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Title 3—

The President

Proclamation 10314 of November 24, 2021

Thanksgiving Day, 2021

By the President of the United States of America

A Proclamation

Thanksgiving provides us with a time to reflect on our many blessings—from God, this Nation, and each other. We are grateful for these blessings, even—and especially—during times of challenge.

That is why George Washington declared a day of Thanksgiving for his troops as they marched into that dark winter at Valley Forge. It is why in the midst of the Civil War—in proclaiming the Thanksgiving holiday we now celebrate today—Abraham Lincoln urged us to remember our ''fruitful fields and healthful skies.'' Just as 400 years ago when the Pilgrims were able to celebrate a successful first harvest thanks to the generosity and support of the Wampanoag, today we too express our gratitude for those who have helped us get through this difficult past year.

We are grateful for the farm workers and frontline workers, many of whom are immigrants, who make sure our food is harvested and shipped, keep our grocery stores stocked, and keep our cities and towns clean and safe.

We are grateful for the educators who are welcoming children back into their classrooms, helping them make up for lost learning and lost time, both academically and socially.

We are grateful for the parents who have carried their families through this challenging time, helping their children navigate this difficult chapter in our Nation's history.

We are grateful for the health care professionals working to vaccinate our Nation, the nurses who comfort and help people, and the doctors who provide care and compassion.

We are grateful for the researchers and scientists who have developed safe and effective vaccines and treatments, allowing us to safely enjoy a Thanksgiving this year with more family around the table.

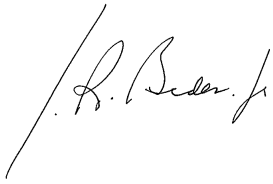
As always, we are grateful for our troops serving far from home, keeping us safe and defending our values.

For the First Lady and me, Thanksgiving has always been a cherished time to enjoy annual traditions that have evolved into sacred rituals with our children and grandchildren: throwing the football, preparing family recipes, lighting candles, and setting the table. For many Americans, this Thanksgiving will be the first time gathering with loved ones in person since the start of the pandemic—a time of full tables and full hearts.

As we celebrate, we will also be thinking of the many families feeling the pain of an empty chair at the Thanksgiving table. You are not alone, and our Nation stands with you.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim Thursday, November 25, 2021, as a National Day of Thanksgiving. I encourage the people of the United States of America to join together and give thanks for the friends, neighbors, family members, and strangers who have supported each other over the past year in a reflection of goodwill and unity.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of November, 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.



[FR Doc. 2021–26219
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Rules and Regulations

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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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0616; Project Identifier MCAI–2021–00256–T; Amendment 39–21805; AD 2021–23–07]

RIN 2120–AA64

Airworthiness Directives; Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Saab AB, Support and Services Model SAAB 340B airplanes. This AD was prompted by a report that the circuit breaker for the emergency cabin lighting tripped without fault in the system. This AD requires replacing a certain circuit breaker with a part having a higher rating, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 5, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 5, 2022.

ADDRESSES: For EASA material incorporated by reference (IBR) in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0616.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0616; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0058, dated March 1, 2021 (EASA AD 2021–0058) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for certain Saab AB, Support and Services Model SAAB 340B airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Saab AB, Support and Services Model SAAB 340B airplanes. The NPRM published in the **Federal Register** on August 9, 2021 (86 FR 43451). The NPRM was prompted by report that the circuit breaker for the emergency cabin lighting tripped without fault in the system. The NPRM proposed to require replacing a certain circuit breaker with a part having a higher rating, as specified in EASA AD 2021–0058.

The FAA is issuing this AD to address the low rating of the 2LN circuit breaker during maximum charging conditions. This condition, if not corrected, could lead to an insufficiently charged emergency battery, with consequent loss of cabin emergency lighting, possibly resulting in injury to occupants during an evacuation. See the MCAI for additional background information.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0058 describes procedures for replacing the 2LN circuit breaker having a rating of 5A with a new breaker having a current rating of 7.5A.

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

Costs of Compliance

The FAA estimates that this AD affects 27 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
1 work-hour × $85 per hour = $85	$50	$135	$3,645

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–23–07 Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics): Amendment 39–21805; Docket No. FAA–2021–0616; Project Identifier MCAI–2021–00256–T.

(a) Effective Date

This airworthiness directive (AD) is effective January 5, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics) Model SAAB 340B airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2021–0058, dated March 1, 2021 (EASA AD 2021–0058).

(d) Subject

Air Transport Association (ATA) of America Code 33, Lights.

(e) Reason

This AD was prompted by a report that the circuit breaker for the emergency cabin lighting tripped without fault in the system. The FAA is issuing this AD to address the low rating of the 2LN circuit breaker during maximum charging conditions. This condition, if not corrected, could lead to an insufficiently charged emergency battery, with consequent loss of cabin emergency lighting, possibly resulting in injury to occupants during an evacuation.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2021–0058.

(h) Exceptions to EASA AD 2021–0058

(1) Where EASA AD 2021–0058 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2021–0058 does not apply to this AD.

(i) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(j) Related Information

For more information about this AD, contact Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2021–0058, dated March 1, 2021.

(ii) [Reserved]

(3) For EASA AD 2021–0058, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

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

Issued on October 27, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–26108 Filed 11–30–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0656; Project Identifier MCAI–2021–00394–T; Amendment 39–21800; AD 2021–23–02]

RIN 2120–AA64

Airworthiness Directives; De Havilland Aircraft of Canada Limited (Type Certificate Previously Held by Bombardier, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain De Havilland Aircraft of Canada Limited Model DHC–8–401 and –402 airplanes. This AD was prompted by reports of loss of hydraulic fluid and annunciation of the check fire detect light. This AD requires doing a detailed visual inspection for chafing and proper clearance of the left-hand (LH) and right-hand (RH) main landing gear (MLG) primary zone advanced pneumatic detector (APD) sensing lines, the hydraulic tube assemblies, and the surrounding structure, and doing all applicable corrective action. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 5, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 5, 2022.

ADDRESSES: For service information identified in this final rule, contact De Havilland Aircraft of Canada Limited, Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd@dehavilland.com;* internet *https://dehavilland.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0656.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0656; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Chirayu Gupta, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued TCCA AD CF–2021–12, dated April 14, 2021 (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for certain De Havilland Aircraft of Canada Limited Model DHC–8–401 and –402 airplanes. You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0656.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain De Havilland Aircraft of Canada Limited Model DHC–8–401 and –402 airplanes. The NPRM published in the **Federal Register** on August 12, 2021 (86 FR 44324). The NPRM was prompted by reports of loss of hydraulic fluid and annunciation of the check fire detect light. The NPRM proposed to require doing a detailed visual inspection for chafing and proper clearance of the LH and RH MLG primary zone APD sensing lines, the hydraulic tube assemblies, and the surrounding structure, and doing all applicable corrective actions. The FAA is issuing this AD to address insufficient separation between the APD sensing line and surrounding components, which could lead to a hydraulic leak, loss of hydraulic systems, and loss of fire detection in the MLG primary zone should prolonged contact occur. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA has considered the comment received. The Air Line Pilots Association, International (ALPA) stated that it supports the NPRM.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

De Havilland Aircraft of Canada Limited has issued Service Bulletin 84–26–20, Revision A, dated March 9, 2021. This service information describes procedures for doing a detailed visual inspection for chafing and proper clearance of the LH and RH MLG primary zone APD sensing lines, the hydraulic tube assemblies and the surrounding structure, and doing all applicable corrective actions. Corrective actions include repair and replacement of the APD sensing line and the hydraulic tube assembly.

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.

Costs of Compliance

The FAA estimates that this AD affects 54 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
5 work-hours × $85 per hour = $425	$0	$425	$22,950

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 7 work-hours × $85 per hour = Up to $595	Up to $12,643	Up to $13,238.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–23–02 De Havilland Aircraft of Canada Limited (Type Certificate Previously Held by Bombardier, Inc.): Amendment 39–21800; Docket No. FAA–2021–0656; Project Identifier MCAI–2021–00394–T.

(a) Effective Date

This airworthiness directive (AD) is effective January 5, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to De Havilland Aircraft of Canada Limited Model DHC–8–401 and –402 airplanes, certificated in any category, serial numbers 4001 and 4003 through 4614 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 26, Fire protection.

(e) Unsafe Condition

This AD was prompted by reports of loss of hydraulic fluid and annunciation of the check fire detect light. The FAA is issuing this AD to address insufficient separation between the advanced pneumatic detector (APD) sensing line and surrounding components, which could lead to a hydraulic leak, loss of hydraulic systems and loss of fire detection in the main landing gear (MLG) primary zone should prolonged contact occur.

(f) Compliance

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

(g) Inspection and Corrective Actions

Within 48 months or 8,000 flight hours, whichever occurs first after the effective date of this AD: Do a detailed visual inspection for chafing and proper clearance of the left- and right-hand MLG primary zone APD sensing lines, the hydraulic tube assemblies and the surrounding structure, and do all applicable corrective actions, in accordance with paragraph 3.B. of the Accomplishment Instructions of De Havilland Aircraft of Canada Limited Service Bulletin 84–26–20, Revision A, dated March 9, 2021. Do all applicable corrective actions before further flight.

(h) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using De Havilland Aircraft of Canada Limited Service Bulletin 84–26–20, dated October 21, 2020.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada Civil Aviation (TCCA); or De Havilland Aircraft of Canada Limited's TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) TCCA AD CF–2021–12, dated April 14, 2021, for related information. This MCAI may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0656.

(2) For more information about this AD, contact Chirayu Gupta, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (k)(3) and (4) of this AD.

(k) Material Incorporated by Reference

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

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

(i) De Havilland Aircraft of Canada Limited Service Bulletin 84–26–20, Revision A, dated March 9, 2021.

(ii) [Reserved]

(3) For service information identified in this AD, contact De Havilland Aircraft of Canada Limited, Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd@dehavilland.com;* internet *https://dehavilland.com.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

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

Issued on October 26, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–26109 Filed 11–30–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0568; Project Identifier MCAI–2021–00446–T; Amendment 39–21798; AD 2021–22–25]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS Model A330–200, –200 Freighter, –300, and –900 series airplanes; and Model A340–200, –300, –500, and –600 series airplanes. This AD was prompted by a report that during the frame of flight test clearance process, a detailed analysis of air data reference (ADR) failure scenarios led to the identification that compliance requirements for loads and handling qualities throughout the flight envelope could be impaired in case of dispatch with one ADR inoperative (master minimum equipment list (MMEL) item 34–10–01) during the maximum interval allowed by the current MMEL. This AD requires revising the operator's existing FAA-approved minimum equipment list (MEL) for the air data/inertial reference system, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 5, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 5, 2022.

