance in the JAR with the FAR and remove outdated and duplicative requirements. The revisions will revise the existing regulation promulgated at 63 FR 16118–01 on April 2, 1998, corrected at 63 FR 26738–01, May 14, 1998, and amended at 64 FR 37044–01, July 9, 1999 (together, the ''current regulation''). Among other things, the revisions will: (1) Update definitions and descriptions, (2) streamline certain sections, (3) remove extraneous procedural information that applies only to DOJ's internal operating procedures, (4) delete outdated information, (5) incorporate new regulatory sections to align with internal bureau procedures as appropriately contained in DOJ policy orders and policy instructions, and (6) simplify other parts for efficiency.

This rulemaking effort creates an efficient JAR that is more straightforward and less burdensome. The revised JAR will supersede the current regulation in its entirety.

C. Relation of the FAR to the JAR

The FAR contains many requirements related to agency procedures, which will not be repeated in DOJ's revision of the JAR. If the JAR does not include provisions supplementing the FAR under the corresponding part or subpart, it is because the FAR language is considered sufficient. Where the JAR states ''in accordance with bureau procedures'' or ''in accordance with agency procedures,'' this does not mean

that the bureau or the agency must have a procedure. It is intended that the bureau or agency procedures are to be followed if they exist, but does not mean that the bureau or the agency necessarily has a formal written procedure. Where neither the JAR nor bureau procedures address a FAR subject, the FAR guidance is to be followed. The JAR is not a complete system of regulations and must be used in conjunction with the FAR.

D. Summary of Noteworthy Changes

Most of the proposed changes to 48 CFR chapter 28 relate to internal Department policies and procedures that do not impact the public. For example, the revisions identify the individuals within the Department who will exercise particular responsibilities set forth in the FAR, and whether such responsibilities may be delegated. There are, however, two provisions that impact the public. Part 2833 contains revisions to the process for filing and deciding agency protests of procurement decisions. In addition, the proposed revisions include a new section 2852.212–4, which is a FAR deviation that sets forth certain terms and conditions that will apply to all software licenses.

E. Other Changes and Effect on Non-Department Entities

While most of the changes to the JAR proposed by this rule relate to internal policies and procedures, some changes govern matters relating to private entities selling goods or services to the Department. In particular, the proposed rule includes changes related to the filing and deciding of procurement protests filed with the Department, and also includes a FAR deviation that establishes certain terms and conditions that will be incorporated in all software licenses with the Department.

Some subparts/subsections that are being removed addressed matters that are now addressed in new subparts/subsections with different numbering, while some subparts/subsections are being removed altogether. The removal of sub-parts as proposed by this rule merely eliminates from the JAR provisions that are either already in the FAR or that only pertain to internal policy guidance. None of the subparts or subsections being removed altogether addressed matters affecting persons or entities external to the Department. To the extent matters addressed in such removed subpart/subsections are incorporated into internal Department guidance documents, this will not affect persons or entities external to the Department.

Attached to this proposed rule is an Appendix that lists the sections of the JAR that are being proposed for removal and/or renaming. The Appendix will not be codified.

III. Regulatory Certifications

Executive Orders 12866, and 13563—Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Orders 12866 and 13563. This rule is primarily limited to agency organization, management and personnel as described by Executive Order 12866, section 3(d)(3) and, therefore, is not a ''regulation'' as defined by that Executive order. Accordingly, this action has not been reviewed by the Office of Management and Budget.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. JMD has examined the economic, budgetary, and policy implications of its regulatory action, and has determined that the impact on the public is minimal. The regulation mainly relates to internal Department policies and procedures that do not impact the public.

Regulatory Flexibility Act

The Attorney General in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities for the following reasons. The proposed rule applies primarily to DOJ internal operating procedures and would generally be business neutral. DOJ estimates that no cost impact would result from this rule update for individual business.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal Governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal Governments or on the private sector.

Congressional Review Act

This rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

The Justice Management Division has determined that this action is a rule relating primarily to agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties, and, accordingly, is not a ''rule'' as that term is used by the Congressional Review Act. Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

Paperwork Reduction Act

This rule imposes no information collection or recordkeeping requirements.

Signing Authority

In accordance with Paragraph 8 of Attorney General Order 1687–93, the undersigned is authorized to sign and submit this document to the Office of the Federal Register for publication electronically as an official document of the Department of Justice.

List of Subjects

48 CFR Parts 2801, 2802, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2819, 2827, 2834, 2836, 2837, 2845, 2850, and 2852

Government procurement.

48 CFR Part 2803

Conflict of interest, Government procurement.

48 CFR Part 2804

Classified information, Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 2822

Government procurement, Individuals with disabilities.

48 CFR Part 2823

Environmental protection, Government procurement.

48 CFR Part 2825

Foreign currencies, Foreign trade, Government procurement.

48 CFR Part 2828

Government procurement, Insurance, Surety bonds.

48 CFR Part 2829

Government procurement, Taxes.

48 CFR Parts 2830, 2831, and 2832

Accounting, Government procurement.

48 CFR Part 2833

Administrative practice and procedure, Government procurement.

48 CFR Part 2839

Computer technology, Government procurement.

48 CFR Part 2841

Government procurement, Reporting and recordkeeping requirements, Utilities.

48 CFR Part 2842

Accounting, Freight, Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 2846

Government procurement, Reporting and recordkeeping requirements, Warranties.

48 CFR Parts 2848 and 2849

Government procurement, Reporting and recordkeeping requirements.

Accordingly, for the reasons set out in the preamble, chapter 28 of title 48 of the CFR is proposed to be revised to read as follows:

CHAPTER 28—DEPARTMENT OF JUSTICE

Subchapter A—General

Part 2801—Department of Justice Acquisition Regulation System
Part 2802—Definitions of Words and Terms
Part 2803—Improper Business Practices and Personal Conflicts of Interest
Part 2804—Administrative Matters

Subchapter B—Competition and Acquisition Planning

Part 2805—Publicizing Contract Actions
Part 2806—Competition Requirements
Part 2807—Acquisition Planning
Part 2808—Required Sources of Supplies and Services
Part 2809—Contractor Qualifications
Part 2810—Market Research
Part 2811—Describing Agency Needs
Part 2812—Acquisition of Commercial Items

Subchapter C—Contracting Methods and Contract Types

Part 2813—Simplified Acquisition Procedures
Part 2814—Sealed Bidding
Part 2815—Contracting by Negotiation
Part 2816—Types of Contracts
Part 2817—Special Contracting Methods

Subchapter D—Socioeconomic Programs

Part 2819—Small Business Programs
Part 2822—Application of Labor Laws to Government Acquisitions
Part 2823—Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug–Free Workplace
Part 2825—Foreign Acquisition

Subchapter E—General Contracting Requirements

Part 2827—Patents, Data, and Copyrights
Part 2828—Bonds and Insurance
Part 2829—Taxes
Part 2830—Cost Accounting Standards Administration
Part 2831—Contract Cost Principles and Procedures
Part 2832—Contract Financing
Part 2833—Protests, Disputes, and Appeals

Subchapter F—Special Categories of Contracting

Part 2834—Major System Acquisition
Part 2836—Construction and Architect-Engineer Contracts
Part 2837—Service Contracting
Part 2839—Acquisition of Information Technology
Part 2841—Acquisition of Utility Services

Subchapter G—Contract Management

Part 2842—Contract Administration and Audit Services
Part 2845—Government Property
Part 2846—Quality Assurance
Part 2848—Value Engineering
Part 2849—Termination of Contracts
Part 2850—Extraordinary Contractual Actions and the Safety Act

Subchapter H—Clauses and Forms

PART 2852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subchapter A—General

PART 2801—DEPARTMENT OF JUSTICE ACQUISITION REGULATION SYSTEM

Subpart 2801.1—Purpose, Authority, Issuance

Sec.
2801.101 Purpose.
2801.105 Issuance.
2801.105–2 Arrangement of regulation.
2801.106 OMB approval under the Paperwork Reduction Act.

Subpart 2801.3—Agency Acquisition Regulations

2801.304 Agency control and compliance procedures.

Subpart 2801.4—Deviations from the FAR and JAR

2801.403 Individual deviations.
2801.404 Class deviations.
2801.404–70 Requests for class deviations.

Subpart 2801.6—Career Development, Contracting Authority, and Responsibilities

2801.601 General.
2801.604 Contracting Officer's Representative (COR).

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2801—DEPARTMENT OF JUSTICE ACQUISITION REGULATION SYSTEM

Subpart 2801.1—Purpose, Authority, Issuance

2801.101 Purpose.

(a) The Justice Acquisition Regulation (JAR) provides agency guidance, in accordance with Federal Acquisition Regulation (FAR) 1.301(a)(2), and establishes, in this chapter, procurement regulations that supplement the FAR, 48 Code of Federal Regulations (CFR) chapter 1, and must be utilized conjunction with the FAR.

(b)(1) The JAR contains Department of Justice (DOJ) policies that govern DOJ's acquisition process or otherwise control acquisition relationships between DOJ's contracting activities and contractors. The JAR contains –

(i) Requirements of law;

(ii) Deviations from the FAR requirements; and

(iii) Policies that either have a significant effect beyond the internal procedures of DOJ or a significant cost or administrative impact on contractors or offerors.

(2) Relevant internal DOJ policies, procedures, guidance, and information not meeting the criteria in paragraph (b)(1) of this section are issued by DOJ in other announcements, internal policies, procedures, or guidance.

2801.105 Issuance.

2801.105–2 Arrangement of regulation.

The JAR is subdivided into parts, which correspond to FAR parts. The numbering system permits the discrete identification of every JAR paragraph. This numbering system permits immediate identification of each JAR part with coverage of the same subject matter and same numbering system as

in the FAR. Supplementary material for which there is no counterpart in the FAR is identified by a numerical suffix of 70 or higher in the final position of the reference number.

Figure 1 to 2801.105-2 - Illustration of numbering system

FAR 1.201 Maintenance of the FAR
JAR 2801.201-70 Maintenance of the JAR

2801.106 OMB approval under the Paperwork Reduction Act.

The Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) and the Office of Management and Budget's (OMB) implementing regulations at 5 CFR part 1320, require that reporting and recordkeeping requirements affecting ten (10) or more members of the public be cleared by OMB. The OMB control number for the collection of information under this chapter is 1103–0018.

Subpart 2801.3—Agency Acquisition Regulations

2801.304 Agency control and compliance procedures.

Pursuant to FAR 1.304, the Senior Procurement Executive (SPE) is responsible for ensuring that bureau acquisition guidance and directives do not restrain the flexibilities found in the FAR. For this reason, bureaus shall forward any bureau acquisition guidance to the SPE upon issuance. The SPE has the authority to revoke any guidance or directive considered restrictive of the regulations found in the FAR.

Subpart 2801.4—Deviations from the FAR and JAR

2801.403 Individual deviations.

Individual deviations from the FAR or the JAR that affect only one contract action shall be approved by the Head of the Contracting Activity (HCA) or designee.

2801.404 Class deviations.

Requests for class deviations from the FAR or JAR shall be submitted to the SPE. The SPE will consult with the chairperson of the Civilian Agency Acquisition Council (CAAC), as appropriate, and send his/her recommendations to the Chief Acquisition Officer (CAO). The CAO will grant or deny requests for such deviations. Requests for deviations involving basic ordering agreements, master type contracts, or situations where multiple awards are made from one solicitation are considered to involve more than one contract and, therefore, are considered class deviation requests.

2801.404–70 Requests for class deviations.

Requests for approval of class deviations from the FAR or the JAR, for any solicitation that will result in multiple awards, shall be forwarded to the SPE. Such requests will be signed by the Bureau Procurement Chief (BPC).

Subpart 2801.6—Career Development, Contracting Authority, and Responsibilities

2801.601 General.

(a) In accordance with Attorney General Order 1687–93, the authority vested in the Attorney General (AG) with respect to contractual actions for goods and services is delegated to the following officials to serve as HCAs:

(1) Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF);

(2) Director, Bureau of Prisons (BOP);

(3) Administrator, Drug Enforcement Administration (DEA);

(4) Director, Federal Bureau of Investigation (FBI);

(5) Director, Federal Prison Industries (FPI/UNICOR);

(6) Inspector General, Office of the Inspector General (OIG);

(7) Assistant Attorney General, Office of Justice Programs (OJP);

(8) Director, U.S. Marshals Service (USMS); and

(9) Assistant Attorney General for Administration (AAG/A) (for the Offices, Boards, and Divisions).

(b) The acquisition authority delegated to the officials in paragraph (a) of this section may be re-delegated to subordinate officials as necessary for the efficient and proper administration of the Department's acquisition operations, unless otherwise prohibited by the FAR or JAR. Such re-delegated authority shall expressly state whether it carries the power of re-delegation of authority.

2801.604 Contracting Officer's Representative (COR).

Contracting officers may appoint individuals to act as authorized representatives in the monitoring and administration of a contract. Such officials shall be designated as a Contracting Officer's Representative (COR). When a COR is to be designated, contracting officers shall include the clause at JAR 2852.201-70 in all contracts. A COR's authority is limited to the authority set forth in the subject clause.

PART 2802—DEFINITIONS OF WORDS AND TERMS

Subpart 2802.1—Definitions

Sec.
2802.101 Definitions.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2802—DEFINITIONS OF WORDS AND TERMS

Subpart 2802.1—Definitions

2802.101 Definitions.

Throughout this chapter, the following words and terms are used as defined in this subpart unless the context in which they appear clearly requires a different meaning, or a different definition is prescribed for a particular part or portion of a part.

(a) *Agency* means the Department of Justice.

(b) *Bureau* means contracting activity. (See ''contracting activity'' in this subpart.)

(c) *Bureau Procurement Chief* or *BPC* means the supervisory official who is directly responsible for supervising, managing, and directing all contracting offices of the bureau.

(d) *Cardholder* means an individual entrusted with a Government Purchase Card.

(e) *Chief Acquisition Officer* or *CAO* means the official appointed to assist the head of the agency and other agency officials to ensure the mission of the agency is achieved through the

management of the agency's acquisition activities.

(f) *Chief of the Contracting Office* means that supervisory official who is directly responsible for supervising, managing and directing a contracting office.

(g) *Contracting activity* means a component within the Department which has been delegated procurement authority to manage contracting functions associated with its mission (see 2801.601(a)).

(h) *Department* or *DOJ* means the Department of Justice.

(i) *Head of the Contracting Activity* or *HCA* means those officials identified in 2801.601(a) having responsibility for supervising, managing, and directing the operations of the contracting activity.