ADDRESSES: For material incorporated by reference (IBR) in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0568.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0568; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

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

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0103, dated April 13, 2021 (EASA AD 2021–0103) (also referred to as the MCAI), to correct an unsafe condition for all Airbus SAS Model A330–200, –200 Freighter, –300, and –900 series airplanes; Model A340–200 and –300 series airplanes; and Model A340–541, –542, –642, and –643 airplanes. Model A340–542 and –643 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus SAS Model A330–200, –200 Freighter, –300, and –900 series airplanes; and Model A340–200, –300, –500, and –600 series airplanes. The NPRM published in the **Federal Register** on July 28, 2021 (86 FR 40373). The NPRM was prompted by a report that during the frame of flight test clearance process, a detailed analysis of ADR failure scenarios led to the identification that compliance requirements for loads and handling qualities throughout the flight envelope

could be impaired in case of dispatch with one ADR inoperative (MMEL item 34–10–01) during the maximum interval allowed by the current MMEL. The NPRM proposed to require revising the operator's existing FAA-approved MEL for the air data/inertial reference system, as specified in EASA AD 2021–0103.

The FAA is issuing this AD to address the possibility of in-flight loss of a second ADR combined with erroneous low speed data provided by the remaining functional ADR, which could result in loss of control of the airplane. See the MCAI for additional background information.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from the Air Line Pilots Association, International (ALPA) who supported the NPRM without change.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting this AD as proposed. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0103 describes procedures for revising the air data/inertial reference system for MMEL item 34–10–01. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 130 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × $85 per hour = $170	$0	$170	$22,100

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–22–25 Airbus SAS: Amendment 39–21798; Docket No. FAA–2021–0568; Project Identifier MCAI–2021–00446–T.

(a) Effective Date

This airworthiness directive (AD) is effective January 5, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus SAS airplanes specified in paragraphs (c)(1) through (8) of this AD, certificated in any category.

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

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

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

(4) Model A330–941 airplanes.

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

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

(7) Model A340–541 airplanes.

(8) Model A340–642 airplanes.

(d) Subject

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

(e) Reason

This AD was prompted by a report that during the frame of flight test clearance process, a detailed analysis of air data reference (ADR) failure scenarios led to the identification that compliance requirements for loads and handling qualities throughout the flight envelope could be impaired in case of dispatch with one ADR inoperative (master minimum equipment list (MMEL) item 34–10–01) during the maximum interval allowed by the current MMEL. The FAA is issuing this AD to address the possibility of in-flight loss of a second ADR combined with erroneous low speed data provided by the remaining functional ADR, which could result in loss of control of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in

accordance with, European Union Aviation Safety Agency (EASA) AD 2021–0103, dated April 13, 2021 (EASA AD 2021–0103).

(h) Exceptions to EASA AD 2021–0103

(1) Where EASA AD 2021–0103 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where EASA AD 2021–0103 specifies to implement certain information in ''the MMEL MER'' into the ''operational documentation,'' this AD requires revising the operator's existing FAA-approved minimum equipment list (MEL) to incorporate that information.

(3) Where EASA AD 2021–0103 specifies to ''inform all flight crews, and, thereafter, operate the aeroplane accordingly,'' this AD does not require those actions as those actions are already required by existing FAA operating regulations.

(4) The ''Remarks'' section of EASA AD 2021–0103 does not apply to this AD.

(i) Additional AD Provisions

The following provisions also apply to this AD:

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

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

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

(j) Related Information

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

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2021–0103, dated April 13, 2021.

(ii) [Reserved]

(3) For EASA AD 2021–0103, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

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

Issued on October 25, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–26110 Filed 11–30–21; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 211

[Release No. SAB 120]

Staff Accounting Bulletin No. 120

AGENCY: Securities and Exchange Commission.

ACTION: Publication of Staff Accounting Bulletin.

SUMMARY: This staff accounting bulletin expresses the views of the staff regarding the estimation of the fair value of share-based payment transactions in accordance with Financial Accounting Standards Board (''FASB'') Accounting Standards Codification (''ASC'') Topic 718, *Compensation—Stock Compensation* (''Topic 718''), when a company is in possession of material non-public information, and modifies portions of the interpretive guidance included in the Staff Accounting Bulletin Series (''Series'') in order to make the relevant interpretive guidance consistent with current authoritative accounting guidance, specifically, to update the Series to bring existing guidance into conformity with Topic 718.

DATES: Effective December 1, 2021.

FOR FURTHER INFORMATION CONTACT: Dan Janiak, Professional Accounting Fellow, Office of the Chief Accountant at (202) 551–5300 or Todd E. Hardiman, Associate Chief Accountant, Division of Corporation Finance at (202) 551–3400, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The statements in 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.

Dated: November 24, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

PART 211—[AMENDED]

Accordingly, Part 211 of Title 17 of the Code of Federal Regulations is amended as follows:

PART 211—INTERPRETATIONS RELATING TO FINANCIAL REPORTING MATTERS

■ 1. The authority citation for 17 CFR 211 continues to read as follows:

Authority: 15 U.S.C. 77g, 15 U.S.C. 77s(a), 15 U.S.C. 77aa(25) and (26), 15 U.S.C. 78c(b), 17 CFR 78l(b) and 13(b), 17 CFR 78m(b) and 15 U.S.C. 80a–8, 30(e) 15 U.S.C. 80a–29(e), 15 U.S.C. 80a–30, and 15 U.S.C. 80a–37(a).

■ 2. Amend the table in subpart B by adding an entry for Staff Accounting Bulletin No. 120 at the end of the table to read as follows:

Subpart B—Staff Accounting Bulletins

Subject	Release No.	Date	Fed. Reg. Vol. and page
*	*	*	*
Publication of Staff Accounting Bulletin No. 120.	SAB120	December 1, 2021	[Insert **Federal Register** citation].

Note: The text of Staff Accounting Bulletin No. 120 will not appear in the Code of Federal Regulations.

Staff Accounting Bulletin No. 120

This staff accounting bulletin (''SAB'') adds interpretive guidance for public companies to consider when entering into share-based payment transactions while in possession of material non-public information, including share-based payment transactions that are commonly referred to as being ''spring-loaded.'' Specifically, the staff is updating the Series to provide additional guidance to companies estimating the fair value of share-based payment transactions in accordance with Topic 718 regarding the determination of the current price of the underlying share and the estimation of the expected volatility of the price of the underlying share for the expected term when the company is in possession of material non-public information.

Additionally, this SAB rescinds portions and conforms portions of the interpretive guidance included in the Series in order to make the relevant staff interpretive guidance consistent with the latest U.S. generally accepted accounting principles (''U.S. GAAP'') as issued by the FASB. Specifically, the staff is updating the Series in order to bring existing guidance into conformity with Topic 718. The FASB has undertaken various projects to update share-based payment accounting in Topic 718 including, but not limited to, issuing:

- Accounting Standards Update (''ASU'') 2019–08, *Compensation—Stock Compensation (Topic 718) and Revenue from Contracts with Customers (Topic 606): Codification Improvements—Share-Based Consideration Payable to a Customer,* in November 2019;
- ASU 2018–07, *Compensation—Stock Compensation (Topic 718): Improvements to Nonemployee Share-Based Payment Accounting* (''ASU 2018–07''), in June 2018; and
- ASU 2016–09, *Compensation—Stock Compensation (Topic 718): Improvements to Employee Share-Based Payment Accounting* (''ASU 2016–09''), in March 2016.

The rescissions and conforming changes bring existing guidance into conformity with Topic 718, as updated by these ASUs.

The following describes the additional interpretive guidance, rescissions, and conforming edits made to the Series that are presented at the end of this release:

1. Topic 14: Share-Based Payment

Topic 14 includes Securities and Exchange Commission staff views on a variety of share-based payment topics. This SAB makes the following updates to Topic 14:

a. Amendment and replacement of Topic 14.D: *Certain Assumptions Used in Valuation Methods.* The staff has observed numerous instances where companies have granted share-based compensation while in possession of positive material non-public information, including share-based payment transactions that are commonly referred to as being ''spring-loaded.'' When companies are in possession of positive material non-public information, the staff believes these companies should consider whether adjustments to the current price of the underlying share or the expected volatility of the price of the underlying share for the expected term of the share-based payment award are appropriate when applying a fair-value-based measurement method to estimate the cost of its share-based payment transactions. The staff is including examples where such adjustments may be necessary and is reminding companies of their corporate governance obligations and disclosure obligations under U.S. GAAP with respect to share-based payment transactions, as well as the need to maintain effective internal control over financial reporting.

b. Rescission of Subtopic 14.A: *Share-Based Payment Transactions with Nonemployees.* The interpretive guidance included in this Subtopic addresses if share-based payment transactions with nonemployees are included in the scope of ASC 718. Because the amendments in ASU 2018–07 expand the scope of ASC 718 to include accounting for share-based payment transactions with nonemployees and supersede the guidance in FASB ASC Subtopic 505–50, *Equity: Equity-Based Payments to Non-Employees* (''ASC 505–50''), Topic 14.A is no longer relevant.

c. Conforming edits to Subtopics 14.B: *Transition from Nonpublic to Public Entity Status;* 14.C: *Valuation Methods;* 14.D: *Certain Assumptions Used in Valuation Methods;* 14.E: *FASB ASC Topic 718, Compensation—Stock Compensation, and Certain Redeemable Financial Instruments;* 14.F: *Classification of Compensation Expense Associated with Share-Based Payment Arrangements;* and 14.I: *Capitalization of Compensation Cost Related to Share-Based Payment Arrangements.* Recent FASB ASUs 2018–07 and 2016–09 updated terminology used in ASC 718. Because the aforementioned Subtopics in Topic 14 directly or indirectly reference ASC 718, conforming updates are necessary to reflect the most updated U.S. GAAP terminology.