(j) *JAR* means the Department of Justice Acquisition Regulation in this chapter.

(k) *JMD* means the Justice Management Division.

(l) *OIG* means DOJ's Office of the Inspector General.

(m) *Suspension and Debarment Official* or *SDO* means the employee designated to impose suspension and debarment for the Department of Justice.

(n) *Senior Procurement Executive* or *SPE* means the official designated to be responsible for management direction of the Department of Justice procurement system, including implementation of unique procurement policies, regulations, and standards of the Department of Justice.

PART 2803—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 2803.1—Safeguards

Sec.
2803.101 Standards of conduct.
2803.101–3 Agency regulations.
2803.104 Procurement integrity.
2803.104–7 Violations or possible violations.

Subpart 2803.2—Contractor Gratuities to Government Personnel

2803.203 Reporting suspected violations of the Gratuities clause.
2803.204 Treatment of violations.

Subpart 2803.3—Reports of Suspected Antitrust Violations

2803.301 General.

Subpart 2803.4—Contingent Fees

2803.405 Misrepresentation or violations of the Covenant Against Contingent Fees.

Subpart 2803.8—Limitations on the Payment of Funds to Influence Federal Transactions

2803.806 Processing suspected violations.

Subpart 2803.9—Whistleblower Protections for Contractor Employees

2803.901 Definitions.
2803.905 Procedures for investigating complaints.
2803.906 Remedies.
2803.908 Pilot program for enhancement of contractor employee whistleblower protections.
2803.908–70 Whistleblower protection in General Non-Disclosure Agreement.
2803.908–71 Whistleblower protection in Intelligence Related Non-Disclosure Agreement.

Subpart 2803.10—Contractor Code of Business Ethics and Conduct

2803.1004 Contract clauses.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2803—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 2803.1—Safeguards

2803.101 Standards of conduct.

2803.101–3 Agency regulations.

The DOJ regulations governing Standards of Conduct are contained in 5 CFR part 2635.

2803.104 Procurement integrity.

2803.104–7 Violations or possible violations.

(a) Upon receipt of information regarding a violation or possible violation of 41 U.S.C. 2102, 2103, or 2104, the contracting officer must make the determination required by FAR 3.104–7(a) and follow the procedures prescribed therein.

(1) Make the determination required by FAR 3.104–7(a) and follow the procedures prescribed therein.

(2) [Reserved]

(b) The individual referenced in FAR 3.104–7(a)(1) is the BPC.

(c) The HCA or designee must follow the criteria contained in FAR 3.104–7(g) when delegating authority under this subpart.

(d) The HCA or designee shall refer information regarding actual or possible violations of section 41 U.S.C. 2102, 2103, or 2014 to the OIG or other office designated in Attorney General Order 1931–94.

(e) If the HCA or designee, after receiving information relating to a violation, or possible violation, determines that award or extension of a contract potentially affected by the violation is justified by urgent and compelling circumstances, or is otherwise in the interest of the Government, then the HCA may authorize the contracting officer to award or extend the contract after notification to the OIG or other office designated in Attorney General Order 1931–94.

(f) The HCA will advise the contracting officer as to the action to be taken. Criminal and civil penalties, and administrative remedies, may apply to conduct that violates 41 U.S.C. Chapter 21, see FAR 3.104–8.

(g) The contracting officer shall advise the SPE in writing of all allegations of violations. The contracting officer must describe the alleged violation as well as actions taken.

Subpart 2803.2—Contractor Gratuities to Government Personnel

2803.203 Reporting suspected violations of the Gratuities clause.

DOJ personnel shall report suspected violations of the gratuities clause, FAR 52.203–3, to the contracting officer or chief of the contracting office in writing. The report shall clearly state the circumstances surrounding the incident, including the nature of the gratuity, the time period in which it occurred, the behavior or action the gratuity was intended to influence, and the persons involved. The contracting officer or chief of the contracting office, after review, shall forward the report along with his or her recommendations regarding the treatment of the violation in accordance with FAR 3.204(c) to the HCA, or designee.

2803.204 Treatment of violations.

(a) The HCA or designee shall determine whether adverse action against the contractor in accordance with FAR 3.204(c) may be taken. In reaching a decision, the HCA or designee shall consult with the contracting activity's legal advisor and the OIG or other office designated in Attorney General Order 1931–94.

(b) The SPE shall be advised of all instances where violations have been determined to have occurred and any action taken as a result.

(c) Prior to taking any action against the contractor, the HCA or designee shall allow the contractor the opportunity to present opposing arguments in accordance with FAR 3.204(b).

Subpart 2803.3—Reports of Suspected Antitrust Violations

2803.301 General.

DOJ personnel shall report suspected antitrust violations to the Attorney General (AG) through the Assistant Attorney General (AAG) for the Antitrust Division (ATR).

(a) The report for the AG shall be addressed to: Attorney General,

Attention: AAG/ATR, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530.

(b) The report shall include:

(1) A brief statement describing the suspected practice and the reason for the suspicion; and

(2) The name, address, and telephone number of an individual in the agency who can be contacted for further information.

Subpart 2803.4—Contingent Fees

2803.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Employees who suspect, or have evidence of, violations by a contractor of the Covenant Against Contingent Fees, see FAR subpart 3.4, must report the matter to the contracting officer or appropriate higher authority, in accordance with agency procedures. Employees who suspect or have evidence of fraudulent or criminal activities must report the matter to the SPE and the OIG.

Subpart 2803.8—Limitations on the Payment of Funds to Influence Federal Transactions

2803.806 Processing suspected violations.

Evidence of suspected violations of 31 U.S.C. 1352, Limitation on the Use of Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions, may be submitted in accordance with agency procedures to the SPE and the OIG or other office designated in Attorney General Order 1931–94.

Subpart 2803.9—Whistleblower Protections for Contractor Employees

2803.901 Definitions.

As used in this subpart—

Covered Individual is defined as an employee of a contractor at any tier required by the Department to sign a Non-Disclosure Agreement (NDA), whether the NDA is directly between the Covered Individual and the Department or between the Covered Individual and a contractor, and whether the NDA is required by a contract or otherwise (*e.g.,* pursuant to a vendor demonstration, product trial, market research effort, or other non-contract efforts).

General NDA means an NDA, other than an Intelligence-Related NDA, required by the Department to be signed by a Covered Individual.

Intelligence-Related NDA means any NDA required by the Department to be signed by a Covered Individual who is connected with the conduct of an intelligence or intelligence-related activity.

Non-Disclosure Agreement means any nondisclosure or confidentiality agreement, policy, or form, including the agreements in Standard Forms 312 (Classified Information Nondisclosure Agreement) and 4414 (Sensitive Compartmented Information Nondisclosure Agreement).

2803.905 Procedures for investigating complaints.

(a) Upon receipt of a complaint filed pursuant to FAR 3.904, the Inspector General shall conduct an investigation and provide a written report of findings to the HCA, or designee.

(b) The HCA or designee will ensure that the Inspector General provides the report of finding to the individuals and entities specified in FAR 3.905(c).

(c) The complainant and contractor shall be afforded the opportunity to submit to the HCA or designee a written response to the report of findings within 30 days of receipt of the report. The HCA or designee may grant extensions of time to file a written response.

(d) The HCA or designee may request that the Inspector General conduct additional investigative work on the complaint at any time.

2803.906 Remedies.

(a) Upon determination that a contractor has subjected one of its employees to a reprisal for providing information as set forth in FAR 3.906(a), the HCA or designee may take one or more actions specified in FAR 3.906(a).

(b) Whenever a contractor fails to comply with an order issued pursuant to FAR 3.906(a), the HCA or designee shall notify the Attorney General and request that DOJ file an action for enforcement of such order in the United States District Court.

2803.908 Pilot program for enhancement of contractor employee whistleblower protections.

2803.908–70 Whistleblower protection in General Non-Disclosure Agreement.

The contracting officer shall ensure that any General NDA that DOJ requires a Covered Individual to sign contains the required Whistleblower Protection Provision at JAR 2852.203–70.

2803.908–71 Whistleblower protection in Intelligence-Related Non-Disclosure Agreement.

The contracting officer shall ensure that any Intelligence-Related NDA that DOJ requires a Covered Individual to sign contains the required Whistleblower Protection Provision at JAR 2852.203–71.

Subpart 2803.10—Contractor Code of Business Ethics and Conduct

2803.1004 Contract clauses.

The information required to be inserted in the clause at FAR 52.203–14, Display of Hotline Poster(s), is the following:

Office of the Inspector General, Fraud Detection Office, Attn: Poster Request, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC20530

PART 2804—ADMINISTRATIVE MATTERS

Subpart 2804.4—Safeguarding Classified Information Within Industry

Sec.
2804.402 General.
2804.402–70 Contractor personnel security program.

Subpart 2804.9—Taxpayer Identification Number Information

2804.901 Definitions.
2804.903 Reporting contract information to the IRS.
2804.903–70 Reporting contract information.
2804.903–71 Special reporting exceptions.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2804—ADMINISTRATIVE MATTERS

Subpart 2804.4—Safeguarding Classified Information Within Industry

2804.402 General.

Classified acquisitions or contracts, which require access to classified material, as defined in FAR 4.402, for their performance shall be subject to the policies, procedures, and instructions contained in departmental regulations and shall be processed in a manner consistent with those regulations. Contractors at all tiers are required to comply with all such policies, procedures, and instructions.

2804.402–70 Contractor personnel security program.

It is DOJ policy that all acquisitions which allow unescorted contractor access to Government facilities or sensitive information contain, as appropriate, requirements for appropriate personnel security screening by the contractor. To the maximum extent practicable, contractors shall be made responsible for the performance of personnel security screening. The personnel security screening may vary from one acquisition to another, depending upon the type, context, duration and location of the work to be performed. Classified contracts are exempted from the

requirements of this section because they are governed by the requirements of Executive Order 12829 (January 6, 1993).

Subpart 2804.9—Taxpayer Identification Number Information

2804.901 Definitions.

Classified contract, as used in this subpart, means a contract whose existence or subject matter has been designated and clearly marked or clearly represented, pursuant to the provisions of Federal law or an Executive order, as requiring protection against unauthorized disclosure for reasons of national security.

Confidential contract, as used in this subpart, means a contract, the reporting of which to the Internal Revenue Service (IRS) as required under 26 U.S.C. 6050M, would interfere with the effective conduct of a confidential law enforcement activity, such as contracts for sites for undercover operations or contracts with informants, or foreign counterintelligence activity.

2804.903 Reporting contract information to the IRS.

2804.903–70 Reporting contract information.

(a) Pursuant to FAR 4.903, the HCA or designee shall certify to the SPE, in the format specified in this section, that such official has examined the information submitted by that bureau as its Federal Procurement Data System (FPDS) data, that the data has been prepared pursuant to the requirements of 26 U.S.C. 6050M, and that, to the best of such official's knowledge and belief, it is compiled from bureau records maintained in the normal course of business for the purpose of making a true, correct, and complete return as required by 26 U.S.C. 6050M.

(b) The following certification will be signed and dated by the HCA or designee and submitted with each bureau's annual FPDS report.

Certification

I, _____(Name), _____(Title) have examined the information to be submitted by _____(Bureau) to the DOJ Senior Procurement Executive, for making information returns on behalf of the Department of Justice to the Internal Revenue Service, and certify that this information has been prepared pursuant to the requirements of 26 U.S.C. 6050M and that, to the best of my knowledge and belief, it is a compilation of bureau records maintained in the normal course of business for the purpose of providing true, correct, and complete returns as required by 26 U.S.C. 6050M.

Signature Date _____ Date _____

(c) The SPE will certify the consolidated FPDS data for the Department, transmit the data to the Federal Procurement Data Center (FPDC), and authorize the FPDC to make returns to the IRS on behalf of the agency.

2804.903–71 Special reporting exceptions.

(a) The Technical and Miscellaneous Revenue Act of 1988, Public Law 100–647, amended, 26 U.S.C. 6050M, to allow exceptions to the reporting requirements for certain classified or confidential contracts.

(b) The head of the agency has determined that the filing of information returns, as required by 26 U.S.C. 6050M, on confidential contracts, which involve law enforcement or foreign counterintelligence activities, would interfere with the effective conduct of those confidential law enforcement or foreign counterintelligence activities, and that the special reporting exceptions added to 26 U.S.C. 6050M by the Technical and Miscellaneous Revenue Act of 1988 apply to these types of contracts.

Subchapter B—Competition and Acquisition Planning

PART 2805—PUBLICIZING CONTRACT ACTIONS

Subpart 2805.2—Synopses of Proposed Contract Actions

Sec.
2805.202 Exceptions.

Subpart 2805.4—Release of Information

2805.403 Requests from Members of Congress.
2805.404 Release of long-range acquisition estimates.
2805.404–1 Release procedures.

Subpart 2805.5—Paid Advertisements

2805.500 Scope.
2805.502 Authority.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2805—PUBLICIZING CONTRACT ACTIONS

Subpart 2805.2—Synopses of Proposed Contract Actions

2805.202 Exceptions.

The HCA or designee is the agency head for the purposes of the determination required by FAR 5.202 (b).

Subpart 2805.4—Release of Information

2805.403 Requests from Members of Congress.

The SPE is the agency head for the purposes of FAR 5.403.

2805.404 Release of long-range acquisition estimates.

2805.404–1 Release procedures.

The SPE is the agency head for the purposes of FAR 5.404–1(a) and (b).

Subpart 2805.5—Paid Advertisements

2805.500 Scope.

This subpart provides policies and procedures for the procurement of paid advertising as covered by 44 U.S.C. 3702, 3703 and 5 U.S.C. 302 (b).

2805.502 Authority.

(a) The HCA or designee is the agency head for approving the publication of paid advertisements in newspapers under FAR 5.502(a).

(b) Authority to place advertisements in media other than newspapers must be granted in writing in advance by the HCA, or designee. No advertisement, notice, or proposal should be published prior to receipt of advance written approval for such publication by the HCA or designee, and no voucher or invoice for any such advertisement or publication will be paid unless there is presented, with the voucher or invoice, a copy of the written approval. Approval shall not be granted retroactively.

PART 2806—COMPETITION REQUIREMENTS

Subpart 2806.2—Full and Open Competition After Exclusion of Sources

Sec.
2806.202 Establishing or maintaining alternative sources.

Subpart 2806.3—Other Than Full and Open Competition

2806.304 Approval of the justification.

Subpart 2806.5—Advocates for Competition

2806.501 Requirement.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2806—COMPETITION REQUIREMENTS

Subpart 2806.2—Full and Open Competition After Exclusion of Sources

2806.202 Establishing or maintaining alternative sources.

The HCA or designee is the agency head for the purposes of FAR 6.202.