2. Topic 5: Miscellaneous Accounting

Subtopic 5.T: *Accounting for Expenses or Liabilities Paid by Principal Stockholder(s)* is updated to make conforming edits as a result of amendments in ASU 2018–07. Subtopic 5.T references ASC 718–10–15–4 and ASU 2018–07 updated the terminology used in this paragraph to include awards to both employees and nonemployees. The conforming updates are necessary to reflect the most updated U.S. GAAP terminology.

Accordingly, the staff hereby amends the Staff Accounting Bulletin Series as follows:

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Topic 14: Share-Based Payment

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The interpretations in this SAB express views of the staff regarding the interaction between FASB ASC Topic 718, Compensation—Stock Compensation, and certain SEC rules and regulations and provide the staff's views regarding the valuation of share-based payment arrangements for public companies. FASB ASC Topic 718 is based on the underlying accounting principle that compensation cost resulting from share-based payment transactions be recognized in financial statements at fair value.[1] Recognition of compensation cost at fair value will provide investors and other users of financial statements with more

[1] FASB ASC paragraphs 718–10–30–2 through 718–10–30–4.

complete and comparable financial information.

FASB ASC Topic 718 addresses a wide range of share-based compensation arrangements including share options, restricted share plans, performance-based awards, share appreciation rights, and employee share purchase plans.

FASB ASC Topic 718 replaced guidance originally issued in 1995 that established as preferable, but did not require, a fair-value-based method of accounting for share-based payment transactions with employees. It also replaced guidance originally issued in 1996 that provided different recognition and measurement requirements for share-based payment awards granted to nonemployees than for those granted to employees.

The staff believes the guidance in this SAB will assist issuers in their application of FASB ASC Topic 718 and enhance the information received by investors and other users of financial statements, thereby assisting them in making investment and other decisions. This SAB includes interpretive guidance related to the transition from nonpublic to public entity [2] status, valuation methods (including assumptions such as expected volatility, expected term, and current price of the underlying share, particularly when valuing spring-loaded awards [3]), the accounting for certain redeemable financial instruments issued under share-based payment arrangements, the classification of compensation expense, and capitalization of compensation cost related to share-based payment arrangements.

The staff recognizes that there is a range of conduct that a reasonable issuer might use to make estimates and valuations and otherwise apply FASB ASC Topic 718, and the interpretive guidance provided by this SAB. Thus, throughout this SAB the use of the terms ''reasonable'' and ''reasonably'' is not meant to imply a single conclusion or methodology, but to encompass the full range of potential conduct, conclusions or methodologies upon which an issuer may reasonably base its valuation decisions. Different conduct, conclusions or methodologies by different issuers in a given situation does not of itself raise an inference that any of those issuers is acting unreasonably. While the zone of reasonable conduct is not unlimited, the staff expects that it will be rare, except when observable market prices of identical or similar equity or liability instruments in active markets are available, when there is only one acceptable choice in estimating the fair value of share-based payment arrangements under the provisions of FASB ASC Topic 718 and the interpretive guidance provided by this SAB in any given situation. In addition, as discussed in the Interpretive Response to Question 1 of Section C, Valuation Methods, estimates of fair value are not intended to predict actual future events, and subsequent events are not indicative of the reasonableness of the original estimates of fair value made under FASB ASC Topic 718.

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A. Removed by SAB 120

B. Transition From Nonpublic to Public Entity Status

Facts: Company A is a nonpublic entity [4] that first files a registration statement with the SEC to register its equity securities for sale in a public market on January 2, 20X8. As a nonpublic entity, Company A had been assigning value to its share options [5] under the calculated value method prescribed by FASB ASC Topic 718, Compensation—Stock Compensation,[6] and had elected to measure its liability awards based on intrinsic value. Company A is considered a public entity on January 2, 20X8 when it makes its initial filing with the SEC in preparation for the sale of its shares in a public market.

Question 1: How should Company A account for the share options that were granted prior to January 2, 20X8 for which the requisite service has not been rendered by January 2, 20X8?

Interpretive Response: Prior to becoming a public entity, Company A had been assigning value to its share options under the calculated value method. The staff believes that Company A should continue to follow that approach for those share options that were granted prior to January 2, 20X8, unless those share options are subsequently modified, repurchased or cancelled.[7] If the share options are subsequently modified, repurchased or cancelled, Company A would assess the event under the public company provisions of FASB ASC Topic 718. For example, if Company A modified the share options on February 1, 20X8, any incremental compensation cost would be measured under FASB ASC subparagraph 718–20–35–3(a), as the fair value of the modified share options over the fair value of the original share options measured immediately before the terms were modified.[8]

Question 2: How should Company A account for its liability awards granted prior to January 2, 20X8 that are fully vested but have not been settled by January 2, 20X8?

Interpretive Response: As a nonpublic entity, Company A had elected to measure its liability awards subject to FASB ASC Topic 718 at intrinsic value.[9] When Company A becomes a public entity, it should measure the liability awards at their fair value determined in accordance with FASB ASC Topic 718.[10] In that reporting period there will be an incremental amount of measured cost for the difference between fair value as determined under FASB ASC Topic 718 and intrinsic value. For example, assume the intrinsic value in the period ended December 31, 20X7 was $10 per award. At the end of the first reporting period ending after January 2, 20X8 (when Company A becomes a public entity), assume the intrinsic value of the award is $12 and the fair value as determined in accordance with FASB ASC Topic 718 is $15. The measured cost in the first reporting period after December 31, 20X7 would be $5.[11]

Question 3: After becoming a public entity, may Company A retrospectively

[2] Defined in the FASB ASC Master Glossary.

[3] A share-based payment award granted when a company is in possession of material nonpublic information to which the market is likely to react positively when the information is announced is sometimes referred to as being ''spring-loaded.'' The interpretive guidance included in this SAB with respect to spring-loaded share-based payment awards is not limited to share options, and applies to all instruments including, for example, restricted stock units.

[4] Defined in the FASB ASC Master Glossary.

[5] For purposes of this staff accounting bulletin, the phrase ''share options'' is used to refer to ''share options or similar instruments.''

[6] FASB ASC paragraph 718–10–30–20 requires a nonpublic entity to use the calculated value method when it is not able to reasonably estimate the fair value of its equity share options and similar instruments because it is not practicable for it to estimate the expected volatility of its share price. FASB ASC paragraph 718–10–55–51 indicates that a nonpublic entity may be able to identify similar public entities for which share or option price information is available and may consider the historical, expected, or implied volatility of those entities' share prices in estimating expected volatility. The staff would expect an entity that becomes a public entity and had previously measured its share options under the calculated value method to be able to support its previous decision to use calculated value and to provide the disclosures required by FASB ASC subparagraph 718–10–50–2(f)(2)(ii).

[7] This view is consistent with the FASB's basis for rejecting full retrospective application of FASB ASC Topic 718 as described in the basis for conclusions of Statement 123R, paragraph B251.

[8] FASB ASC paragraph 718–20–55–94. The staff believes that because Company A is a public entity as of the date of the modification, it would be inappropriate to use the calculated value method to measure the original share options immediately before the terms were modified.

[9] FASB ASC paragraph 718–30–30–2.

[10] FASB ASC paragraph 718–30–35–3.

[11] $15 fair value less $10 intrinsic value equals $5 of incremental cost.

apply the fair-value-based method to its awards that were granted prior to the date Company A became a public entity?

Interpretive Response: No. Before becoming a public entity, Company A did not use the fair-value-based method for either its share options or its liability awards. The staff does not believe it is appropriate for Company A to apply the fair-value-based method on a retrospective basis, because it would require the entity to make estimates of a prior period, which, due to hindsight, may vary significantly from estimates that would have been made contemporaneously in prior periods.[12]

Question 4: Upon becoming a public entity, what disclosures should Company A consider in addition to those prescribed by FASB ASC Topic 718? [13]

Interpretive Response: In the registration statement filed on January 2, 20X8, Company A should clearly describe in MD&A the change in accounting policy that will be required by FASB ASC Topic 718 in subsequent periods and the reasonably likely material future effects.[14] In subsequent filings, Company A should provide financial statement disclosure of the effects of the changes in accounting policy. In addition, Company A should consider the requirements of Item 303(b)(3) of Regulation S–K regarding critical accounting estimates in MD&A.

C. Valuation Methods

FASB ASC paragraph 718–10–30–6 (Compensation—Stock Compensation Topic) indicates that the measurement objective for equity instruments awarded to grantees is to estimate at the grant date the fair value of the equity instruments the entity is obligated to issue when grantees have delivered the good or rendered the service and satisfied any other conditions necessary to earn the right to benefit from the instruments.[15] The Topic also states that observable market prices of identical or similar equity or liability instruments in active markets are the best evidence of fair value and, if available, should be used as the basis for the measurement for equity and liability instruments awarded in a share-based payment transaction.[16] However, if observable market prices of identical or similar equity or liability instruments are not available, the fair value shall be estimated by using a valuation technique or model that complies with the measurement objective, as described in FASB ASC Topic 718.[17]

Question 1: If a valuation technique or model is used to estimate fair value, to what extent will the staff consider a company's estimates of fair value to be materially misleading because the estimates of fair value do not correspond to the value ultimately realized by the grantees who received the share options?

Interpretive Response: The staff understands that estimates of fair value of share options, while derived from expected value calculations, cannot predict actual future events.[18] The estimate of fair value represents the measurement of the cost of the grantee's goods or services to the company. The estimate of fair value should reflect the assumptions marketplace participants would use in determining how much to pay for an instrument on the fair value measurement date.[19] For example, valuation techniques used in estimating the fair value of share options may consider information about a large number of possible share price paths, while, of course, only one share price path will ultimately emerge. If a company makes a good faith fair value estimate in accordance with the provisions of FASB ASC Topic 718 in a way that is designed to take into account the assumptions that underlie the instrument's value that marketplace participants would reasonably make, then subsequent future events that affect the instrument's value do not provide meaningful information about the quality of the original fair value estimate. As long as the share options were originally so measured, changes in a share option's value, no matter how significant, subsequent to its grant date do not call into question the reasonableness of the grant date fair value estimate.

Question 2: In order to meet the fair value measurement objective in FASB ASC Topic 718, are certain valuation techniques preferred over others?

Interpretive Response: FASB ASC paragraph 718–10–55–17 clarifies that the Topic does not specify a preference for a particular valuation technique or model. As stated in FASB ASC paragraph 718–10–55–11 in order to meet the fair value measurement objective, a company should select a valuation technique or model that (a) is applied in a manner consistent with the fair value measurement objective and other requirements of FASB ASC Topic 718, (b) is based on established principles of financial economic theory and generally applied in that field and (c) reflects all substantive characteristics of the instrument (except for those explicitly excluded by FASB ASC Topic 718).

The chosen valuation technique or model must meet all three of the requirements stated above. In valuing a particular instrument, certain techniques or models may meet the first and second criteria but may not meet the third criterion because the techniques or models are not designed to reflect certain characteristics contained in the instrument. For example, for a share option in which the exercisability is conditional on a specified increase in the price of the underlying shares, the Black-Scholes-Merton closed-form model would not generally be an appropriate valuation model because, while it meets both the first and second criteria, it is not designed to take into account that type of market condition.[20]

Further, the staff understands that a company may consider multiple techniques or models that meet the fair value measurement objective before making its selection as to the appropriate technique or model. The staff would not object to a company's choice of a technique or model as long as the technique or model meets the fair value measurement objective. For example, a company is not required to use a lattice model simply because that model was the most complex of the models the company considered.

Question 3: In subsequent periods, may a company change the valuation technique or model chosen to value instruments with similar characteristics? [21]

Interpretive Response: As long as the new technique or model meets the fair value measurement objective as described in Question 2 above, the staff would not object to a company changing its valuation technique or model.[22] A

[12] This view is consistent with the FASB's basis for rejecting full retrospective application of FASB ASC Topic 718 as described in the basis for conclusions of Statement 123R, paragraph B251.

[13] FASB ASC Section 718–10–50.

[14] *See* Item 303 of Regulation S–K.

[15] FASB ASC paragraph 718–10–30–1 states that this guidance applies equally to awards classified as liabilities.

[16] FASB ASC paragraph 718–10–55–10.

[17] FASB ASC paragraph 718–10–55–11.

[18] FASB ASC paragraph 718–10–55–15 states, ''The fair value of those instruments at a single point in time is not a forecast of what the estimated fair value of those instruments may be in the future.''

[19] Generally, the grant date for equity awards or the reporting date for liability-classified awards.

[20] *See* FASB ASC paragraphs 718–10–55–16 and 718–10–55–20.

[21] FASB ASC paragraph 718–10–55–17 indicates that an entity may use different valuation techniques or models for instruments with different characteristics.

[22] The staff believes that a company should take into account the reason for the change in technique or model in determining whether the new

change in the valuation technique or model used to meet the fair value measurement objective would not be considered a change in accounting principle.[23] As such, a company would not be required to file a preferability letter from its independent accountants as described in Rule 10–01(b)(6) of Regulation S–X when it changes valuation techniques or models. However, the staff would not expect that a company would frequently switch between valuation techniques or models, particularly in circumstances where there was no significant variation in the form of share-based payments being valued. Disclosure in the footnotes of the basis for any change in technique or model would be appropriate.[24]

Question 4: Must every company that issues share options or similar instruments hire an outside third party to assist in determining the fair value of the share options?

Interpretive Response: No. However, the valuation of a company's share options or similar instruments should be performed by a person with the requisite expertise.

D. Certain Assumptions Used in Valuation Methods

FASB ASC Topic 718's (Compensation—Stock Compensation Topic) fair value measurement objective for equity instruments awarded to grantees for goods or services is to estimate the grant-date fair value of the equity instruments that the entity is obligated to issue when grantees have delivered the good or rendered the service and satisfied any other conditions necessary to earn the right to benefit from the instruments.[25] In order to meet this fair value measurement objective, management will generally be required to develop estimates regarding (1) the expected volatility of its company's share price; (2) the expected term of the option, taking into account both the contractual term of the option and the effects of grantees' expected exercise and post-vesting termination behavior; and (3) the determination of the current price of the underlying share. The staff is providing guidance in the following sections related to the expected volatility, expected term and current share price assumptions to assist public entities in applying those requirements.

1. Expected Volatility

FASB ASC paragraph 718–10–55–36 states, ''Volatility is a measure of the amount by which a financial variable, such as share price, has fluctuated (historical volatility) or is expected to fluctuate (expected volatility) during a period. Option-pricing models require an estimate of expected volatility as an assumption because an option's value is dependent on potential share returns over the option's term. The higher the volatility, the more the returns on the share can be expected to vary—up or down. Because an option's value is unaffected by expected negative returns on the shares, other things [being] equal, an option on a share with higher volatility is worth more than an option on a share with lower volatility.''

Facts: Company B is a public entity whose common shares have been publicly traded for over twenty years. Company B also has multiple options on its shares outstanding that are traded on an exchange (''traded options''). Company B grants share options on January 2, 20X6.

Question 1: What should Company B consider when estimating expected volatility for purposes of measuring the fair value of its share options?

Interpretive Response: FASB ASC Topic 718 does not specify a particular method of estimating expected volatility. However, the Topic does clarify that the objective in estimating expected volatility is to ascertain the assumption about expected volatility that marketplace participants would likely use in determining an exchange price for an option.[26] FASB ASC Topic 718 provides a list of factors entities should consider in estimating expected volatility.[27] Company B may begin its process of estimating expected volatility by considering its historical volatility.[28] However, Company B should also then consider, based on available information, how the expected volatility of its share price may differ from historical volatility.[29] Implied volatility[30] can be useful in estimating expected volatility because it is generally reflective of both historical volatility and expectations of how future volatility will differ from historical volatility.

The staff believes that companies should make good faith efforts to identify and use sufficient information in determining whether taking historical volatility, implied volatility or a combination of both into account will result in the best estimate of expected volatility. The staff believes companies that have appropriate traded financial instruments from which they can derive an implied volatility should generally consider this measure. The extent of the ultimate reliance on implied volatility will depend on a company's facts and circumstances; however, the staff believes that a company with actively traded options or other financial instruments with embedded options[31] generally could place greater (or even exclusive) reliance on implied volatility. (*See* the Interpretive Responses to Questions 3 and 4 below.)

The process used to gather and review available information to estimate expected volatility should be applied consistently from period to period. When circumstances indicate the availability of new or different information that would be useful in estimating expected volatility, a company should incorporate that information.

Question 2: What should Company B consider if computing historical volatility?[32]

Interpretive Response: The following should be considered in the computation of historical volatility:

1. Method of Computing Historical Volatility—

The staff believes the method selected by Company B to compute its historical volatility should produce an estimate that is representative of a marketplace participant's expectations about Company B's future volatility over the expected (if using a Black-Scholes-Merton closed-form model) or contractual (if using a lattice model)

technique or model meets the fair value measurement objective. For example, changing a technique or model from period to period for the sole purpose of lowering the fair value estimate of a share option would not meet the fair value measurement objective of the Topic.

[23] FASB ASC paragraph 718–10–55–27.

[24] *See generally* FASB ASC paragraph 718–10–50–1.

[25] FASB ASC paragraph 718–10–30–6. FASB ASC paragraph 718–10–30–1 states that this guidance applies equally to awards classified as liabilities.

[26] FASB ASC paragraph 718–10–55–35.

[27] FASB ASC paragraph 718–10–55–37.

[28] FASB ASC paragraph 718–10–55–40.

[29] *Ibid.*

[30] Implied volatility is the volatility assumption inherent in the market prices of a company's traded options or other financial instruments that have option-like features. Implied volatility is derived by entering the market price of the traded financial instrument, along with assumptions specific to the financial options being valued, into a model based on a constant volatility estimate (*e.g.,* the Black-Scholes-Merton closed-form model) and solving for the unknown assumption of volatility.

[31] The staff believes implied volatility derived from embedded options can be utilized in determining expected volatility if, in deriving the implied volatility, the company considers all relevant features of the instruments (*e.g.,* value of the host instrument, value of the option, etc.). The staff believes the derivation of implied volatility from other than simple instruments (*e.g.,* a simple convertible bond) can, in some cases, be impracticable due to the complexity of multiple features.

[32] *See* FASB ASC paragraph 718–10–55–37.

term [33] of its share options. Certain methods may not be appropriate for longer term share options if they weight the most recent periods of Company B's historical volatility much more heavily than earlier periods.[34] For example, a method that applies a factor to certain historical price intervals to reflect a decay or loss of relevance of that historical information emphasizes the most recent historical periods and thus would likely bias the estimate to this recent history.[35]

2. Amount of Historical Data—

FASB ASC subparagraph 718–10–55–37(a) indicates entities should consider historical volatility over a period generally commensurate with the expected or contractual term, as applicable, of the share option. The staff believes Company B could utilize a period of historical data longer than the expected or contractual term, as applicable, if it reasonably believes the additional historical information will improve the estimate. For example, assume Company B decided to utilize a Black-Scholes-Merton closed-form model to estimate the value of the share options granted on January 2, 20X6 and determined that the expected term was six years. Company B would not be precluded from using historical data longer than six years if it concludes that data would be relevant.

3. Frequency of Price Observations—

FASB ASC subparagraph 718–10–55–37(d) indicates an entity should use appropriate and regular intervals for price observations based on facts and circumstances that provide the basis for a reasonable fair value estimate. Accordingly, the staff believes Company B should consider the frequency of the trading of its shares and the length of its trading history in determining the appropriate frequency of price observations. The staff believes using daily, weekly or monthly price observations may provide a sufficient basis to estimate expected volatility if the history provides enough data points on which to base the estimate.[36] Company B should select a consistent point in time within each interval when selecting data points.[37]

4. Consideration of Future Events—

The objective in estimating expected volatility is to ascertain the assumptions that marketplace participants would likely use in determining an exchange price for an option.[38] Accordingly, the staff believes that Company B should consider those future events that it reasonably concludes a marketplace participant would also consider in making the estimation. For example, if Company B has recently announced a merger with a company that would change its business risk in the future, then it should consider the impact of the merger in estimating the expected volatility if it reasonably believes a marketplace participant would also consider this event.

The staff believes that careful consideration is required to determine whether material non-public information is currently available (or would be available) to the issuer that would be considered by a marketplace participant in estimating the expected volatility.[39] For example, if Company B has entered into a material transaction that has not yet been announced prior to its grant of equity instruments, the specific facts and circumstances of the material transaction may lead Company B to conclude that the impact of this event should be included in estimating the expected volatility when determining the grant-date fair value of those equity instruments.