Subpart 2806.3—Other Than Full and Open Competition

2806.304 Approval of the justification.

(a) Justifications for contract actions over the contracting officer's approval dollar threshold shall be submitted to the BPC for concurrence before being forwarded to the bureau Competition Advocate for approval.

(b) Justifications requiring approval by the HCA, or a designee, shall be submitted to the {i} BPC and {ii} bureau Competition Advocate for concurrence before being forwarded to the HCA or designee.

(c) Justifications requiring approval by the SPE shall be submitted to the {i} BPC, {ii} the bureau Competition Advocate, and {iii} the HCA for concurrence before being forwarded to the SPE for approval.

(d) A class justification shall be approved in accordance with established bureau procedures and FAR 6.304(c).

Subpart 2806.5—Advocates for Competition

2806.501 Requirement.

(a) The Director, Office of Acquisition Management (OAM), Justice Management Division (JMD), is designated as the DOJ Competition Advocate.

(b) The HCA or designee for each bureau will appoint an official to be the bureau Competition Advocate. The bureau Competition Advocate shall be vested with the overall responsibility for competition activities within his or her bureau. The delegated bureau Competition Advocate must be at or above the level of the BPC organizationally.

PART 2807—ACQUISITION PLANNING

Subpart 2807.1—Acquisition Plans

Sec.
2807.103 Agency-head responsibilities.
2807.104 General procedures.
2807.104–70 Bundled requirements.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2807—ACQUISITION PLANNING

Subpart 2807.1—Acquisition Plans

2807.103 Agency-head responsibilities.

(a) The HCA is the agency head's designee for the purposes of FAR 7.103.

(b) The CAO may establish acquisition planning criteria and dollar approval thresholds for those bureaus that:

(1) Fail to allow ample time for conducting competitive acquisitions.

(2) Develop a pattern of awarding urgent requirements that generally restrict competition.

(3) Fail to identify identical or like requirements that, where appropriate, can be combined under one solicitation, and thereby miss opportunities to obtain lower costs through volume purchasing, reduced administrative costs in processing one contract action versus multiple actions, and standardizing goods and services.

2807.104 General procedures.

2807.104–70 Bundled requirements.

In the case of bundled requirements, as defined in FAR 7.104(d)(2) and 7.107, the contracting officer shall consult with the bureau Small Business Technical Advisor (SBTA). After receiving concurrence from the bureau SBTA, the contracting officer will provide a copy of the proposed acquisition package to the Small Business Administration (SBA) Procurement Center Representative (PCR) and a copy to the DOJ Director, Office of Small Disadvantaged Business Unit (OSDBU), at least 30 days prior to the solicitation issuance. The SBA PCR is required to make any alternative recommendations to the contracting officer within 15 days after receipt of the package. If the SBA does not respond in this timeframe, the contracting officer may proceed as planned with the procurement.

PART 2808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 2808.4—Federal Supply Schedules

Sec.
2808.405 Ordering procedures for Federal Supply Schedules.
2808.405–3 Blanket purchase agreements (BPAs).

Subpart 2808.6—Acquisition from Federal Prison Industries, Inc.

2808.605 Exceptions.
2808.605–70 Clearances.

Subpart 2808.8—Acquisition of Printing and Related Supplies

2808.802 Policy.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 2808.4—Federal Supply Schedules

2808.405 Ordering procedures for Federal Supply Schedules.

2808.405–3 Blanket purchase agreements (BPAs).

The SPE is the agency head for purposes of FAR 8.405–3(a)(3)(ii).

Subpart 2808.6—Acquisition from Federal Prison Industries, Inc.

2808.605 Exceptions.

2808.605–70 Clearances.

Include the Federal Prison Industries (FPI) clearance numbers in solicitations and award documents.

Subpart 2808.8—Acquisition of Printing and Related Supplies

2808.802 Policy.

The Director, Facilities and Administrative Services Staff (FASS), JMD, has been designated to serve as the central printing authority for the DOJ, for purposes of FAR 8.802(b).

PART 2809—CONTRACTOR QUALIFICATIONS

Subpart 2809.2—Qualifications Requirements

Sec.
2809.202 Policy.

Subpart 2809.4—Debarment, Suspension, and Ineligibility

2809.402 Policy.
2809.404 Exclusions in the System for Award Management.
2809.405 Effect of listing.
2809.405–1 Continuation of current contracts.
2809.405–2 Restrictions on subcontracting.

Subpart 2809.5—Organizational and Consultant Conflicts of Interest

2809.503 Waiver.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2809—CONTRACTOR QUALIFICATIONS

Subpart 2809.2—Qualifications Requirements

2809.202 Policy.

The HCA or designee is the agency head for the purposes of FAR 9.202(a)(1).

Subpart 2809.4—Debarment, Suspension, and Ineligibility

2809.402 Policy.

(a) The SPE is the agency head for purposes of suspension and debarment under FAR subpart 9.4, and serves as the Suspension and Debarment Official (SDO) for both procurement and non-procurement matters.

(b) Contracting activities shall consider recommending suspension or debarment of a contractor when cause is shown as listed under FAR 9.406–2 and 9.407–2.

(1) If a determination is made that available facts do not justify debarment or suspension, the file should be documented accordingly and no additional action is required.

(2) If the decision is made to recommend suspension or debarment of a contractor, in coordination with the activity's BPC and legal counsel, the bureau shall submit a memorandum to the SDO containing all relevant facts and analysis on which the recommendation is based. The submission also should include copies of all relevant documents.

2809.404 Exclusions in the System for Award Management exclusions.

(a) The SDO shall ensure the discharge of all agency responsibilities prescribed in FAR 9.404(c)(1) through (6), (8), and (9).

(b) The authority to establish procedures prescribed in FAR 9.404(c)(7) is delegated to the HCA, or designee.

2809.405 Effect of listing.

The HCA or designee is the agency head for the purposes of FAR 9.405.

2809.405–1 Continuation of current contracts.

The HCA or designee is the agency head for the purposes of FAR 9.405–1.

2809.405–2 Restrictions on subcontracting.

The HCA or designee is the agency head for the purposes of FAR 9.405–2.

Subpart 2809.5—Organizational and Consultant Conflicts of Interest

2809.503 Waiver.

The HCA is the agency head for the purpose of waiving any general rule or procedure prescribed in FAR subpart 9.5. As prescribed in FAR 9.503, the authority delegated to the HCA to waive any general rule or procedure prescribed in FAR subpart 9.5 may not be delegated below the level of the HCA.

PART 2810—MARKET RESEARCH

Sec.
2810.002 Procedures.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2810—MARKET RESEARCH

2810.002 Procedures.

(a) Market research must be conducted in accordance with DOJ sustainability policies and procedures in order to determine whether there are any sustainable acquisition standards applicable to the desired product or service.

(b) Ensure the statement of work includes sustainability requirements in accordance with JAR 2823.103, when applicable.

PART 2811—DESCRIBING AGENCY NEEDS

Sec.
2811.002 Policy.

Subpart 2811.1—Selecting and Developing Requirements Documents

2811.103 Market acceptance.

Subpart 2811.5—Liquidated Damages

2811.501 Policy.

Subpart 2811.6—Priorities and Allocations

2811.603 Procedures.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2811—DESCRIBING AGENCY NEEDS

2811.002 Policy.

(a) Consistent with the policy expressed in FAR 11.002(b), the metric system is the preferred system of weights and measures and shall be used in DOJ solicitations and contracts.

(b) When acquiring products or services, the requirements of FAR 11.002(d)(1) and DOJ sustainability policies and procedures are to be followed.

Subpart 2811.1—Selecting and Developing Requirements Documents

2811.103 Market acceptance.

The HCA is the agency head for the purposes of FAR 11.103(a).

Subpart 2811.5—Liquidated Damages

2811.501 Policy.

The HCA or designee is the agency head for the purposes of FAR 11.501(d).

Subpart 2811.6—Priorities and Allocations

2811.603 Procedures.

The HCA or designee is the agency head for the purposes of FAR 11.603.

PART 2812—ACQUISITION OF COMMERCIAL ITEMS

Subpart 2812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

Sec.
2812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.
2812.302 Tailoring of provisions and clauses for the acquisition of commercial items.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2812—ACQUISITION OF COMMERCIAL ITEMS

Subpart 2812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

2812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

Contracting Officers shall include the provisions and clauses at JAR 2852.212–4 in all solicitations and contracts for the acquisition of commercial items that require FAR 52.212–4, Contract Terms and Conditions—Commercial Items.

2812.302 Tailoring of provisions and clauses for the acquisition of commercial items.

The HCA, or designee at a level at or above the BPC, is authorized to approve the contracting officer's request for waiver for an individual contract action submitted under FAR 12.302(c). The SPE is authorized to approve the contracting officer's request for wavier for a class of contracts submitted under FAR 12.302(c).

Subchapter C—Contracting Methods and Contract Types

PART 2813—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 2813.2—Actions at or Below the Micro-Purchase Threshold

Sec.
2813.201 General.

Subpart 2813.3—Simplified Acquisition Methods

2813.305 Imprest funds and third party drafts.
2813.307 Forms.

Subpart 2813.4—Fast Payment Procedure

2813.401 General.

Subpart 2813.70—Certified Invoice Procedure

2813.70–1 Policy.
2813.70–2 Procedures.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75 (j) and 28 CFR 0.76(j).

PART 2813—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 2813.2—Actions at or Below the Micro-Purchase Threshold

2813.201 General.

The SPE is the agency head for the purposes of FAR 13.201(g)(1).

Subpart 2813.3—Simplified Acquisition Methods

2813.305 Imprest funds and third party drafts.

The HCA or designee is the agency head for the purposes of FAR 13.305–3(a).

2813.307 Forms.

Bureaus may use order forms other than the Standard Forms (SF) and Optional Forms (OF) identified in FAR 13.307. They may also include on those forms clauses suitable for the specific purchase, including tailored clauses, provided that proper procedures and all relevant limitations, documentation instructions, and required maintenance are followed.

Subpart 2813.4—Fast Payment Procedure

2813.401 General.

DOJ contracting activities are authorized to use the fast payment procedures prescribed in FAR 13.4 solely for utility service payments.

Subpart 2813.70—Certified Invoice Procedure

2813.70–1 Policy.

Supplies or services may be acquired on the open market from local suppliers at the site of the work or usage point. Using the vendor's invoice, instead of issuing a Government purchase order, is authorized under the certified invoice procedure. Certified invoice procedures may not be used to place orders under established contracts.

2813.70–2 Procedures.

(a) The certified invoice procedure for purchases may be used only under FAR part 13 and this part, subject to the following:

(1) The individual transaction amount does not exceed the micro-purchase threshold;

(2) Availability of sufficient funds is verified;

(3) A purchase order is not required by either the supplier or the Government;

(4) The vendor submits approved and appropriate invoices; and,

(5) The items purchased are domestic source end products, except as provided in FAR subpart 25.1.

(b) Using the certified invoice procedures does not eliminate the requirements in FAR part 13 that apply to purchases at or below the micro-purchase threshold.

(c) The chief of the contracting office, as defined in JAR 2802.101, may delegate the authority to use the certified invoice procedure. Each delegation must specify any limitations placed on the individual's use of these procedures, such as limits on the amount of each purchase, or limits on the commodities, or services being procured.

(d) Individuals using this purchasing technique shall require the supplier to immediately submit properly prepared invoices that itemize property or services furnished. Upon receiving the invoice, the individual making the purchase shall annotate the invoice with the date of receipt, verify the accuracy of the invoiced amount and verify on the invoice that the supplies and/or services have been received and accepted. If the invoice is valid and correct, the individual making the purchase shall sign the invoice indicating acceptance and immediately forward it to the appropriate administrative office.

(e) The administrative office must approve the invoice and, if approved, forward it to the Finance Office for payment. Before forwarding the invoice to the Finance Office, the administrative office shall place the following statement on the invoice, along with the accounting and appropriation data:

I certify that these goods and/or services were received on _____ (date) and accepted on _____ (date). Oral purchase was authorized and no confirming order has been issued.

Signature _____

Date _____

_____

Printed name or Typed Name and Title

PART 2814—SEALED BIDDING

Subpart 2814.4—Opening of Bids and Award of Contract

Sec.
2814.404 Rejection of bids.
2814.404–1 Cancellation of invitations after opening.
2814.407 Mistakes in bids.
2814.407–3 Other mistakes disclosed before award.
2814.407–4 Mistakes after awards.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2814—SEALED BIDDING

Subpart 2814.4—Opening of Bids and Award of Contract

2814.404 Rejection of bids.

2814.404–1 Cancellation of invitations after opening.

The HCA or designee is the agency head for the purposes of FAR 14.404–1(c), (e)(1), and (f).

2814.407 Mistakes in bids.

2814.407–3 Other mistakes disclosed before award.

(a) The authority to make determinations under paragraphs (a), (b), (c), and (d) of FAR 14.407–3 is delegated to the HCA, or designee at a level at or above the chief of the contracting office. The HCA or designee shall seek the advice of legal counsel before making any determinations.

(b) The following procedures shall be followed when submitting cases of mistakes in bids to the Comptroller General for an advance decision.

(1) Requests for advance decisions submitted to the Comptroller General in cases of mistakes in bids shall be made by the HCA, or designee.

(2) Requests for advance decisions shall be in writing, dated, signed by the requestor, addressed to the Comptroller General of the United States, General Accounting Office, Washington, D. C. 20548, and contain the following:

(i) The name and address of the party requesting the decision;

(ii) A statement of the question to be decided, a presentation of all relevant facts, and a statement of the requesting party's position with respect to the question; and,

(iii) Copies of all pertinent records and supporting documentation.

2814.407–4 Mistakes after award.

The authority to make determinations under FAR 14.407–4 is delegated to the HCA. The HCA may re-delegate this authority at a level at or above the chief of the contracting office. The determination must be coordinated with the contracting activity's legal counsel.

PART 2815—CONTRACTING BY NEGOTIATION

Subpart 2815.2—Solicitation and Receipt of Proposals and Information

Sec.

2815.204 Contract format.

Subpart 2815.3—Source Selection

2815.303 Responsibilities.

Subpart 2815.4—Contract Pricing

2815.404 Proposal analysis.
2815.404–2 Data to support proposal analysis.

Subpart 2815.6—Unsolicited Proposals

2815.604 Agency points of contact.
2815.605 Content of unsolicited proposals.
2815.606 Agency procedures.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75 (j) and 28 CFR 0.76(j).

PART 2815—CONTRACTING BY NEGOTIATION

Subpart 2815.2—Solicitation and Receipt of Proposals and Information

2815.204 Contract format.

The HCA or designee is the agency head for the purposes of FAR 15.204(e).

Subpart 2815.3—Source Selection

2815.303 Responsibilities.

The HCA or designee is the agency head for the purposes of FAR 15.303(a).

Subpart 2815.4—Contract Pricing

2815.404 Proposal analysis.

2815.404–2 Data to support proposal analysis.

All requests for field pricing support shall be made by the contracting officer directly to the cognizant audit agency. In accordance with Attorney General Order 1931–94, a copy of the request for such services shall be sent to the OIG at the time it is mailed to the cognizant audit agency. A copy of each report received shall also be sent to the OIG. Requests for other audit assistance may be made to the Assistant Inspector General for Audits.

Subpart 2815.6—Unsolicited Proposals

2815.604 Agency points of contact.

Each contracting activity shall designate a point of contact for the receipt and handling of unsolicited proposals. Generally, the official designated shall be the BPC or immediate subordinate.

2815.605 Content of unsolicited proposals.

To ensure against contracts between DOJ and prospective offers that would exceed the limits of advance guidance set forth in FAR 15.604 and potentially result in an unfair advantage to an offeror, the offeror of an unsolicited proposal must include the following warranty in any unsolicited proposal. Contracting officers receiving an unsolicited proposal without this warranty shall not process the proposal until the offeror is notified and given an opportunity to submit a proper warranty. If no warranty is provided in a reasonable time, the contracting officer shall reject the unsolicited proposal and notify the offeror of the rejection and the reason therefore. The warranty must be signed by a responsible management official of the proposing organization authorized to contractually obligate the organization.

UNSOLICITED PROPOSAL WARRANTY BY OFFEROR

This is to warrant that—

(a) This proposal has not been prepared under Government supervision;

(b) The methods and approaches stated in the proposal were developed by this offeror;

(c) Any contact with DOJ personnel has been with the limits of appropriate advance guidance set forth in FAR 15.604; and,

(d) No prior commitments were received from DOJ personnel regarding acceptance of this proposal.

Date: _____

Organization: _____

Name: _____

Title: _____

2815.606 Agency procedures.

The designated point of contact for each contracting activity shall provide for and coordinate receipt, review, evaluation, safeguarding, and final disposition of unsolicited proposals in accordance with FAR subpart 15.6.

PART 2816—TYPES OF CONTRACTS

Subpart 2816.2—Fixed-Price Contracts

Sec.
2816.207 Firm-fixed-price, level-of-effort term contracts.
2816.207–3 Limitations.

Subpart 2816.5—Indefinite-Delivery Contracts

2816.505 Ordering.

Subpart 2816.6—Time-and-Materials, Labor-Hour, and Letter Contracts

2816.601 Time-and-materials contracts.
2816.602 Labor-hour contracts.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75 (j) and 28 CFR 0.76(j).

PART 2816—TYPES OF CONTRACTS

Subpart 2816.2—Fixed-Price Contracts

2816.207 Firm-fixed-price, level-of-effort term contracts.

2816.207–3 Limitations.

The BPC or designee is the chief of the contracting office for the purposes of FAR 16.207–3(d).

Subpart 2816.5—Indefinite-Delivery Contracts

2816.505 Ordering.

(a) Justifications for exceptions to the fair opportunity process specified in FAR 16.505(b)(2) shall be approved in accordance with JAR 2806.304.

(b) In accordance with FAR 16.505(b)(8), the DOJ task order and delivery order ombudsman is the DOJ Competition Advocate.

(c) HCAs shall designate a bureau task order and delivery order ombudsman. This person may be the bureau Competition Advocate.

(d) Bureau ombudsmen shall review and resolve complaints from contractors concerning task or delivery orders placed by the bureau.

(e) Contractors not satisfied with the resolution of a complaint by a bureau ombudsman may request the DOJ ombudsman to review the complaint.

Subpart 2816.6—Time-and-Materials, Labor-Hour, and Letter Contracts

2816.601 Time-and-materials contracts.

The BPC, or designee at a level at or above the chief of the contracting office, is the agency official authorized to approve a determination and finding prescribed in FAR 16.601(d)(1)(ii).

2816.602 Labor-hour contracts.

The limitations set forth in 2816.601 for time-and-materials contracts also applies to labor hour contracts.

PART 2817—SPECIAL CONTRACTING METHODS

Subpart 2817.1—Multiyear Contracting

Sec.
2817.104 General.

Subpart 2817.2—Options

2817.204 Contracts.

Subpart 2817.6—Management and Operating Contracts

2817.602 Policy.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j); and 28 CFR 0.76(j).

PART 2817—SPECIAL CONTRACTING METHODS

Subpart 2817.1—Multiyear Contracting

2817.104 General.

The SPE is the agency head for the purposes of FAR 17.104(b).

Subpart 2817.2—Options

2817.204 Contracts.

Deviation requests to exceed the 5-year limitations specified in FAR 17.204(e) require advance approval from—

(a) The HCA or designee for individual contracts; and

(b) The SPE for classes of contracts.

Subpart 2817.6—Management and Operating Contracts

2817.602 Policy.

The HCA or designee is the agency head for the purposes of FAR 17.602(a).

Subchapter D—Socioeconomic Programs

PART 2819—SMALL BUSINESS PROGRAMS

Subpart 2819.5—Small Business Total Set-Asides, Partial Set-Asides, and Reserves

Sec.
2819.505 Limitations on subcontracting and nonmanufacturer rule.

Subpart 2819.8—Contracting with the Small Business Administration (the 8(a) Program)

2819.810 SBA appeals.
2819.812 Contract administration.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2819—SMALL BUSINESS PROGRAMS

Subpart 2819.5—Small Business Total Set-Asides, Partial Set-Asides, and Reserves

2819.505 Limitations on subcontracting and nonmanufacturer rule.

The SPE is the agency head for the purposes of FAR 19.505.

Subpart 2819.8—Contracting with the Small Business Administration (the 8(A) Program)

2819.810 SBA appeals.

The SPE is the agency head for the purposes of FAR 19.810(c).

2819.812 Contract administration.

The HCA or designee is the agency head for the purposes of FAR 19.812(d).

PART 2822—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 2822.1—Basic Labor Policies

Sec.
2822.101 Labor relations.
2822.101–70 Domestic violence, sexual assault, and stalking.
2822.103 Overtime.
2822.103–4 Approvals.

Subpart 2822.3—Contract Work Hours and Safety Standards Act

2822.302 Liquidated damages and overtime pay.

Subpart 2822.4—Labor Standards for Contracts Involving Construction

2822.406 Administration and enforcement.
2822.406–8 Investigations.
2822.406–12 Cooperation with the Department of Labor.

Subpart 2822.6—Contracts for Materials, Supplies, Articles, and Equipment Exceeding $15,000

2822.604 Exemptions.
2822.604–2 Regulatory exemptions.

Subpart 2822.8—Equal Employment Opportunity

2822.803 Responsibilities.
2822.807 Exemptions.
2822.807–70 Cooperation in equal employment opportunity investigations.

Subpart 2822.13—Equal Opportunity for Veterans

2822.1305 Waivers.
2822.1310 Solicitation provisions and contract clauses.

Subpart 2822.14—Employment of Workers with Disabilities

2822.1403 Waivers.
2822.1408 Contract clause.

Subpart 2822.15—Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor

2822.1503 Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2822—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 2822.1—Basic Labor Policies

2822.101 Labor relations.

2822.101–70 Domestic violence, sexual assault, and stalking.

Contracting officers shall insert the clause at JAR 2852.222–70, Domestic Violence, Sexual Assault, and Stalking, in every written solicitation when services will be performed in whole or in part on DOJ premises.

2822.103 Overtime.

2822.103–4 Approvals.

During contract performance, contractor requests for overtime exceeding the amount authorized in paragraph (a) of the clause at FAR 52.222–2, Payment for Overtime Premiums, must be approved at a level above the contracting officer. Such approval should be reflected by the signature of the approving official on the contracting officer's written determination made in accordance with FAR 22.103–4.

Subpart 2822.3—Contract Work Hours and Safety Standards Act

2822.302 Liquidated damages and overtime pay.

The authority to make the determination prescribed in FAR 22.302(c) is delegated to the HCA, or designee.

Subpart 2822.4—Labor Standards for Contracts Involving Construction

2822.406 Administration and enforcement.

2822.406–8 Investigations.

The contracting officer shall prepare and forward reports of violations under FAR 22.406–8(d)(1) to the HCA or designee at a level at or above the BPC. That official shall be responsible for processing the report in accordance with FAR 22.406–8(d)(2).

2822.406–12 Cooperation with the Department of Labor.

Any information furnished to the Department of Labor, as required by FAR 22.406–12(a), shall be submitted through the HCA, or designee.

Subpart 2822.6—Contracts for Materials, Supplies, Articles, and Equipment Exceeding $15,000

2822.604 Exemptions.

2822.604–2 Regulatory exemptions.

The SPE is the agency head for the purposes of FAR 22.604–2(b)(1).

Subpart 2822.8—Equal Employment Opportunity

2822.803 Responsibilities.

The SPE is the agency head for the purposes of FAR 22.803(c).

2822.807 Exemptions.

The SPE is the agency head for the purposes of FAR 22.807(a)(1).

2822.807–70 Cooperation in equal employment opportunity investigations.

The contracting officer shall insert the clause at 52.222–70, Contractor

Cooperation in Equal Employment Opportunity Investigations, in solicitations, contracts, and orders that include the clause at FAR 52.222–26, Equal Opportunity.

Subpart 2822.13—Equal Opportunity for Veterans

2822.1305 Waivers.

All requests for waiver of the terms of FAR 52.222–35 pursuant to FAR 22.1310(a)(1)(ii) or (a)(2) shall be forwarded from the HCA or designee to Office of Acquisition Management (OAM), JMD, for review and approval by the Attorney General (AG).

2822.1310 Solicitation provisions and contract clauses.

The SPE is the agency head for the purposes of FAR 22.1310(a)(1)(ii) and (a)(2).

Subpart 2822.14—Employment of Workers with Disabilities

2822.1403 Waivers.

The SPE is the agency head for the purposes of FAR 22.1403(b).

2822.1408 Contract clause.

The SPE is the agency head for the purposes of FAR 22.1408(a)(2).

Subpart 2822.15—Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor

2822.1503 Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor.

The contracting officer shall refer to the DOJ Inspector General for investigation, under FAR 22.1503(e), any matters relating to that section.

PART 2823—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 2823.2—Energy and Water Efficiency and Renewable Energy

Sec.
2823.204 Procurement exemptions.

Subpart 2823.3—Hazardous Material Identification and Material Safety Data

2823.303 Contract clause.
2823.303–70 Unsafe conditions due to hazardous material.

Subpart 2823.4—Use of Recovered Materials and Biobased Products

2823.404 Agency affirmative procurement programs.
2823.404–70 Affirmative procurement program for recycled materials.
2823.405 Procedures.

Subpart 2823.7—Contracting for Environmentally Preferable Products and Services

2823.704 Electronic products environmental assessment tool.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2823—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 2823.2—Energy and Water Efficiency and Renewable Energy

2823.204 Procurement exemptions.

The HCA or designee is the agency head for the purposes of executing the written determination not to purchase ENERGY STAR® or Federal Energy Management Program (FEMP)-designated products.

Subpart 2823.3—Hazardous Material Identification and Material Safety Data

2823.303 Contract clause.

2823.303–70 Unsafe conditions due to hazardous material.

FAR clause 52.223–3 shall be included in solicitations and contracts that will require delivery of hazardous material as defined in FAR 23.301. In addition, the contracting officer shall insert the clause at JAR 2852.223–70, Unsafe Conditions Due to the Presence of Hazardous Material, in all such solicitations and contracts, where the contract will require the performance of services on Government-owned or Government-leased facilities.

Subpart 2823.4—Use of Recovered Materials and Biobased Products

2823.404 Agency affirmative procurement programs.

2823.404–70 Affirmative procurement program for recycled materials.

(a) *Recovered materials preference program.* Preference will be given to procuring and using products containing recovered materials rather than products made with virgin materials when adequate competition exists, and when price, performance, and availability are equal.

(b) *Promotion program.* The Department of Justice Environmental Executive (DOJEE) has primary responsibility for actively promoting the acquisition of products containing recycled materials throughout DOJ. Technical and procurement personnel will cooperate with the DOJEE to actively promote DOJ's Affirmative Procurement Program.

(c) *Procedures for vendor estimation, verification, and certification*—(1) *Estimation.* The contractor shall provide estimates of the total percentage(s) of recovered materials for EPA designated items used in products or services provided.

(2) *Certification.* Contracting officers shall provide copies of all vendor and subcontractor certifications required by FAR 23.404 to the DOJEE.

(3) *Verification.* The DOJEE is responsible for periodically reviewing vendor certification documents and waivers as part of the annual review and monitoring process to determine if DOJ is in compliance with EOs 13101, 13693, and any subsequent amendments.

2823.405 Procedures.

The contracting officer is the approving official for justifications made pursuant to FAR 23.405(b)(2).

Subpart 2823.7—Contracting for Environmentally Preferable Products and Services

2823.704 Electronic products environmental assessment tool.

The HCA or designee is the agency head for the purposes of executing the written determination not to purchase EPEAT®-registered products.

PART 2825—FOREIGN ACQUISITION

Subpart 2825.1—Buy American—Supplies

Sec.
2825.103 Exceptions.
2825.105 Determining reasonableness of cost.

Subpart 2825.2—Buy American—Construction Materials

2825.202 Exceptions.
2825.204 Evaluating offers of foreign construction material.
2825.206 Noncompliance.

Subpart 2825.10—Additional Foreign Acquisition Regulations

2825.1001 Waiver of right to examination of records.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2825—FOREIGN ACQUISITION

Subpart 2825.1—Buy American—Supplies

2825.103 Exceptions.

The authority to make the determination prescribed in FAR 25.103(a) is delegated to the HCA, or designee.

2825.105 Determining reasonableness of cost.

The authority to make the determinations prescribed in FAR 25.105(a)(1) is delegated to the HCA, or designee.

Subpart 2825.2—Buy American—Construction Materials

2825.202 Exceptions.

The authority to make the determinations prescribed in FAR 25.202(a)(1) is delegated to the HCA, or designee.