5. Exclusion of Periods of Historical Data—

In some instances, due to a company's particular business situations, a period of historical volatility data may not be relevant in evaluating expected volatility.[40] In these instances, that period should be disregarded. The staff believes that if Company B disregards a period of historical volatility, it should be prepared to support its conclusion that its historical share price during that previous period is not relevant to estimating expected volatility due to one or more discrete and specific historical events and that similar events are not expected to occur during the expected term of the share option. The staff believes these situations would be rare.

Question 3: What should Company B consider when evaluating the extent of its reliance on the implied volatility derived from its traded options?

Interpretive Response: To achieve the objective of estimating expected volatility as stated in FASB ASC paragraphs 718–10–55–35 through 718–10–55–41, the staff believes Company B generally should consider the following in its evaluation: (1) The volume of market activity of the underlying shares and traded options; (2) the ability to synchronize the variables used to derive implied volatility; (3) the similarity of the exercise prices of the traded options to the exercise price of the newly-granted share options; (4) the similarity of the length of the term of the traded and newly-granted share options; [41] and (5) consideration of material non-public information.

1. Volume of Market Activity—

The staff believes Company B should consider the volume of trading in its underlying shares as well as the traded options. For example, prices for instruments in actively traded markets are more likely to reflect a marketplace participant's expectations regarding expected volatility.

2. Synchronization of the Variables—

Company B should synchronize the variables used to derive implied volatility. For example, to the extent reasonably practicable, Company B should use market prices (either traded prices or the average of bid and asked quotes) of the traded options and its shares measured at the same point in time. This measurement should also be synchronized with the grant of the share options; however, when this is not reasonably practicable, the staff believes Company B should derive implied volatility as of a point in time as close to the grant of the share options as reasonably practicable.

[33] For purposes of this staff accounting bulletin, the phrase ''expected or contractual term, as applicable'' has the same meaning as the phrase ''expected (if using a Black-Scholes-Merton closed-form model) or contractual (if using a lattice model) term of a share option.''

[34] FASB ASC subparagraph 718–10–55–37(a) states that entities should consider historical volatility over a period generally commensurate with the expected or contractual term, as applicable, of the share option. Accordingly, the staff believes methods that place extreme emphasis on the most recent periods may be inconsistent with this guidance.

[35] Generalized Autoregressive Conditional Heteroskedasticity (''GARCH'') is an example of a method that demonstrates this characteristic.

[36] Further, if shares of a company are thinly traded the staff believes the use of weekly or monthly price observations would generally be more appropriate than the use of daily price observations. The volatility calculation using daily observations for such shares could be artificially inflated due to a larger spread between the bid and asked quotes and lack of consistent trading in the market.

[37] FASB ASC paragraph 718–10–55–40 states that a company should establish a process for estimating expected volatility and apply that process consistently from period to period. In addition, FASB ASC paragraph 718–10–55–27 indicates that assumptions used to estimate the fair value of instruments granted in share-based payment transactions should be determined in a consistent manner from period to period.

[38] FASB ASC paragraph 718–10–55–35.

[39] FASB ASC paragraph 718–10–55–13 states ''assumptions shall reflect information that is (or would be) available to form the basis for an amount at which the instruments being valued would be exchanged. In estimating fair value, the assumptions used shall not represent the biases of a particular party.''

[40] FASB ASC paragraph 718–10–55–37.

[41] *See generally* Options, Futures, and Other Derivatives by John C. Hull (Pearson, 11th Edition, 2021).

3. Similarity of the Exercise Prices—

The staff believes that when valuing an at-the-money share option, the implied volatility derived from at- or near-the-money traded options generally would be most relevant.[42] If, however, it is not possible to find at- or near-the-money traded options, Company B should select multiple traded options with an average exercise price close to the exercise price of the share option.[43]

4. Similarity of Length of Terms—

The staff believes that when valuing a share option with a given expected or contractual term, as applicable, the implied volatility derived from a traded option with a similar term would be the most relevant. However, if there are no traded options with maturities that are similar to the share option's contractual or expected term, as applicable, then the staff believes Company B could consider traded options with a remaining maturity of six months or greater.[44] However, when using traded options with a term of less than one year,[45] the staff would expect the company to also consider other relevant information in estimating expected volatility. In general, the staff believes more reliance on the implied volatility derived from a traded option would be expected the closer the remaining term of the traded option is to the expected or contractual term, as applicable, of the share option.

5. Consideration of Material Nonpublic Information—

When a company is in possession of material non-public information, the staff believes that the related guidance in the interpretive response to Question 2 above would also be relevant in determining whether the implied volatility appropriately reflects a marketplace participant's expectations of future volatility.

The staff believes Company B's evaluation of the factors above should assist in determining whether the implied volatility appropriately reflects the market's expectations of future volatility and thus the extent of reliance that Company B reasonably places on the implied volatility.

Question 4: Are there situations in which it is acceptable for Company B to rely exclusively on either implied volatility or historical volatility in its estimate of expected volatility?

Interpretive Response: As stated above, FASB ASC Topic 718 does not specify a method of estimating expected volatility; rather, it provides a list of factors that should be considered and requires that an entity's estimate of expected volatility be reasonable and supportable.[46] Many of the factors listed in FASB ASC Topic 718 are discussed in Questions 2 and 3 above. The objective of estimating volatility, as stated in FASB ASC Topic 718, is to ascertain the assumption about expected volatility that marketplace participants would likely use in determining an exchange price for an option.[47] The staff believes that a company, after considering the factors listed in FASB ASC Topic 718, could, in certain situations, reasonably conclude that exclusive reliance on either historical or implied volatility would provide an estimate of expected volatility that meets this stated objective.

The staff would not object to Company B placing exclusive reliance on implied volatility when the following factors are present, as long as the methodology is consistently applied:

- Company B utilizes a valuation model that is based upon a constant volatility assumption to value its share options;[48]
- The implied volatility is derived from options that are actively traded;
- The market prices (trades or quotes) of both the traded options and underlying shares are measured at a similar point in time to each other and on a date reasonably close to the fair value measurement date of the share options;
- The traded options have exercise prices that are both (a) near-the-money and (b) close to the exercise price of the share options;[49]
- The remaining maturities of the traded options on which the estimate is based are at least one year, and
- Material nonpublic information that would be considered in a marketplace participant's expectation of future volatility does not exist.

The staff would not object to Company B placing exclusive reliance on historical volatility when the following factors are present, so long as the methodology is consistently applied:

- Company B has no reason to believe that its future volatility over the expected or contractual term, as applicable, is likely to differ from its past;[50]
- The computation of historical volatility uses a simple average calculation method;
- A sequential period of historical data at least equal to the expected or contractual term of the share option, as applicable, is used; and
- A reasonably sufficient number of price observations are used, measured at a consistent point throughout the applicable historical period.[51]

Question 5: What disclosures would the staff expect Company B to include in its financial statements and MD&A regarding its assumption of expected volatility?

Interpretive Response: FASB ASC paragraph 718–10–50–2 prescribes the

[42] Implied volatilities of options differ systematically over the ''moneyness'' of the option. This pattern of implied volatilities across exercise prices is known as the ''volatility smile'' or ''volatility skew.'' Studies such as ''Implied Volatility'' by Stewart Mayhew, Financial Analysts Journal, July–August 1995, as well as more recent studies, have found that implied volatilities based on near-the-money options do as well as sophisticated weighted implied volatilities in estimating expected volatility. In addition, the staff believes that because near-the-money options are generally more actively traded, they may provide a better basis for deriving implied volatility.

[43] The staff believes a company could use a weighted-average implied volatility based on traded options that are either in-the-money or out-of-the-money. For example, if the share option has an exercise price of $52, but the only traded options available have exercise prices of $50 and $55, then the staff believes that it is appropriate to use a weighted average based on the implied volatilities from the two traded options; for this example, a 40% weight on the implied volatility calculated from the option with an exercise price of $55 and a 60% weight on the option with an exercise price of $50.

[44] The staff believes it may also be appropriate to consider the entire term structure of volatility provided by traded options with a variety of remaining maturities. If a company considers the entire term structure in deriving implied volatility, the staff would expect a company to include some options in the term structure with a remaining maturity of six months or greater.

[45] The staff believes the implied volatility derived from a traded option with a term of one year or greater would typically not be significantly different from the implied volatility that would be derived from a traded option with a significantly longer term.

[46] FASB ASC paragraphs 718–10–55–36 through 718–10–55–37.

[47] FASB ASC paragraph 718–10–55–35.

[48] FASB ASC paragraphs 718–10–55–18 and 718–10–55–39 discuss the incorporation of a range of expected volatilities into option pricing models. The staff believes that a company that utilizes an option pricing model that incorporates a range of expected volatilities over the option's contractual term should consider the factors listed in FASB ASC Topic 718, and those discussed in the Interpretive Responses to Questions 2 and 3 above, to determine the extent of its reliance (including exclusive reliance) on the derived implied volatility.

[49] When near-the-money options are not available, the staff believes the use of a weighted-average approach, as noted previously, may be appropriate.

[50] *See* FASB ASC paragraph 718–10–55–38. A change in a company's business model that results in a material alteration to the company's risk profile is an example of a circumstance in which the company's future volatility would be expected to differ from its historical volatility. Other examples may include, but are not limited to, the introduction of a new product that is central to a company's business model or the receipt of U.S. Food and Drug Administration approval for the sale of a new prescription drug.

[51] If the expected or contractual term, as applicable, of the employee share option is less than three years, the staff believes monthly price observations would not provide a sufficient amount of data.

minimum information needed to achieve the Topic's disclosure objectives.[52] Under that guidance, Company B is required to disclose the expected volatility and the method used to estimate it.[53] Accordingly, the staff expects that, at a minimum, Company B would disclose in a footnote to its financial statements how it determined the expected volatility assumption for purposes of determining the fair value of its share options in accordance with FASB ASC Topic 718. For example, at a minimum, the staff would expect Company B to disclose whether it used only implied volatility, historical volatility, or a combination of both, and how it determined any significant adjustments to historical volatility.

In addition, Company B should consider the requirements of Regulation S–K Item 303(b)(3) regarding critical accounting estimates in MD&A. A company should determine whether its evaluation of any of the factors listed in Questions 2 and 3 of this section, such as consideration of future events in estimating expected volatility, resulted in an estimate that involves a significant level of estimation uncertainty and has had or is reasonably likely to have a material impact on the financial condition or results of operations of the company.

Facts: Company C is a newly public entity with limited historical data on the price of its publicly-traded shares and no other traded financial instruments. Company C believes that it does not have sufficient company-specific information regarding the volatility of its share price on which to base an estimate of expected volatility.

Question 6: What other sources of information should Company C consider in order to estimate the expected volatility of its share price?

Interpretive Response: FASB ASC Topic 718 provides guidance on estimating expected volatility for newly-public and nonpublic entities that do not have company-specific historical or implied volatility information available.[54] Company C may base its estimate of expected volatility on the historical, expected or implied volatility of similar entities whose share or option prices are publicly available. In making its determination as to similarity, Company C would likely consider the industry, stage of life cycle, size and financial leverage of such other entities.[55]

The staff would not object to Company C looking to an industry sector index (*e.g.,* NASDAQ Computer Index) that is representative of Company C's industry, and possibly its size, to identify one or more similar entities.[56] Once Company C has identified similar entities, it would substitute a measure of the individual volatilities of the similar entities for the expected volatility of its share price as an assumption in its valuation model.[57] Because of the effects of diversification that are present in an industry sector index, Company C should not substitute the volatility of an index for the expected volatility of its share price as an assumption in its valuation model.[58]

After similar entities have been identified, Company C should continue to consider the volatilities of those entities unless circumstances change such that the identified entities are no longer similar to Company C. Until Company C has sufficient information available, the staff would not object to Company C basing its estimate of expected volatility on the volatility of similar entities for those periods for which it does not have sufficient information available.[59] Until Company C has either a sufficient amount of historical information regarding the volatility of its share price or other traded financial instruments are available to derive an implied volatility to support an estimate of expected volatility, it should consistently apply a process as described above to estimate expected volatility based on the volatilities of similar entities.[60]

2. Expected Term

FASB ASC paragraph 718–10–55–29 states, ''The fair value of a traded (or transferable) share option is based on its contractual term because rarely is it economically advantageous to exercise, rather than sell, a transferable share option before the end of its contractual term. Employee share options generally differ from transferable [or tradable] share options in that employees cannot sell (or hedge) their share options—they can only exercise them; because of this, employees generally exercise their options before the end of the options' contractual term. Thus, the inability to sell or hedge an employee share option effectively reduces the option's value [compared to a transferable option] because exercise prior to the option's expiration terminates its remaining life and thus its remaining time value.'' Accordingly, FASB ASC Topic 718 requires that when valuing an employee share option under the Black-Scholes-Merton framework the fair value of employee share options be based on the share options' expected term rather than the contractual term.

FASB ASC paragraph 718–10–55–29A states, ''On an award-by-award basis, an entity may elect to use the contractual term as the expected term when estimating the fair value of a nonemployee award to satisfy the measurement objective in paragraph 718–10–30–6. Otherwise, an entity shall apply the guidance in [Topic 718] in estimating the expected term of a nonemployee award, which may result in a term less than the contractual term of the award. If an entity does not elect to use the contractual term as the expected term, similar considerations discussed in paragraph 718–10–55–29, such as the inability to sell or hedge a nonemployee award, apply when estimating its expected term.''

The staff believes the estimate of expected term should be based on the facts and circumstances available in each particular case. Consistent with our Topic 14 introductory guidance regarding reasonableness, the fact that other possible estimates are later determined to have more accurately reflected the term does not necessarily mean that the particular choice was unreasonable. The staff reminds registrants of the expected term disclosure requirements described in FASB ASC subparagraph 718–10–50–2(f)(2)(i).

Facts: Company D utilizes the Black-Scholes-Merton closed-form model to value its share options for the purposes of determining the fair value of the options under FASB ASC Topic 718. Company D recently granted share options to its employees. Based on its review of various factors, Company D determines that the expected term of the options is six years, which is less than the contractual term of ten years.

[52] FASB ASC paragraph 718–10–50–1.

[53] FASB ASC subparagraph 718–10–50–2(f) (2) (ii).

[54] FASB ASC paragraphs 718–10–55–25 and 718–10–55–51.

[55] FASB ASC paragraph 718–10–55–25.

[56] If a company operates in a number of different industries, it could look to several industry indices. However, when considering the volatilities of multiple companies, each operating only in a single industry, the staff believes a company should take into account its own leverage, the leverages of each of the entities, and the correlation of the entities' stock returns.

[57] FASB ASC paragraph 718–10–55–51.

[58] FASB ASC paragraph 718–10–55–25.

[59] FASB ASC paragraph 718–10–55–37. The staff believes that at least two years of daily or weekly historical data could provide a reasonable basis on which to base an estimate of expected volatility if a company has no reason to believe that its future volatility will differ materially during the expected or contractual term, as applicable, from the volatility calculated from this past information. If the expected or contractual term, as applicable, of a share option is shorter than two years, the staff believes a company should use daily or weekly historical data for at least the length of that applicable term.

[60] FASB ASC paragraph 718–10–55–40.

Question 1: When determining the fair value of the share options in accordance with FASB ASC Topic 718, should Company D consider an additional discount for nonhedgability and nontransferability?

Interpretive Response: No. FASB ASC paragraph 718–10–55–29 indicates that nonhedgability and nontransferability have the effect of increasing the likelihood that an employee share option will be exercised before the end of its contractual term. Nonhedgability and nontransferability therefore factor into the expected term assumption (in this case reducing the term assumption from ten years to six years), and the expected term reasonably adjusts for the effect of these factors. Accordingly, the staff believes that no additional reduction in the term assumption or other discount to the estimated fair value is appropriate for these particular factors.[61]

Question 2: Should forfeitures or terms that stem from forfeitability be factored into the determination of expected term?

Interpretive Response: No. FASB ASC Topic 718 indicates that the expected term that is utilized as an assumption in a closed-form option-pricing model or a resulting output of a lattice option pricing model when determining the fair value of the share options should not incorporate restrictions or other terms that stem from the pre-vesting forfeitability of the instruments. Under FASB ASC Topic 718, these pre-vesting restrictions or other terms are taken into account by ultimately recognizing compensation cost only for awards for which grantees deliver the good or render the service.[62]

Question 3: Can a company's estimate of expected term ever be shorter than the vesting period?

Interpretive Response: No. The vesting period forms the lower bound of the estimate of expected term.[63]

Question 4: FASB ASC paragraph 718–10–55–34 indicates that an entity shall aggregate individual awards into relatively homogenous groups with respect to exercise and post-vesting employment termination behaviors for the purpose of determining expected term, regardless of the valuation technique or model used to estimate the fair value. How many groupings are typically considered sufficient?

Interpretive Response: As it relates to employee groupings, the staff believes that an entity may generally make a reasonable fair value estimate with as few as one or two groupings.[64]

Question 5: What approaches could a company use to estimate the expected term of its employee share options?

Interpretive Response: A company should use an approach that is reasonable and supportable under FASB ASC Topic 718's fair value measurement objective, which establishes that assumptions and measurement techniques should be consistent with those that marketplace participants would be likely to use in determining an exchange price for the share options.[65] If, in developing its estimate of expected term, a company determines that its historical share option exercise experience is the best estimate of future exercise patterns, the staff will not object to the use of the historical share option exercise experience to estimate expected term.[66]

A company may also conclude that its historical share option exercise experience does not provide a reasonable basis upon which to estimate expected term. This may be the case for a variety of reasons, including, but not limited to, the life of the company and its relative stage of development, past or expected structural changes in the business, differences in terms of past equity-based share option grants,[67] or a lack of variety of price paths that the company may have experienced.[68]

FASB ASC Topic 718 describes other alternative sources of information that might be used in those cases when a company determines that its historical share option exercise experience does not provide a reasonable basis upon which to estimate expected term. For example, a lattice model (which by definition incorporates multiple price paths) can be used to estimate expected term as an input into a Black-Scholes-Merton closed-form model.[69] In addition, FASB ASC paragraph 718–10–55–32 states that ''. . . expected term might be estimated in some other manner, taking into account whatever relevant and supportable information is available, including industry averages and other pertinent evidence such as published academic research.'' For example, data about exercise patterns of employees in similar industries and/or situations as the company's might be used.

Facts: Company E grants equity share options to its employees that have the following basic characteristics:[70]

- The share options are granted at-the-money;
- Exercisability is conditional only on performing service through the vesting date;[71]
- If an employee terminates service prior to vesting, the employee would forfeit the share options;
- If an employee terminates service after vesting, the employee would have a limited time to exercise the share options (typically 30–90 days); and
- The share options are nontransferable and nonhedgeable.

Company E utilizes the Black-Scholes-Merton closed-form model for valuing its employee share options.

Question 6: As share options with these ''plain vanilla'' characteristics have been granted in significant quantities by many companies in the past, is the staff aware of any ''simple'' methodologies that can be used to estimate expected term?

Interpretive Response: The staff understands that an entity that is unable to rely on its historical exercise data

[61] The staff notes the existence of academic literature that supports the assertion that the Black-Scholes-Merton closed-form model, with expected term as an input, can produce reasonable estimates of fair value. Such literature includes J. Carpenter, ''The exercise and valuation of executive stock options,'' Journal of Financial Economics, May 1998, pp.127–158; C. Marquardt, ''The Cost of Employee Stock Option Grants: An Empirical Analysis,'' Journal of Accounting Research, September 2002, pp. 1191–1217); and J. Bettis, J. Bizjak and M. Lemmon, ''Exercise behavior, valuation, and the incentive effect of employee stock options,'' Journal of Financial Economics, May 2005, pp. 445–470, as well as more recent studies,.

[62] FASB ASC paragraph 718–10–30–11.

[63] FASB ASC paragraph 718–10–55–31.

[64] The staff believes the focus should be on groups of employees with significantly different expected exercise behavior. Academic research suggests two such groups might be executives and non-executives. A study by S. Huddart found executives and other senior managers to be significantly more patient in their exercise behavior than more junior employees. (Employee rank was proxied for by the number of options issued to that employee.) *See* S. Huddart, ''Patterns of stock option exercise in the United States,'' in: J. Carpenter and D. Yermack, eds., Executive Compensation and Shareholder Value: Theory and Evidence (Kluwer, Boston, MA, 1999), pp. 115–142. *See also* S. Huddart and M. Lang, ''Employee stock option exercises: An empirical analysis,'' Journal of Accounting and Economics, 1996, pp. 5–43.