2825.204 Evaluating offers of foreign construction material.

The HCA, or designee at a level at or above the BPC, is the agency official authorized to make the determination in accordance with FAR 25.204(b) that using a particular domestic construction material would unreasonably increase the cost of the acquisition or would be impracticable.

2825.206 Noncompliance.

Potentially fraudulent noncompliance under FAR 25.206(c)(4) shall be referred to the OIG for investigation.

Subpart 2825.10—Additional Foreign Acquisition Regulations

2825.1001 Waiver of right to examination of records.

The HCA, or designee at a level at or above the BPC, is the agency official authorized to make determinations under FAR 25.1001(a)(2)(iii).

Subchapter E—General Contracting Requirements

PART 2827—PATENTS, DATA, AND COPYRIGHTS

Subpart 2827.3—Patent Rights Under Government Contracts

Sec.
2827.303 Contract clauses.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2827—PATENTS, DATA, AND COPYRIGHTS

Subpart 2827.3—Patent Rights Under Government Contracts

2827.303 Contract clauses.

The SPE is the agency head for the purposes of FAR 27.303(e)(4).

PART 2828—BONDS AND INSURANCE

Subpart 2828.1—Bonds and Other Financial Protections

Sec.
2828.101 Bid guarantees.
2828.101–1 Policy on use.
2828.106 Administration.
2828.106–6 Furnishing information.

Subpart 2828.2—Sureties and Other Security for Bonds

2828.203 Acceptability of individual sureties.
2828.203–7 Exclusion of individual sureties.

Subpart 2828.3—Insurance

2828.307 Insurance under cost-reimbursements contracts.
2828.307–1 Group insurance plans.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2828—BONDS AND INSURANCE

Subpart 2828.1—Bonds and Other Financial Protections

2828.101 Bid guarantees.

2828.101–1 Policy on use.

The HCA or designee is the agency head for the purposes of authorizing class waivers in accordance with FAR 28.101–1(c).

2828.106 Administration.

2828.106–6 Furnishing information.

In accordance with FAR 28.106–6(c), the HCA, or designee at a level at or above the BPC, is the agency official authorized to furnish the certified copy of the bond and the contract.

Subpart 2828.2—Sureties and Other Security for Bonds

2828.203 Acceptability of individual sureties.

All assets pledged by individual sureties must be eligible obligations as defined in 31 CFR part 225, ''Acceptable Collateral for Pledging to Federal Agencies.'' This collateral will be placed in the custody of the U.S. Treasury, with a Federal Reserve Bank acting as the depositary until the completion of the obligation.

2828.203–7 Exclusion of individual sureties.

The SDO is the agency head for the purposes of FAR 28.203–7(a).

Subpart 2828.3—Insurance

2828.307 Insurance under cost-reimbursements contracts.

2828.307–1 Group insurance plans.

Under cost-reimbursement contracts, the contractor, before buying insurance under a group insurance plan, shall submit the plan to the contracting officer for review and approval. During review, the contracting officer may utilize all sources of information available such as audit, industry practices, etc., to determine if acceptance of the group insurance plan is in the Government's best interest.

PART 2829—TAXES

Subpart 2829.3—State and Local Taxes

Sec.
2829.302 Application of State and local taxes to the Government.
2829.303 Application of State and local taxes to Government contractors and subcontractors.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2829—TAXES

Subpart 2829.3—State and Local Taxes

2829.302 Application of State and local taxes to the Government.

Generally, purchases and leases made by the Federal Government are immune from State and local taxation.

2829.303 Application of State and local taxes to Government contractors and subcontractors.

(a) It is DOJ policy that DOJ contracts shall not contain clauses expressly designating prime contractors as agents of the Government for the purpose of avoiding State and local taxes.

(b) A DOJ contracting activity may request to the CAO, through the HCA, that a contractor be considered an agent of the Government for the purpose of claiming immunity from State and local sales and use taxes. The CAO will review such requests to ensure compliance with DOJ policy and applicable law. Each case forwarded will be reviewed by the HCA or designee for approval before referral to the CAO.

PART 2830—COST ACCOUNTING STANDARDS ADMINISTRATION

Subpart 2830.2—CAS Program Requirements

Sec.
2830.201 Contract requirements.
2830.201–5 Waiver.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2830—COST ACCOUNTING STANDARDS ADMINISTRATION

Subpart 2830.2—CAS Program Requirements

2830.201 Contract requirements.

2830.201–5 Waiver.

The SPE is the agency head for the purposes of FAR 30.201–5. Pursuant to FAR 30.201–5, this authority may not be

delegated to any official in the agency below the senior contract policymaking level.

PART 2831—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 2831.1—Applicability

Sec.
2831.101 Objectives.
2831.109 Advance agreements.

Subpart 2831.2—Contracts With Commercial Organizations

2831.205 Selected costs.
2831.205–6 Compensation for personal services.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2831—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 2831.1—Applicability

2831.101 Objectives.

(a) The SPE is the official authorized to grant individual deviations from the cost principles of FAR part 31.

(b) Requests for class deviations from the cost principles set forth in FAR part 31 will be forwarded through the SPE prior to submission to the Civilian Agency Acquisition Council (CAAC).

2831.109 Advance agreements.

(a) DOJ and bureau contracting officers are encouraged to negotiate advance agreements concerning the treatment of special or unusual costs to avoid possible subsequent disputes or disallowance of costs based upon unreasonableness or nonallowability. All such agreements shall be negotiated in accordance with FAR 31.109, prior to the contractor incurring such costs.

(b) All determinations required by this subpart shall be reviewed and approved at a level above the contracting officer prior to negotiation of the proposed agreement. The approved determination shall be placed in the contract file.

(c) Advance agreements will be signed by both the contractor and the contracting officer, and made a part of the contract file. Copies of executed advance agreements will be distributed to the cognizant audit office, when applicable.

Subpart 2831.2—Contracts With Commercial Organizations

2831.205 Selected costs.

2831.205–6 Compensation for personal services.

The HCA or designee is the agency head for the purposes FAR 31.205–6(g)(6).

PART 2832—CONTRACT FINANCING

Sec.
2832.006 Reduction or suspension of contract payments upon finding of fraud.
2832.006–1 General.
2832.006–2 Definition.
2832.006–3 Responsibilities.
2832.006–4 Procedures.

Subpart 2832.1—Non-Commercial Item Purchase Financing

2832.114 Unusual contract financing.

Subpart 2832.2—Commercial Item Purchase Financing

2832.201 Statutory authority.

Subpart 2832.4—Advance Payments for Non-Commercial Items

2832.402 General.

2832.407 Interest.

Subpart 2832.5—Progress Payments Based on Costs

2832.502 Preaward matters.

2832.502–2 Contract finance office clearance.

2832.503 Postaward matters.

2832.503–6 Suspension or reduction of payments.

Subpart 2832.7—Contract Funding

2832.703 Contract funding requirements.

2832.703–3 Contracts crossing fiscal years.

Subpart 2832.9—Prompt Payment

2832.903 Responsibilities.

Subpart 2832.11—Electronic Funds Transfer

2832.1110 Solicitation provision and contract clauses.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2832—CONTRACT FINANCING

2832.006 Reduction or suspension of contract payments upon finding of fraud.

2832.006–1 General.

The SPE is the agency head for the purposes of FAR 32.006–1.

2832.006–2 Definition.

The SPE is the ''remedy coordination official'' for the purposes of FAR 32.006–2.

2832.006–3 Responsibilities.

DOJ personnel shall immediately report, in writing, to the contracting officer and the OIG any apparent or suspected contractor request for advance, partial, or progress payments based on fraud.

2832.006–4 Procedures.

The SPE is the agency head for the purposes of FAR 32.006–4.

Subpart 2832.1—Non-Commercial Item Purchase Financing

2832.114 Unusual contract financing.

The HCA, or designee at a level at or above the BPC, is the official authorized to approve unusual contract financing as set forth in FAR 32.114.

Subpart 2832.2—Commercial Item Purchase Financing

2832.201 Statutory authority.

The HCA or designee is the agency head for the purposes of FAR 32.201.

Subpart 2832.4—Advance Payments for Non-Commercial Items

2832.402 General.

(a) The authority to make the determinations prescribed in FAR 32.402 and sign written determinations and findings with respect to making advance payments is vested in the HCA or designee.

(b) Prior to awarding a contract which contains provisions for making advanced payments, the contract terms and conditions concerning advance payments shall be approved at a level above the contracting officer.

(c) In ensuring that all FAR and agency requirements are met, the contracting officer shall coordinate with the activity that is to provide contract financing for advance payments, the bureau's disbursing or finance office, or the Treasury Department, as appropriate.

2832.407 Interest.

In accordance with FAR 32.407(d), advance payments may be made on an interest free basis. A determination to make such interest free advance payments, and the circumstance permitting interest free advance payments, shall be set forth in the original determination and findings and be approved in accordance with JAR 2832.402.

Subpart 2832.5—Progress Payments Based on Costs

2832.502 Preaward matters.

2832.502–2 Contract finance office clearance.

Before taking any of the actions prescribed in FAR 32.502–2, the contracting officer shall obtain advice

and assistance from the bureau's Chief Financial Officer.

2832.503 Postaward matters.

2832.503–6 Suspension or reduction of payments.

The HCA or designee is the approving official for any action recommended under FAR 32.503–6. Upon approval, the contracting officer shall request the finance office to suspend or reduce payments.

Subpart 2832.7—Contract Funding

2832.703 Contract funding requirements.

2832.703–3 Contracts crossing fiscal years.

The HCA or designee is the agency head for the purposes of FAR 32.703–3(b).

Subpart 2832.9—Prompt Payment

2832.903 Responsibilities.

The HCA or designee is responsible for promulgating policies and procedures to implement FAR 32.9.

Subpart 2832.11—Electronic Funds Transfer

2832.1110 Solicitation provision and contract clauses.

When the clause at FAR 52.232–34, Payment by Electronic Funds Transfer (EFT)—Other than System for Award Management, is required, the contracting officer may insert in paragraph (b)(1) of the clause a particular time after award, such as a fixed number of days, or an event such as the submission of the first request for payment, to establish the point at which contractors' EFT information shall be provided.

PART 2833—PROTESTS, DISPUTES, AND APPEALS

Subpart 2833.1—Protests

Sec.

2833.101 Definitions. 2833.102 General. 2833.103 Protests to the agency.

Subpart 2833.2—Disputes and Appeals

2833.203 Applicability.

2833.209 Suspected fraudulent claims. 2833.211 Contracting officer's decision.

2833.214 Alternative dispute resolution (ADR).

2833.214–70 Policy.

Authority: 28 U.S.C. 510; 40 U.S.C 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2833—PROTESTS, DISPUTES, AND APPEALS

Subpart 2833.1—Protests

2833.101 Definitions.

(a) *Agency Protest Official* (APO) means the Deciding Official for a procurement protest filed with a contracting activity of DOJ when the contracting officer will not be the Deciding Official because of the protestor's election under JAR 22833.103(b). The HCA will designate the individual who will serve as the APO for a given protest subject to the following:

(1) The APO will be at an organizational level above that of the contracting officer, will be knowledgeable about the acquisition process in general, and will not have had any previous personal involvement or programmatic interest in the procurement that is the subject of the protest.

(2) The departmental or bureau Competition Advocate may serve as the APO.

(b) *Deciding Official* means the official who will review and decide a procurement protest filed with the agency. The Deciding Official will be the contracting officer unless the protestor requests pursuant to JAR 2833.103(b) that the protest be decided by an individual above the level of the contracting officer, in which case the HCA will designate an APO to serve as the Deciding Official.

(c) *Interested party* means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

2833.102 General.

(a) This part prescribes policies and procedures for processing protests to DOJ in accordance with FAR 33.103 and Executive Order 12979, Agency Procurement Protests, dated October 25, 1995.

(b) Contracting officers and contractors are encouraged to use their best efforts to resolve concerns outside of the protest process through frank and open discussion as required by FAR 33.103(b) or through alternative dispute resolution techniques where appropriate.

(c) Responsibilities are as follows:

(1) *Contracting officers.* (i) Include the provision at JAR 2852.233–70 in all solicitations that are expected to exceed the simplified acquisition threshold.

(ii) When serving as the Deciding Official, decide the protest using the procedures in this subpart and FAR 33.103(d)(2).

(iii) If the protestor requests that the protest be decided at a level above the contracting officer, the contracting officer shall ensure that the Agency Protest Official, once designated, receives a copy of the protest and any other materials the protestor has provided to the contracting officer in support of the protest.

(2) *Agency Protest Official.* The APO shall use the procedures in this subpart and FAR 33.103 to provide an independent review of and decision on the issues raised in the protest.

2833.103 Protests to the agency.

(a) The filing time frames in FAR 33.103(e) apply. An agency protest is filed when the protest is received at the location the solicitation designates for serving protests.

(b) Only interested parties may file a protest.

(c) An interested party filing an agency protest has the choice of requesting either that the contracting officer or an individual above the level of the contracting officer decide the protest.

(d) In addition to the information required by FAR 33.103(d)(2), the protest shall:

(1) Indicate that it is a protest to the agency.

(2) Be filed with the contracting officer or other official designated to receive protests.

(3) State whether the protestor chooses to have the contracting officer or an individual above the level of the contracting officer decide the protest. If the protest is silent on this matter, the contracting officer will decide the protest.

(4) Indicate whether the protestor prefers to make an oral or written presentation of arguments in support of the protest to the Deciding Official.

(e) Upon receipt of a protest by the agency, the contracting officer, even when not serving as the Deciding Official, will notify other vendors competing in the procurement of the protest, any stay of award or suspension of performance, and/or any determination under FAR 33.103(f)(1) or (3) if and when made.

(f) Intervenors to the protest are not permitted.

(g) The decision by the Agency Protest Official is an alternative to a decision by the contracting officer on a protest. The Agency Protest Official will not consider appeals from a contracting officer's decision on an agency protest and a decision by the Agency Protest Official is final and not appealable.

(h) The protestor has only one opportunity to support or explain the

substance of its protest. DOJ procedures do not provide for any discovery. The Deciding Official has discretion to request additional information from the agency or the protestor.

(i) A protestor may represent itself or be represented by legal counsel. DOJ will not reimburse the protester for any legal fees or costs related to the agency protest.