[65] FASB ASC paragraph 718–10–55–13.

[66] Historical share option exercise experience encompasses data related to share option exercise, post-vesting termination, and share option contractual term expiration.

[67] For example, if a company had historically granted share options that were always in-the-money, and will grant at-the-money options prospectively, the exercise behavior related to the in-the-money options may not be sufficient as the sole basis to form the estimate of expected term for the at-the-money grants.

[68] For example, if a company had a history of previous equity-based share option grants and exercises only in periods in which the company's share price was rising, the exercise behavior related to those options may not be sufficient as the sole basis to form the estimate of expected term for current option grants.

[69] FASB ASC paragraph 718–10–55–30.

[70] Employee share options with these features are sometimes referred to as ''plain vanilla'' options.

[71] In this fact pattern the requisite service period equals the vesting period.

may find that certain alternative information, such as exercise data relating to employees of other companies, is not easily obtainable. As such, some companies may encounter difficulties in making a refined estimate of expected term. Accordingly, if a company concludes that its historical share option exercise experience does not provide a reasonable basis upon which to estimate expected term, the staff will accept the following ''simplified'' method for ''plain vanilla'' options consistent with those in the fact set above: Expected term = ((vesting term + original contractual term)/2). Assuming a ten year original contractual term and graded vesting over four years (25% of the options in each grant vest annually) for the share options in the fact set described above, the resultant expected term would be 6.25 years.[72] Academic research on the exercise of options issued to executives provides some general support for outcomes that would be produced by the application of this method.[73]

Examples of situations in which the staff believes that it may be appropriate to use this simplified method include the following:

- A company does not have sufficient historical exercise data to provide a reasonable basis upon which to estimate expected term due to the limited period of time its equity shares have been publicly traded.
- A company significantly changes the terms of its share option grants or the types of employees that receive share option grants such that its historical exercise data may no longer provide a reasonable basis upon which to estimate expected term.
- A company has or expects to have significant structural changes in its business such that its historical exercise data may no longer provide a reasonable basis upon which to estimate expected term.

The staff understands that a company may have sufficient historical exercise data for some of its share option grants but not for others. In such cases, the staff will accept the use of the simplified method for only some but not all share option grants. The staff also does not believe that it is necessary for a company to consider using a lattice model before it decides that it is eligible to use this simplified method. Further, the staff will not object to the use of this simplified method in periods prior to the time a company's equity shares are traded in a public market.

If a company uses this simplified method, the company should disclose in the notes to its financial statements the use of the method, the reason why the method was used, the types of share option grants for which the method was used if the method was not used for all share option grants, and the periods for which the method was used if the method was not used in all periods. Companies that have sufficient historical share option exercise experience upon which to estimate expected term may not apply this simplified method. In addition, this simplified method is not intended to be applied as a benchmark in evaluating the appropriateness of more refined estimates of expected term.

The staff does not expect that such a simplified method would be used for share option grants when more relevant detailed information is available to the company.

3. Current Price of the Underlying Share (Including Considerations for Spring-Loaded Grants)

FASB ASC paragraph 718–10–55–21 states that ''if an observable market price is not available for a share option or similar instrument with the same or similar terms and conditions, an entity shall estimate the fair value of that instrument using a valuation technique or model that meets the requirements in paragraph 718–10–55–11,'' and requires such valuation technique or model to take into account, at a minimum a number of factors including the current price of the underlying share.

FASB ASC paragraph 718–10–55–27 states, ''Assumptions used to estimate the fair value of equity and liability instruments granted in share-based payment transactions shall be determined in a consistent manner from period to period. For example, an entity might use the closing share price or the share price at another specified time as the current share price on the grant date in estimating fair value, but whichever method is selected, it shall be used consistently.''

For a valuation technique to be consistent with the fair value measurement objective and the other requirements of Topic 718, the staff believes that a consistently applied method to determine the current price of the underlying share should include consideration of whether adjustments to observable market prices (*e.g.,* the closing share price or the share price at another specified time) are required. Such adjustments may be required, for example, when the observable market price does not reflect certain material non-public information known to the company but unavailable to marketplace participants at the time the market price is observed.

Determining whether an adjustment to the observable market price is necessary, and if so, the magnitude of any adjustment, requires significant judgment. The staff acknowledges that companies generally possess non-public information when entering into share-based payment transactions. The staff believes that an observable market price on the grant date is generally a reasonable and supportable estimate of the current price of the underlying share in a share-based payment transaction, for example, when estimating the grant-date fair value of a routine annual grant to employees that is not designed to be spring-loaded.

However, companies should carefully consider whether an adjustment to the observable market price is required, for example, when share-based payments arrangements are entered into in contemplation of or shortly before a planned release of material non-public information, and such information is expected to result in a material increase in share price. The staff believes that non-routine spring-loaded grants merit particular scrutiny by those charged with compensation and financial reporting governance. Additionally, when a company has a planned release of material non-public information within a short period of time after the measurement date of a share-based payment, the staff believes a material increase in the market price of the company's shares upon release of such information indicates marketplace participants would have considered an adjustment to the observable market price on the measurement date to determine the current price of the underlying share.

[72] Calculated as [[[1 year vesting term (for the first 25% vested) plus 2 year vesting term (for the second 25% vested) plus 3 year vesting term (for the third 25% vested) plus 4 year vesting term (for the last 25% vested)] divided by 4 total years of vesting] plus 10 year contractual life] divided by 2; that is, (((1+2+3+4)/4) + 10)/2 = 6.25 years.

[73] J.N. Carpenter, ''The exercise and valuation of executive stock options,'' Journal of Financial Economics, 1998, pp.127–158 studies a sample of 40 NYSE and AMEX firms over the period 1979–1994 with share option terms reasonably consistent to the terms presented in the fact set and example. The mean time to exercise after grant was 5.83 years and the median was 6.08 years. The ''mean time to exercise'' is shorter than expected term since the study's sample included only exercised options. Other research on executive options includes (but is not limited to) J. Carr Bettis; John M. Bizjak; and Michael L. Lemmon, ''Exercise behavior, valuation, and the incentive effects of employee stock options,'' Journal of Financial Economics, May 2005, pp. 445–470. One of the few studies on nonexecutive employee options the staff is aware of is S. Huddart, ''Patterns of stock option exercise in the United States,'' in: J. Carpenter and D. Yermack, eds., Executive Compensation and Shareholder Value: Theory and Evidence (Kluwer, Boston, MA, 1999), pp. 115–142.

Facts: Company D is a public company that entered into a material contract with a customer after market close. Subsequent to entering into the contract but before the market opens the next trading day, Company D awards share options to its executives. The share option award is non-routine, and the award is approved by the Board of Directors in contemplation of the material contract. Company D expects the share price to increase significantly once the announcement of the contract is made the next day. Company D's accounting policy is to consistently use the closing share price on the day of the grant as the current share price in estimating the grant-date fair value of share options.

Question 1: Should Company D make an adjustment to the closing share price to determine the current price of shares underlying share options?

Interpretive Response: Prior to awarding share options in this fact pattern, the staff expects Company D to consider whether such awards are consistent with its policies and procedures, including the terms of the compensation plan approved by shareholders, other governance policies, and legal requirements. The staff reminds companies of the importance of strong corporate governance and controls in granting share options, as well as the requirements to maintain effective internal control over financial reporting and disclosure controls and procedures.

In estimating the grant-date fair value of share options in this fact pattern, absent an adjustment to the closing share price to reflect the impact of Company D's new material contract with a customer, the staff believes the closing share price would not be a reasonable and supportable estimate and, without an adjustment the valuation of the award would not meet the fair value measurement objective of FASB ASC Topic 718 because the closing share price would not reflect a price that is unbiased for marketplace participants at the time of the grant.[74]

Question 2: What disclosures would the staff expect Company D to include in its financial statements regarding its determination of the current price of shares underlying newly-granted share options?

Interpretive Response: FASB ASC paragraph 718–10–50–1 requires disclosure of information that enables users of the financial statements to understand, among other things, the nature and terms of share-based payment arrangements that existed during the period and the potential effects of those arrangements on shareholders. FASB ASC paragraph 718–10–50–2 prescribes the minimum information needed to achieve the Topic's disclosure objectives, including a description of the method used and significant assumptions used to estimate the fair value of awards under share-based payment arrangements.

Accordingly, the staff expects that, at a minimum, Company D would disclose in a footnote to its financial statements how it determined the current price of shares underlying share options for purposes of determining the grant-date fair value of its share options in accordance with FASB ASC Topic 718. For example, the staff would expect Company D to disclose its accounting policy related to how it identifies when an adjustment to the closing price is required, how it determined the amount of the adjustment to the closing share price, and any significant assumptions used to determine such adjustment, if material. Further, the characteristics of the share options, including their spring-loaded nature, may differ from Company D's other share-based payment arrangements to such an extent Company D should disclose information regarding these share options separately from other share-based payment arrangements to allow investors to understand Company D's use of share-based compensation.[75]

Additionally, Company D should consider the applicability of MD&A and other disclosure requirements, including those related to liquidity and capital resources, results of operations, critical accounting estimates, executive compensation, and transactions with related persons.[76]

E. FASB ASC Topic 718, Compensation—Stock Compensation, and Certain Redeemable Financial Instruments

Certain financial instruments awarded in conjunction with share-based payment arrangements have redemption features that require settlement by cash or other assets upon the occurrence of events that are outside the control of the issuer.[77] FASB ASC Topic 718 provides guidance for determining whether instruments granted in conjunction with share-based payment arrangements should be classified as liability or equity instruments. Under that guidance, most instruments with redemption features that are outside the control of the issuer are required to be classified as liabilities; however, some redeemable instruments will qualify for equity classification.[78] SEC Accounting Series Release No. 268, Presentation in Financial Statements of ''Redeemable Preferred Stocks,''[79] (''ASR 268'') and related guidance[80] address the classification and measurement of certain redeemable equity instruments.

Facts: Under a share-based payment arrangement, Company F grants to an employee shares (or share options) that all vest at the end of four years (cliff vest). The shares (or shares underlying the share options) are redeemable for cash at fair value at the holder's option, but only after six months from the date of share issuance (as defined in FASB ASC Topic 718). Company F has determined that the shares (or share options) would be classified as equity instruments under the guidance of FASB ASC Topic 718. However, under ASR 268 and related guidance, the instruments would be considered to be redeemable for cash or other assets upon the occurrence of events (*e.g.,* redemption at the option of the holder) that are outside the control of the issuer.