(j) If an agency protest is received before contract award, the contracting officer shall not make award unless the HCA or designee makes a determination to proceed under FAR 33.103(f)(1). Similarly, if an agency protest is filed within ten (10) days after award or within 5 days after a debriefing date has been offered to the protester under a timely debriefing request under FAR 15.505 or 15.506, whichever is later, the contracting officer shall suspend contract performance unless the HCA or designee makes a determination to proceed under FAR 33.103(f)(3). Any stay of award or suspension of performance remains in effect until the agency protest is decided, dismissed, or withdrawn.

(k) The Deciding Official's decision may be oral or written. If oral, the Deciding Official shall send a confirming letter after the decision using a means that allows proof of receipt, including electronic mail. The letter shall:

(1) State whether the protest was denied, sustained, or dismissed;

(2) Indicate the date the decision was provided; and

(3) Provide the rationale for the decision.

(l) If the Deciding Official sustains the protest, relief may consist of any of the following:

(1) Termination of the contract for convenience or cause.

(2) Recompeting the requirement.

(3) Amending the solicitation.

(4) Refraining from exercising contract options.

(5) Reevaluating the offers or bids and making a new award determination.

(6) Other action that the Deciding Official determines is appropriate.

(m) Proceedings on an agency protest shall be dismissed if a protest on the same or similar basis is filed with a protest forum outside of DOJ.

Subpart 2833.2—Disputes and Appeals

2833.203 Applicability.

The SPE is the agency head for the purposes of FAR 33.203(b).

2833.209 Suspected fraudulent claims.

Contracting officers shall report suspected fraudulent claims to the OIG for investigation.

2833.211 Contracting officer's decision.

The Civilian Board of Contract Appeals (CBCA) hears and decides contract disputes originating from DOJ.

2833.214 Alternative dispute resolution (ADR).

2833.214–70 Policy.

It is DOJ's goal to resolve contract disputes before the issuance of a contracting officer's final decision under the Contract Disputes Act. Therefore, contracting officers will consider all possible means of reaching a negotiated settlement consistent with the Government's best interest, before issuing a final decision on a contractor claim under the process outlined in FAR 33.206 through 33.211.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 2834—MAJOR SYSTEM ACQUISITION

Subpart 2834.0—General

Sec.
2834.002 Policy.
2834.003 Responsibilities.
2834.005 General requirements.
2834.005–6 Full production.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2834—MAJOR SYSTEM ACQUISITION

Subpart 2834.0—General

2834.002 Policy.

The Small Business and Federal Procurement Competition Enhancement Act of 1984 allows an executive agency to establish a dollar threshold for the designation of a major system, in accordance with Public Law 98–577. Dollar thresholds for a major system under Office of Management and Budget (OMB) Circular A–109 are designated in this section.

(a) *Major automated information system.* Within DOJ, a major automated information system is one whose life-cycle cost is in excess of $100 million.

(b) *Major real property system.* (1) By purchase, when the assessed value of the property exceeds $60 million.

(2) By lease, when the annual rental charges, including basic services (*e.g.,* cleaning, guards, maintenance), exceed $1.8 million.

(3) By transfer from another agency at no cost when the assessed value of the property exceeds $12 million.

(c) *Research and development (R&D) system.* Any R&D activity expected to exceed $500,000 for the R&D phase is subject to OMB Circular A–109, unless exempted by the HCA or designee under paragraph (e) of this section.

(d) *Any other system or activity.* The HCA or designee responsible for the system may designate any system or activity as a Major System under OMB Circular A–109, *e.g.,* selected systems designed to support more than one principal organizational unit.

(e) *Exemption.* The CAO, upon recommendation by the HCA or designee responsible for the system, may determine that, because of the routine nature of the acquisition, the system (*e.g.,* an information system utilizing only off-the-shelf hardware or software) will be exempt from the OMB Circular A–109 process, even where by virtue of the life cycle costs it would otherwise be identified as ''major'' in response to OMB Circular A–109.

2834.003 Responsibilities.

(a) The SPE is the agency head for the purposes of FAR 34.003(a).

(b) The CAO is the agency head for the purposes of FAR 34.003(c).

2834.005 General requirements.

2834.005–6 Full production.

The CAO is the agency head for the purposes of FAR 34.005–6.

PART 2836—CONSTRUCTION AND ARCHITECT–ENGINEER CONTRACTS

Subpart 2836.2—Special Aspects of Contracting for Construction

Sec.
2836.204 Disclosure of the magnitude of construction projects.

Subpart 2836.6—Architect-Engineer Services

2836.602 Selection of firms for architect-engineer contracts.
2836.602–1 Selection criteria.
2836.602–4 Selection authority.
2836.602–5 Short selection process for contracts not to exceed the simplified acquisition threshold.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2836—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 2836.2—Special Aspects of Contracting for Construction

2836.204 Disclosure in solicitations of the magnitude of construction projects.

For construction projects over $10,000,000, present the magnitude in ranges as follows:

(a) Between $10,000,001 and $25,000,000;

(b) Between $25,000,001 and $100,000,000;

(c) Between $100,000,001 and $250,000,000;

(d) Between $250,000,001 and $500,000,000; and

(e) Over $500,000,000.

Subpart 2836.6—Architect-Engineer Services

2836.602 Selection of firms for architect-engineer contracts.

2836.602–1 Selection criteria.

The HCA or designee is the agency head for purposes of FAR 36.602–1(b).

2836.602–4 Selection authority.

The HCA or designee is the agency head for purposes of FAR 36.602–4(a).

2836.602–5 Short selection process for contracts not to exceed the simplified acquisition threshold.

(a) The short selection process, described in FAR 36.602–5, is authorized for use in DOJ contracts not expected to exceed the simplified acquisition threshold.

(b) The HCA or designee is the agency head for purposes of FAR 36.602–5(b)(2).

PART 2837—SERVICE CONTRACTING

Subpart 2837.1—Service Contracts—General

Sec.
2837.106 Funding and term of service contracts.

Subpart 2837.2—Advisory and Assistance Services

2837.204 Guidelines for determining availability of personnel.

Subpart 2837.5—Management Oversight of Service Contracts

2837.503 Agency-head responsibilities.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2837—SERVICE CONTRACTING

Subpart 2837.1—Service Contracts—General

2837.106 Funding and term of service contracts.

The HCA or designee is the agency head for purposes of FAR 37.106(b).

Subpart 2837.2—Advisory and Assistance Services

2837.204 Guidelines for determining availability of personnel.

The HCA or designee is the agency head for purposes of FAR 37.204.

Subpart 2837.5—Management Oversight of Service Contracts

2837.503 Agency-head responsibilities.

The HCA or designee or designee is the agency head for purposes of FAR 37.503.

PART 2839—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 2839.1—General

Sec.
2839.101 Policy.
2839.102 Management of risk.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2839—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 2839.1—General

2839.101 Policy.

DOJ's Chief Information Officer (CIO) and SPE are responsible for issuing policies and procedures to manage the agency information technology (IT) acquisition process.

2839.102 Management of risk.

Contracts involving DOJ Information and Information Systems shall comply with the security requirements prescribed in FAR 39.102 and all applicable DOJ security requirements, including without limitation all DOJ Policy Statements and DOJ Policy Instructions established under the DOJ Acquisition Management Order relating to the Management of Risk of DOJ Information and Information Systems.

PART 2841—ACQUISITION OF UTILITY SERVICES

Subpart 2841.2—Acquiring Utility Services

Sec.
2841.201 Policy.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2841—ACQUISITION OF UTILITY SERVICES

Subpart 2841.2—Acquiring Utility Services

2841.201 Policy.

The HCA or designee is the agency head for the purposes of FAR 41.201(d)(2)(i) and (d)(3).

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 2842—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 2842.6—Corporate Administrative Contracting Officer

Sec.
2842.602 Assignment and location.

Subpart 2842.7—Indirect Cost Rates

2842.703 General.
2842.703–2 Certificate of indirect costs.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2842—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 2842.6—Corporate Administrative Contracting Officer

2842.602 Assignment and location.

The HCA or designee is the agency head for the purposes of FAR 42.602(a).

Subpart 2842.7—Indirect Cost Rates

2842.703 General.

2842.703–2 Certificate of indirect costs.

The HCA or designee is the agency head for the purposes of FAR 42.703–2(b).

PART 2845—GOVERNMENT PROPERTY

Subpart 2845.1—General

Sec.
2845.105 Contractors' property management system compliance.
2845.105–70 Contractor reporting of Government-furnished property.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2845—GOVERNMENT PROPERTY

Subpart 2845.1—General

2845.105 Contractors' property management system compliance.

The contractor's records for Government-furnished property may be kept as a separate account in the bureau's internal property management system, in which case the contracting officer or formally designated property administrator shall serve as custodian of the account.

2845.105–70 Contractor reporting of Government-furnished property.

(a) In compliance with FAR 45.105, by January 31 of each year, DOJ contractors shall furnish the cognizant contracting officer an annual report of the DOJ property for which they are accountable as of the end of the calendar year.

(b) By March 1 of each year, bureaus shall submit to the Facilities and Administrative Services Staff (FASS), JMD, a summary report of agency property furnished under each contract as of the end of the calendar year. The report shall include a listing of Government-furnished property for all contracts for which the bureau maintains the official Government records.

PART 2846—QUALITY ASSURANCE

Subpart 2846.6—Material Inspection and Receiving Reports

Sec.
2846.601 General.

Subpart 2846.7—Warranties

2846.704 Authority for use of warranties.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2846—QUALITY ASSURANCE

Subpart 2846.6—Material Inspection and Receiving Reports

2846.601 General.

Bureaus shall prescribe procedures and instructions for the use, preparation, and distribution of material inspection and receiving reports and commercial shipping document/packing lists to evidence Government inspection (FAR 46.401) and acceptance (FAR 46.501).

Subpart 2846.7—Warranties

2846.704 Authority for use of warranties.

The use of a warranty in an acquisition shall be approved at a level above the contracting officer.

PART 2848—VALUE ENGINEERING

Subpart 2848.1- Policies and Procedures

Sec.
2848.102 Policies.

Subpart 2848.2—Contract Clauses

2848.201 Clauses for supply or service contracts.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2848—VALUE ENGINEERING

Subpart 2848.1—Policies and Procedures

2848.102 Policies.

The HCA is the agency head for purposes of FAR 48.102(a).

Subpart 2848.2—Contract Clauses

2848.201 Clauses for supply or service contracts.

The HCA or designee is the agency head for purposes of FAR 48.201(a)(6).

PART 2849—TERMINATION OF CONTRACTS

Subpart 2849.1—General Principles

Sec.
2849.106 Fraud or other criminal conduct.
2849.111 Review of proposed settlements.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2849—TERMINATION OF CONTRACTS

Subpart 2849.1—General Principles

2849.106 Fraud or other criminal conduct.

If the contracting officer has reason to suspect fraud or other criminal conduct related to the settlement negotiations of a terminated contract, the contracting officer shall discontinue the negotiations and report the facts supporting the suspicion through the HCA or designee to the OIG.

2849.111 Review of proposed settlements.

The HCA or designee may establish procedures for the review and approval of settlement agreements at a level above the contracting officer. In addition, all proposed termination settlements shall be reviewed by legal counsel.

PART 2850—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

Subpart 2850.1—Extraordinary Contractual Actions

Sec.
2850.100 Definition.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2850—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

Subpart 2850.1—Extraordinary Contractual Actions

2850.100 Definition.

Approving authority as used in this part means the Attorney General.

SUBCHAPTER H—CLAUSES AND FORMS

PART 2852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Sec.
2852.000 Scope of part.

Subpart 2852.1—Instructions for Using Provisions and Clauses

2852.102 Incorporating provisions and clauses.

Subpart 2852.2—Text of Provisions and Clauses

2852.200 Scope of subpart.
2852.201–70 Contracting Officer's Representative (COR).
2852.203–70 General Non-Disclosure Agreement.
2852.203–71 Intelligence Related Non-Disclosure Agreement.
2852.212–4 Contract Terms and Conditions—Commercial Items (FAR Deviation).
2852.222–70 Domestic Violence, Sexual Assault, and Stalking.
2852.223–70 Unsafe Conditions Due to the Presence of Hazardous Material.
2852.233–70 Protests Filed Directly with the Department of Justice.

Authority: 28 U.S.C. 510; 40 U.S.C. 486(c); 28 CFR 0.75(j) and 28 CFR 0.76(j).

PART 2852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

2852.000 Scope of part.

This part provides the text of provisions and clauses which are unique to DOJ or supplement the FAR.

Subpart 2852.1—Instructions for Using Provisions and Clauses

2852.102 Incorporating provisions and clauses.

JAR provisions and clauses in this part may be incorporated in solicitations and contracts by reference.

Subpart 2852.2—Text of Provisions and Clauses

2852.200 Scope of subpart.

This subpart sets forth the text of all DOJ provisions and clauses. It also cross-references to the location in the JAR that prescribes the use of each provision and clause.

2852.201–70 Contracting Officer's Representative (COR).

As prescribed in JAR 2801.604, insert the following clause:

CONTRACTING OFFICER'S REPRESENTATIVE (COR) (NOV 2020)

(a) Mr./Ms. (Name) of (Organization), (Address), (Area Code & Telephone No.), is hereby designated to act as Contracting Officer's Representative (COR) under (contract #), for the period of (specify the performance period of the contract that the designation covers).

(b) Performance of work under this contract is subject to the technical direction of the COR identified above, or another representative designated in writing by the Contracting Officer. The term ''technical direction'' includes, without limitation, the following:

(i) Receiving all deliverables;

(ii) Inspecting and accepting the supplies or services provided in accordance with the terms and conditions of this contract;

(iii) Clarifying, directing, or redirecting the contract effort, including shifting work between work areas and locations, filling in details, or otherwise serving to accomplish the contractual statement of work to ensure the work is accomplished satisfactorily;

(iv) Evaluating performance of the Contractor; and

(v) Certifying all invoices/vouchers for acceptance of the supplies or services furnished for payment.

(c) The COR does not have the authority to issue direction that:

(i) Constitutes a change of assignment or work outside the contract specification/work statement/scope of work.

(ii) Constitutes a change as defined in the clause entitled ''Changes'' or other similar contract term.

(iii) Causes, in any manner, an increase or decrease in the contract price or the time required for contract performance;

(iv) Causes, in any manner, any change in a term, condition, or specification or the work statement/scope of work of the contract;

(v) Causes, in any manner, any change or commitment that affects price, quality, quantity, delivery, or other term or condition of the contract or that, in any way, directs the contractor or its subcontractors to operate in conflict with the contract terms and conditions;

(vi) Interferes with the contractor's right to perform under the terms and conditions of the contract;

(vii) Directs, supervises, or otherwise controls the actions of the Contractor's employees or a Subcontractor's employees.

(d) The Contractor shall proceed promptly with performance resulting from the technical direction of the COR. If, in the opinion of the Contractor, any direction by the COR or the designated representative falls outside the authority of (b) above and/or within the limitations of (c) above, the Contractor shall immediately notify the Contracting Officer.

(e) Failure of the Contractor and Contracting Officer to agree that technical direction is within the scope of the contract is a dispute that shall be subject to the ''Disputes'' clause and/or other similar contract term.

(f) COR authority is not re-delegable.

(End of Clause)

2852.203–70 General Non-Disclosure Agreement.

As prescribed in JAR 2803.908–70, insert the following provision:

GENERAL NON-DISCLOSURE AGREEMENT (AUG 2016)

The provisions of this Non-Disclosure Agreement (NDA) are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive Order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive Orders and statutory provisions are incorporated into this agreement and are controlling.

(End of Provision)

2852.203–71 Intelligence Related Non-Disclosure Agreement.

As prescribed in JAR 2803.908–71, insert the following provision:

INTELLIGENCE RELATED NON-DISCLOSURE AGREEMENT (AUG 2016)

(1) The signatory will not disclose any classified information received in the course of such intelligence or intelligence-related activity unless specifically authorized to do so by the United States Government; and

(2) The Non-Disclosure Agreement (NDA) does not bar disclosures to Congress, or to an authorized official of an executive agency or the Department of Justice, which are essential to reporting a substantial violation of law.

(End of Provision)

2852.212–4 Contract Terms and Conditions, Commercial Items (FAR Deviation).

As prescribed in JAR 2812.301, insert the following provision:

TERMS AND CONDITIONS—COMMERCIAL ITEMS (NOV 2020)

When a commercial item is contemplated (using FAR Part 12 procedures or otherwise) and the contract will include FAR 52.212–4, the following replaces subparagraph (g)(2); paragraph (h); subparagraph (i)(2); paragraph (s); and paragraph (u), Unauthorized Obligations, of the basic FAR clause, and adds paragraph (w), as follows:

(g)(2) Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) prompt payment act regulations at 5 CFR part 1315, as modified by subparagraph (i)(2), *Prompt payment,* of this clause.

* * *

(h) *Patent indemnity.* Contractor shall indemnify and hold harmless the Government and its respective affiliates, officers, directors, employees, agents, successors and assigns (collectively, ''Indemnities'') from and against any and all liability and losses incurred by the Indemnities that are (i) included in any settlement and/or (ii) awarded by a court of competent jurisdiction arising from or in connection with any third party claim of infringement made against Indemnities asserting that any product or service supplied under this contract constitutes infringement of any patent, copyright, trademark, service mark, trade name or other proprietary or intellectual right. This indemnity shall not apply unless Contractor shall have been informed within a reasonable time by the Government of the claim or action alleging such infringement and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense. This indemnity also shall not apply to any claim unreasonably settled by the Government which obligates Contractor to make any admission or pay any amount without written consent signed by an authorized officer of Contractor, unless required by final decree of a court of competent jurisdiction.

* * *

(i)(2) *Prompt payment.* The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations (5 CFR part 1315), with the following modification regarding the due date: For the sole purpose of computing an interest penalty due the Contractor, the Government agrees to inspect and determine the acceptability of any supply delivered or service performed specified in the invoice within thirty (30) days of receipt of a proper invoice from the Contractor, after which time, if no affirmative action has been taken by the Government to accept such supply or service, the supply or service will be deemed accepted and payment due thirty (30) days from the date of deemed acceptance. If the Government makes the determination that the item delivered or service performed is deficient or otherwise unacceptable, or the invoice is otherwise determined not to be a proper invoice, the terms and conditions of this paragraph regarding prompt payment will apply to the date the Contractor corrects the deficiency in the item delivered or service performed or submits a proper invoice. If actual acceptance occurs within the constructive acceptance period, the Government will base the determination of an interest penalty on the actual date of acceptance. The constructive acceptance requirement does not, however, compel Government officials to accept supplies or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

* * *

(s) *Order of precedence.* Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

(1) The schedule of supplies/services.

(2) The Assignments, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts provisions of the basic FAR clause at 52.212–4, and the Unauthorized Obligations and Contractor's Commercial Supplier Agreements—Unenforceable Clauses provisions of JAR 2852.212–4.

(3) FAR 52.212–5.

(4) Other paragraphs of the basic FAR clause at 52.212–4, with the exception of paragraph (o), Warranty, and those paragraphs identified in this deviation of 52.212–4.

(5) Addenda to this solicitation, contract, or order, including contractor's Commercial supplier agreements incorporated into the contract.

(6) Solicitation provisions if this is a solicitation.

(7) Paragraph (o), Warranty, of the basic FAR clause at 52.212–4.

(8) The Standard Form 1449.

(9) Other documents, exhibits, and attachments.

(10) The specification.

* * *

(u) *Unauthorized obligations.*

(1) Except as stated in paragraph (u)(2) of this clause, when any supply or service acquired under this contract or order is subject to any Commercial supplier agreement that includes any language, provision, or clause requiring the

Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (see 31 U.S.C. 1341), the following shall govern:

(i) Any such language, provision, or clause is unenforceable against the Government.

(ii) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the commercial supplier agreement. If the commercial supplier agreement is invoked through an ''I agree'' click box or other similar mechanism (*e.g.,* ''click-wrap'' or ''browse-wrap'' agreements), execution does not bind the Government or any Government authorized end user to such clause.

(iii) Any such language, provision, or clause is deemed to be stricken from the commercial supplier agreement and have no effect.

(2) Paragraph (u) (1) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

* * *

(w) *Commercial supplier agreements—unenforceable clauses.* When any supply or service acquired under this contract or order is subject to a contractor's commercial supplier agreement, the following shall be deemed incorporated into such agreement and modifies and replaces any similar language, provision, or clause in such agreement. As used herein, ''this agreement'' means any contractor commercial supplier agreement:

(1) Notwithstanding any other provision of this agreement, when the end user is an agency or instrumentality of the U.S. Government, the following shall apply:

(i) *Applicability.* This agreement is a part of a contract between commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license or other similar legal instrument (including all contracts, task orders, and delivery orders under FAR Part 12).

(ii) *End user.* This agreement shall bind the Government as end user but shall not operate to bind the Government employee or person acting on behalf of the Government in his or her personal capacity.

(iii) *Law and disputes.* This agreement is governed by Federal law.

(A) Any language, provision, or clause purporting to subject the U.S. Government to the laws of any U.S. state, territory, district, or municipality, or the laws of a foreign nation, except where Federal law expressly provides for the application of such laws, is hereby deleted and shall have no effect.

(B) Any language, provision, or clause requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law is hereby deleted and shall have no effect.

(C) Any language, provision, or clause prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted and shall have no effect.

(iv) *Continued performance.* Notwithstanding any other provision in this agreement, if the Contractor believes the Government to be in breach of this contract, order, or agreement, it shall pursue its rights under the Contract Disputes Act or other applicable Federal statute while continuing performance as set forth in subparagraph (d), Disputes, of FAR 52.212–4.

(v) *Arbitration; equitable or injunctive relief.* In the event of a claim or dispute arising under or relating to the contract, order, or this agreement, (A) binding arbitration shall not be used unless otherwise specifically authorized by agency guidance, and (B) equitable or injunctive relief, including the award of attorney fees, costs or interest, may be awarded against the Government only when explicitly provided by statute.

(vi) *Updating terms.*

(A) After award, the contractor may unilaterally revise terms if they are not material. Material terms are defined as:

(1) Terms that change Government rights or obligations;

(2) Terms that increase Government prices;

(3) Terms that decrease the overall level of service; or

(4) Terms that limit any other Government right addressed elsewhere in this contract.

(B) For revisions that materially change the terms of the contract, the revised commercial supplier agreement must be incorporated into the contract using a bilateral modification.

(C) Any agreement terms or conditions unilaterally revised subsequent to award that are inconsistent with any material term or provisions of this contract shall not be enforceable against the Government, and the Government shall not be deemed to have consented to them.

(vii) *Order of precedence.* Any Order of Precedence clause in any commercial supplier agreement is not enforceable against the Government. The applicable Order of Precedence for this contract, order, or agreement is FAR 52.212–4(s), as revised by JAR 2812.302 and 2852.212–4(s).

(viii) *No automatic renewals.* If any license or service tied to period payment is provided under this agreement (*e.g.,* annual software maintenance or annual lease term), such license or service shall not renew automatically upon expiration of its current term without prior express consent by a properly warranted contracting officer, and any provision or term of any license or service purporting to provide for automatic renewal is unenforceable against the Government.

(ix) *Indemnification by the Government or end-user.* Any language, provision, or clause of this commercial supplier agreement requiring the Government or End-user to indemnify the commercial supplier or licensor is not enforceable against the Government.

(x) *Indemnification by the commercial supplier or licensor.* Any clause of this agreement requiring or permitting the commercial supplier or licensor to defend the Government as a condition of indemnifying the Government for any claim of infringement is hereby amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action, in accordance with 28 U.S.C. 516.

(xi) *Audits.* Any language, provision, or clause of this commercial supplier agreement permitting Contractor to audit the end user's compliance with this agreement is not enforceable against the Government. To the extent any language, provision or clause of this agreement permits Contractor to audit the Government's compliance under this contract, order, or agreement, such language, provision, or clause of this agreement is hereby stricken and replaced as follows:

''(A) If Contractor reasonably believes that the Government has violated the terms of this agreement with regard to the restrictions on authorized use and/or the number of authorized users, upon written request from Contractor, including an explanation of the basis for the request, DOJ will provide a redacted version of the Government's most recent Security Assessment and Authorization package (SAA) to Contractor on a confidential basis, so that Contractor may reasonably verify the Government's compliance with its obligations under this agreement. Contractor understands and agrees that the Government will remove or redact any information from the SAA that it reasonably believes may compromise (a) the security of the Government's information technology environment; (b) the confidentiality of any third-party proprietary or confidential information; (c) any confidential, sensitive law enforcement information; and (d) any other information that the Government believes may compromise a past, current, or prospective investigation, prosecution, or litigation. Notwithstanding the preceding, and subject to the Government's policies and procedures for such review, including but not limited to complying with all Government security requirements prior to being granted access to the Government's facilities, including the execution of appropriate confidentiality and/or non-disclosure agreements, the Government will arrange, upon Contractor's written request, for Contractor to view an un-redacted version of the SAA on Government premises. Contractor understands that Contractor will be provided a copy of the un-redacted SAA on Government premises only and that no un-redacted copy of the SAA, or any medium containing information relating to it, will be permitted to be removed from Government premises.

(B) The Contractor also understands and agrees that the Contractor shall make a request under this paragraph no more than on an annual basis and only during the period of the contract, and that any activities performed by Contractor under this clause will be performed at Contractor's expense, without reimbursement by the Government.

(C) Discrepancies found with regard to the restrictions on authorized use and/or the number of authorized users may result in a charge by Contractor to the Government. Any resulting invoice must comply with the proper invoicing and payment requirements specified in the contract. This charge, if disputed by the Government, will be resolved through the Disputes clause at 52.212–4(d); no payment obligation shall arise on the part of the Government until the conclusion of the dispute process.''

(xii) *Taxes or surcharges.* Any taxes or surcharges which the Contractor seeks to

pass along to the Government as end user will be governed by the terms of the underlying Government contract and, in any event, must be submitted to the Contracting Officer for a determination of applicability prior to invoicing unless specifically agreed to otherwise in the Government contract.

(xiii) *Non-assignment.* This agreement may not be assigned, nor may any rights or obligations thereunder be delegated, without the Government's prior approval, except as expressly permitted under FAR 52.212–4 (b), Assignment.

(xiv) *Confidential information.*

(A) During the term of this contract or order, either party may identify information as ''confidential information,'' and there shall be no disclosure, dissemination, or publication of any such information except to the extent required for the performance of this contract or order and otherwise provided in this clause or by statute or regulation. Specifically, the parties agree that the party receiving confidential information may only disclose such information to its employees and contractors on a ''need-to-know'' basis to carry out the obligations of this contract or order, and that subcontractors performing under this Agreement are subject to the same stipulations provided in this provision. The parties also agree that this provision shall survive the termination of this contract or order, and any confidential information obtained or received which comes within these restrictions shall remain confidential, provided that the obligation to treat information as confidential shall not apply to information which is or becomes publicly available through no improper action of the receiving party; is or comes to be in the receiving party's possession independent of its relationship with the disclosing party; is developed by or becomes known to the receiving party without use of any confidential information of the disclosing party; or is obtained rightfully from a third party not bound by an obligation of confidentiality. Additionally, nothing in this contract or order shall restrict disclosure by the receiving party pursuant to any applicable law, including but not limited to the Freedom of Information Act, 5 U.S.C. 552, *et seq.,* or an order of any court of competent jurisdiction, provided that in either such case the receiving party gives prompt notice to the disclosing party to allow the disclosing party to interpose an objection to such disclosure, take action to assure confidential handling of the confidential information, or take such other action as it deems appropriate to protect its confidential information.

(B) The Government considers and hereby identifies as confidential any and all information related to any inquiries and/or searches performed by the Government or by contractor at the Government's direction under this contract or order, including the subject of any such inquiry or search and any and all search terms, regardless of whether provided in writing or orally to Contractor, and Contractor agrees that it may only disclose such information to its employees and contractors on a ''need-to-know'' basis to carry out the obligations of this contract or order and that it will not share, reveal, divulge, disclose, disseminate, or publicize any such information to any third party except as provided in this provision without the prior written approval of the Contracting Officer. Contractor also understands and agrees that any subcontractors performing under this contract or order are subject to the same stipulations and that Contractor may be held responsible for any violations of confidentiality by a subcontractor.

(C) These provisions are consistent with and do not supersede, conflict with, or otherwise alter an employee's obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by Executive orders and statutory provisions relating to whistleblower protection are incorporated into this contract and are controlling.

(D) The Government may share the terms, conditions and prices set forth in this Order with, and provide a copy of the Order to, other Executive branch agencies of the U.S. Government, provided that the Government shall ensure that other Executive branch agencies to which it provides such information will be required to treat all such information consistent with terms and conditions set forth in this Order.

(E) Notwithstanding anything in this agreement, the Government may retain any confidential information as required by law, regulation, or its internal document retention procedures for legal, regulatory, or compliance purposes; provided, however, that all such retained confidential information will continue to be subject to the confidentiality obligations of this Order.

(xv) *Authorized users.* Authorized users may include full and part-time employees of the Government, including those working at or from remote locations, and contractors and contractor employees working within the scope of their contract with the Government, including those at or from remote locations.

(xvi) *Authorized use.* Authorized users are authorized to use the product or service acquired under this contract in performing business on behalf of the Government. Any information obtained or acquired by the Government under this contract may be used by the Government in the performance of Government business.

(2) If any language, provision, or clause of this agreement conflicts or is inconsistent with the preceding paragraph (w)(1), the language, provisions, or clause of paragraph (w)(1) shall prevails to the extent of such inconsistency.

2852.222–70 Domestic Violence, Sexual Assault, and Stalking.

As prescribed in JAR 2822.101–70, insert the following clause:

DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING (DEC 2014)

(a) It is DOJ policy to enhance workplace awareness of and safety for victims of domestic violence, sexual assault, and stalking. This policy is summarized in ''*DOJ Policy Statement 1200.02, Federal Workforce Responses to Domestic Violence, Sexual Assault, and Stalking,*'' available in full for public viewing at: *https://www.justice.gov/sites/default/files/ovw/legacy/2013/12/19/federal-workplacee-responses-to-domesticviolence-sexualassault-stalking.pdf.*

Vendor agrees, upon contract award, to provide notice of this Policy Statement, including at a minimum the above-listed URL, to all Vendor employees and employees of subcontractors who will be assigned to work on DOJ premises.

(b) Upon contract award, DOJ will provide the Contractor with the name and contact information of the point of contact for victims of domestic violence, sexual assault, and stalking for the component or components where the Contractor will be performing. The Contractor agrees to inform its employees and employees of subcontractors, who will be assigned to work on DOJ premises, with the name and contact information of the point of contact for victims of domestic violence, sexual assault, and stalking.

(End of Clause)

2852.223–70 Unsafe Conditions Due to the Presence of Hazardous Material.

As prescribed in JAR 2823.303–70, insert the following clause:

UNSAFE CONDITIONS DUE TO THE PRESENCE OF HAZARDOUS MATERIAL (NOV 2020)

(a) ''Unsafe condition'' as used in this clause means the actual or potential exposure of Contractor or Government employees to a hazardous material.

(b) ''Hazardous Material'' as used in this clause includes any material defined as hazardous under the latest version of Federal Standard No. 313 (including revisions adopted during the term of the contract), any other potentially hazardous material requiring safety controls, or any other material or working condition designated as hazardous by the Contracting Officer's Representative (COR).

(c) The Occupational Safety and Health Administration (OSHA) is responsible for issuing and administering regulations that require Contractors to apprise its employees of all hazards to which they may be exposed in the course of their employment; proper conditions and precautions for safe use and exposure; and related symptoms and emergency treatment in the event of exposure.

(d) Prior to commencement of work, Contractors are required to inspect for and report to the Contracting Officer the presence of, or suspected presence of, any unsafe condition including asbestos or other hazardous materials or working conditions in areas in which they will be working.

(e) If during the performance of the work under this contract, the Contractor or any of its employees, or subcontractor employees, discovers the existence of an unsafe condition, the Contractor shall immediately notify the Contracting Officer, or designee (with written notice provided not later than three (3) working days thereafter), of the existence of an unsafe condition. Such notice shall include the Contractor's recommendations for the protection and the safety of Government, Contractor and subcontractor personnel and property that may be exposed to the unsafe condition.

(f) When the Government receives notice of an unsafe condition from the Contractor, the parties will agree on a course of action to mitigate the effects of that condition and, if necessary, the contract will be amended. Failure to agree on a course of action will constitute a dispute under the Disputes clause of this contract.

(g) Nothing contained in this clause shall relieve the Contractor or subcontractors from complying with applicable Federal, State, and local laws, codes, ordinances and regulations (including the obtaining of licenses and permits) in connection with hazardous material including but not limited to the use, disturbance, or disposal of such material.

(End of Clause)

2852.233–70 Protests Filed Directly with the Department of Justice.

As prescribed in JAR 2833.102(d), insert a clause substantially as follows:

PROTESTS FILED DIRECTLY WITH THE DEPARTMENT OF JUSTICE (NOV 2020)

(a) The following definitions apply in this provision:

(1) ''Agency Protest Official'' (APO) means the Deciding Official for a procurement protest filed with a contracting activity of DOJ when the contracting officer will not be the Deciding Official because of the protestor's election under JAR 2833.103(b)

(2) ''Deciding Official'' means the official who will review and decide a procurement protest filed with the agency. The Deciding Official will be the contracting officer unless the protestor requests pursuant to JAR 2833.103(b) that the protest be decided by an individual above the level of the contracting officer, in which case the HCA will designate an APO to serve as the Deciding Official.

(3) ''Interested Party'' means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

(b) Only interested parties may file a protest.

(c) An interested party filing a protest with the DOJ has the choice of requesting either that the Contracting Officer or the APO decide the protest.

(d) A protest filed directly with the DOJ shall:

(1) Indicate that it is a protest to DOJ.

(2) Be filed with the Contracting Officer.

(3) State whether the protestor chooses to have the Contracting Officer or the Agency Protest Official decide the protest. If the protestor is silent on this matter, the Contracting Officer will decide the protest.

(4) Indicate whether the protestor prefers to make an oral or written presentation of arguments in support of the protest to the deciding official.

(5) Include the information required by FAR 33.103(d)(2):

(i) Name, address, facsimile number and telephone number of the protestor.

(ii) Solicitation or contract number.

(iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protestor.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protestor is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

(e) The decision by the APO is an alternative to a decision by the Contracting Officer. The APO will not consider appeals from the Contracting Officer's decision on an agency protest and a decision by the APO is final and not appealable.

(f) The Deciding Official may conduct a scheduling conference. The scheduling conference, if conducted, will establish deadlines for oral or written arguments in support of the agency protest and for agency officials to present information in response to the protest issues. The deciding official may hear oral arguments in support of the agency protest at the same time as the scheduling conference, depending on availability of the necessary parties.

(g) Oral conferences may take place either by telephone or in person.

(h) The protestor has only one opportunity to support or explain the substance of its protest. DOJ procedures do not provide for any discovery. The deciding official may request additional information from the agency or the protestor. The deciding official will resolve the protest through informal presentations or meetings to the maximum extent practicable.

(i) A protestor may represent itself or be represented by legal counsel. The DOJ will not reimburse the protester for any legal fees related to the agency protest.

(j) The DOJ will stay award or suspend contract performance in accordance with FAR 33.103(f), unless the contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. The justification or determination shall be approved at a level above the Contracting Officer. The stay or suspension, unless over-ridden, remains in effect until the protest is decided, dismissed, or withdrawn.

(k) The deciding official will make a best effort to issue a decision on the protest within thirty-five (35) days after the filing date. The decision shall be written, and provided to the protestor using a method that provides for evidence of receipt.

(l) The DOJ may dismiss or stay proceedings on an agency protest if a protest on the same or similar basis is filed with a forum outside DOJ.

(End of Clause)

Dated: September 30, 2021.

Lee Lofthus,

Assistant Attorney General for Administration.

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

APPENDIX—SECTIONS OF THE JAR THAT ARE BEING PROPOSED FOR REMOVAL AND/OR RENAMING

Current JAR provision	Disposition
2801.2 Administration	Not Replaced. New 2801.1 Purpose, Authority, Issuance.
2801.270–1 Revisions	Not Replaced.
2801.470 Requests for Class Deviations	Now 2801.404.
2801.602 Contracting Officer	Not Replaced.
2801.602–3 Ratification of Unauthorized Commitments	Not Replaced.
2801.603 Selection, Appointment and Termination of Appointment	Not Replaced.
2801.603–1 Department of Justice Acquisition Career Management Program.	Not Replaced.
2801.603–3 Appointment	Not Replaced. [Addressed Contracting Officer's Representative (COR) appointment below Micro Threshold.]
2801.70 Contracting Officer's Technical Representative (COTR)	New 2801.604 addresses COR.
2801.7001–701 General	New 2801.604 addresses COR.
2801.7001–702 Selection, Appointment and Limitation of Authority	New 2801.604 addresses COR.
2803.104–10 Violations or Possible Violations	Now 2803.104–7.
2803.104–70 Ethics Program Training Requirements	Not Replaced.
2804.403 Responsibilities of Contracting Officers	Not Replaced.

APPENDIX—SECTIONS OF THE JAR THAT ARE BEING PROPOSED FOR REMOVAL AND/OR RENAMING—Continued

Current JAR provision	Disposition
2804.470 Contractor Personnel Security Program	Now 2804.402–70—Contractor Personal Security Program.
2804.470–1 Policy	See 2804.402–70.
2804.470–2 Responsibilities	See 2804.402–70.
2804.5 Electronic Commerce in Contracting	Not Replaced.
2804.506 Exemptions	Not Replaced.
2804.6 Contract Reporting	Now 2804.903–70.
2804.602 Federal Procurement Data System	Now 2804.903–70.
2804.8 Government Contract Files	Not Replaced.
2804.805 Storage, Handling, and Contract Files	Not Replaced.
2804.902 Contract Information	Now addressed in 2804.903–70.
2804.970 Special Reporting Exceptions	Now addressed in 2804.903–71.
2805.201–70 Departmental Notification	Not Replaced.
2805.3 Synopses of Contract Awards	Now 2805.2 Synopsis of Proposed Contract Actions.
2805.302–70 Departmental Notification	Not Replaced.
2805.503–70 Procedures	Not Replaced.
2806.302 Circumstances Permitting Other Than Full and Open Competition.	Now addressed in 2806.3.
2806.302–7 Public Interest	Not Replaced.
2806.302–70 Determinations and Findings	Now addressed in 2806.304 Approval of the Justification.
2806.303 Justifications	See above.
2806.303–1 Requirements	See above.
2806.303–2 Content	See above.
2806.502 Duties and Responsibilities	Now 2806.5 Advocates for Competition.
2807.102 Policy	Now 2807.1 addresses Acquisition Planning.
2807.102–70 Applicability	Now 2807.1 addresses Acquisition Planning.
2807.103–70 Other Officials' Responsibilities	Now 2807.1 addresses Acquisition Planning.
2807.105 Contents of Written Acquisition Plans	Now 2807.1 addresses Acquisition Planning.
2807.5 Inherently Governmental Functions	Not Replaced.
2807.503 Policy	Not Replaced.
2809.404 List of Parties Excluded From Federal Procurement and Nonprocurement Programs.	Not Replaced.
2811.001 Definitions	[Not replaced, but 2811.001 Still "Describing Agency's Needs"].
2811.104–70 Brand-Name or Equal Description	Not Replaced.
2813.7001 Policy	Now 2813.70–1. [2813.70–1 addresses Simplified Acquisitions].
2813.7002 Procedures	Now in 2813.70–2.
2814.409 Information to Bidders	Not Replaced.
2814.409–2 Award of Classified Contracts	Not Replaced.
2815.205 Issuing Solicitations	Not Replaced.
2815.404–2 Information to Support Proposal Analysis	Renamed "Data to Support Proposal Analysis".
2815.207 Handling Proposals and Information	Not Replaced.
2815.404–4 Profit	Not Replaced.
2815.407–4 Should-Cost Review	Not Replaced.
2816.6 Time-And-Materials, Labor-Hour, and Letter Contracts	Not Replaced.
2816.601 Time-And-Material Contracts	Not Replaced.
2816.603–2 Application	Not Replaced.
2816.603–3 Limitations	Not Replaced.
2817.108 Congressional Notification	Not Replaced. [But Multi-Year Contracting now at part 2817].
2817.605 Award, Renewal and Extension	Not Replaced. [Multi-Year Contracting now at part 2817].
2819.506 Withdrawing or Modifying Set-Asides	Not Replaced.
2819.6 Certificates of Competency and Determinations of Eligibility	Not Replaced.
2819.602 Procedures	Not Replaced.
2819.602–1 Referral	Not Replaced.
2819.70 Forecasts of Expected Contract Opportunities	Not Replaced.
2819.7001 General	Not Replaced.
2819.7002 Procedures	Not Replaced.
2822.13 SERVICE DISABLED AND VIETNAM ERA VETERANS	Renamed Equal Opp. For Veterans.
2822.303 Waivers	Not Replaced.
2823 ENVIRONMENT CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG–FREE WORKPLACE.	Renamed ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG–FREE WORKPLACE.
2823.1 Pollution Control and Clean Air and Water	Not Replaced.
2823.107 Compliance Responsibilities	Not Replaced.
2823.303–70 Departmental Contract Clause	Renamed Unsafe Conditions Due to Hazardous Material.
2823.4 USE OF RECOVERED MATERIALS	Now "USE OF RECOVERED MATERIALS AND BIOBASED PRODUCTS".
2823.403 Policy	Not Replaced.
2823.404 Procedures	Renamed "Agency affirmative procurement programs".
Part 2824 Protection of Privacy and Freedom of Information	Not Replaced.
2824.2 Freedom of Information Act	Not Replaced.
2824.202 Policy	Not Replaced.
2825.203 Evaluating Offers	Now 2825.204.
2825.3 BALANCE OF PAYMENT PROGRAM	Not Replaced.

APPENDIX—SECTIONS OF THE JAR THAT ARE BEING PROPOSED FOR REMOVAL AND/OR RENAMING—Continued

Current JAR provision	Disposition
2825.3 Policy	[There were two sections labelled 2825.3] Not Replaced.
2825.9 Additional Foreign Acquisition Clause	Not Replaced.
2825.901 Omission of Audit Clause	Not Replaced.
2828.1 Bonds	Now BONDS AND OTHER FINANCIAL PROTECTIONS.
2828.2 Sureties	Now SURETIES AND OTHER SECURITY FOR BONDS.
2831.205–32 Precontract Costs	Not Replaced.
2832.903 Policy [under PROMPT PAYMENT]	Renamed ''Responsibilities.''
2842.15 Contractor Performance Information	Not Replaced.
2842.1502 Policy	Not Replaced.
2842.1503 Procedures	Not Replaced.
2845.105 Records of Government Property	Renamed, but still at 2845.105.
2845.505–14 Report of Government Property	Renamed, now at 2845.105–70.
2845.6 Reporting, Redistribution, and Disposal of Contactor Inventory	Now part of 2845.105–70.
2845.603 Disposal Methods	Not Replaced.
2852.102–270 Incorporation in Full Text	Not Replaced.
2852.201–70 Contracting Officer's Technical Representative	Renamed Contracting Officer's Representative (COR).
2852.211–70 Brand Name or Equal	Not Replaced.

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