Question 1: While the instruments are subject to FASB ASC Topic 718, is ASR 268 and related guidance applicable to instruments issued under share-based payment arrangements that are classified as equity instruments under FASB ASC Topic 718?

Interpretive Response: Yes. The staff believes that registrants must evaluate whether the terms of instruments granted in conjunction with share-based payment arrangements that are not classified as liabilities under FASB ASC Topic 718 result in the need to present certain amounts outside of permanent equity (also referred to as being presented in ''temporary equity'') in accordance with ASR 268 and related guidance.[81]

[74] FASB ASC paragraph 718–10–55–13.

[75] ASC 718–10–50–1 and 718–10–50–2(g).

[76] Items 303, 402, and 404 of Regulation S–K.

[77] The terminology ''outside the control of the issuer'' is used to refer to any of the three redemption conditions described in Rule 5–02.27 of Regulation S–X that would require classification outside permanent equity. That rule requires preferred securities that are redeemable for cash or other assets to be classified outside of permanent equity if they are redeemable (1) at a fixed or determinable price on a fixed or determinable date, (2) at the option of the holder, or (3) upon the occurrence of an event that is not solely within the control of the issuer.

[78] FASB ASC paragraphs 718–10–25–6 through 718–10–25–19A.

[79] ASR 268, July 27, 1979, Rule 5–02.27 of Regulation S–X.

[80] Related guidance includes EITF Topic No. D–98, *Classification and Measurement of Redeemable Securities,* included in the FASB ASC in paragraph 480–10–S99–3A.

[81] Instruments granted in conjunction with share-based payment arrangements with employees that do not by their terms require redemption for cash

Continued

When an instrument ceases to be subject to FASB ASC Topic 718 and becomes subject to the recognition and measurement requirements of other applicable GAAP, the staff believes that the company should reassess the classification of the instrument as a liability or equity at that time and consequently may need to reconsider the applicability of ASR 268.

Question 2: How should Company F apply ASR 268 and related guidance to the shares (or share options) granted under the share-based payment arrangements with employees that may be unvested at the date of grant?

Interpretive Response: Under FASB ASC Topic 718, when compensation cost is recognized for instruments classified as equity instruments, additional paid-in-capital [82] is increased. If the award is not fully vested at the grant date, compensation cost is recognized and additional paid-in-capital is increased over time as services are rendered over the requisite service period. A similar pattern of recognition should be used to reflect the amount presented as temporary equity for share-based payment awards that have redemption features that are outside the issuer's control but are classified as equity instruments under FASB ASC Topic 718. The staff believes Company F should present as temporary equity at each balance sheet date an amount that is based on the redemption amount of the instrument, but takes into account the proportion of consideration received in the form of employee services. Thus, for example, if a nonvested share that qualifies for equity classification under FASB ASC Topic 718 is redeemable at fair value more than six months after vesting, and that nonvested share is 75% vested at the balance sheet date, an amount equal to 75% of the fair value of the share should be presented as temporary equity at that date. Similarly, if an option on a share of redeemable stock that qualifies for equity classification under FASB ASC Topic 718 is 75% vested at the balance sheet date, an amount equal to 75% of the intrinsic [83] value of the option should be presented as temporary equity at that date.

Question 3: Would the methodology described for employee awards in the Interpretive Response to Question 2 above apply to nonemployee awards to be issued in exchange for goods or services with similar terms to those described above?

Interpretive Response: The staff believes it would generally be appropriate to apply the methodology described in the Interpretive Response to Question 2 above to nonemployee awards.

F. Classification of Compensation Expense Associated With Share-Based Payment Arrangements

Facts: Company G utilizes both cash and share-based payment arrangements to compensate its employees and nonemployee service providers. Company G would like to emphasize in its income statement the amount of its compensation that did not involve a cash outlay.

Question: How should Company G present in its income statement the non-cash nature of its expense related to share-based payment arrangements?

Interpretive Response: The staff believes Company G should present the expense related to share-based payment arrangements in the same line or lines as cash compensation paid to the same employees or nonemployees.[84] The staff believes a company could consider disclosing the amount of expense related to share-based payment arrangements included in specific line items in the financial statements. Disclosure of this information might be appropriate in a parenthetical note to the appropriate income statement line items, on the cash flow statement, in the footnotes to the financial statements, or within MD&A.

G. Removed by SAB 114

H. Removed by SAB 114

I. Capitalization of Compensation Cost Related to Share-Based Payment Arrangements

Facts: Company K is a manufacturing company that grants share options to its production employees. Company K has determined that the cost of the production employees' service is an inventoriable cost. As such, Company K is required to initially capitalize the cost of the share option grants to these production employees as inventory and later recognize the cost in the income statement when the inventory is consumed.[85]

Question: If Company K elects to adjust its period end inventory balance for the allocable amount of share-option cost through a period end adjustment to its financial statements, instead of incorporating the share-option cost through its inventory costing system, would this be considered a deficiency in internal controls?

Interpretive Response: No. FASB ASC Topic 718, Compensation—Stock Compensation, does not prescribe the mechanism a company should use to incorporate a portion of share-option costs in an inventory-costing system. The staff believes Company K may accomplish this through a period end adjustment to its financial statements. Company K should establish appropriate controls surrounding the calculation and recording of this period end adjustment, as it would any other period end adjustment. The fact that the entry is recorded as a period end adjustment, by itself, should not impact management's ability to determine that the internal control over financial reporting, as defined by the SEC's rules implementing Section 404 of the Sarbanes-Oxley Act of 2002,[86] is effective.

or other assets (at a fixed or determinable price on a fixed or determinable date, at the option of the holder, or upon the occurrence of an event that is not solely within the control of the issuer) would not be assumed by the staff to require net cash settlement for purposes of applying ASR 268 in circumstances in which FASB ASC Section 815–40–25, Derivatives and Hedging—Contracts in Entity's Own Equity—Recognition, would otherwise require the assumption of net cash settlement. *See* FASB ASC paragraph 815–40–25–11 (See FASB ASC paragraph 815–10–65–1 for the transition and effective date information related to FASB ASU No. 2020–06, *Debt—Debt with Conversion and Other Options (Subtopic 470–20) and Derivatives and Hedging—Contracts in Entity's Own Equity (Subtopic 815–40): Accounting for Convertible Instruments and Contracts in an Entity's Own Equity,* which superseded FASB ASC paragraph 815–40–25–11.), which states, in part: ''. . . the events or actions necessary to deliver registered shares are not controlled by an entity and, therefore, except under the circumstances described in FASB ASC paragraph 815–40–25–16, if the contract permits the entity to net share or physically settle the contract only by delivering registered shares, it is assumed that the entity will be required to net cash settle the contract.'' *See also* FASB ASC subparagraph 718–10–25–15(a).

[82] Depending on the fact pattern, this may be recorded as common stock and additional paid in capital.

[83] The potential redemption amount of the share option in this illustration is its intrinsic value because the holder would pay the exercise price upon exercise of the option and then, upon redemption of the underlying shares, the company would pay the holder the fair value of those shares. Thus, the net cash outflow from the arrangement would be equal to the intrinsic value of the share option. In situations where there would be no cash inflows from the share option holder, the cash required to be paid to redeem the underlying shares upon the exercise of the put option would be the redemption value.

[84] FASB ASC Topic 718 does not identify a specific line item in the income statement for presentation of the expense related to share-based payment arrangements, with the exception of the guidance in ASC 718–10–15–5A on share-based payment awards granted to a customer.

[85] FASB ASC paragraph 718–10–25–2A.

[86] Release No. 34–47986, June 5, 2003, Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Period Reports.

J. Removed by SAB 114

K. Removed by SAB 114

L. Removed by SAB 114

M. Removed by SAB 114

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Topic 5: Miscellaneous Accounting

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T. Accounting for Expenses or Liabilities Paid by Principal Stockholder(s)

Facts: Company X was a defendant in litigation for which the company had not recorded a liability in accordance with FASB ASC Topic 450, Contingencies. A principal stockholder [34] of the company transfers a portion of his shares to the plaintiff to settle such litigation. If the company had settled the litigation directly, the company would have recorded the settlement as an expense.

Question: Must the settlement be reflected as an expense in the company's financial statements, and if so, how?

Interpretive Response: Yes. The value of the shares transferred should be reflected as an expense in the company's financial statements with a corresponding credit to contributed (paid-in) capital.

The staff believes that such a transaction is similar to those described in FASB ASC paragraph 718–10–15–4 (Compensation—Stock Compensation Topic), which states that ''share-based payments awarded to a grantee by a related party or other holder of an economic interest [35] in the entity as compensation for goods or services provided to the reporting entity are share-based payment transactions to be accounted for under this Topic unless the transfer is clearly for a purpose other than compensation for goods or services to the reporting entity.'' As explained in this paragraph, the substance of such a transaction is that the economic interest holder makes a capital contribution to the reporting entity, and the reporting entity makes a share-based payment to its grantee in exchange for goods or services provided to the reporting entity.

The staff believes that the problem of separating the benefit to the principal stockholder from the benefit to the company cited in FASB ASC Topic 718 is not limited to transactions involving stock compensation. Therefore, similar accounting is required in this and other [36] transactions where a principal stockholder pays an expense for the company, unless the stockholder's action is caused by a relationship or obligation completely unrelated to his position as a stockholder or such action clearly does not benefit the company.

Some registrants and their accountants have taken the position that since FASB ASC Topic 850, Related Party Disclosures, applies to these transactions and requires only the disclosure of material related party transactions, the staff should not analogize to the accounting called for by FASB ASC paragraph 718–10–15–4 for transactions other than those specifically covered by it. The staff notes, however, that FASB ASC Topic 850 does not address the measurement of related party transactions and that, as a result, such transactions are generally recorded at the amounts indicated by their terms.[37] However, the staff believes that transactions of the type described above differ from the typical related party transactions.

The transactions for which FASB ASC Topic 850 requires disclosure generally are those in which a company receives goods or services directly from, or provides goods or services directly to, a related party, and the form and terms of such transactions may be structured to produce either a direct or indirect benefit to the related party. The participation of a related party in such a transaction negates the presumption that transactions reflected in the financial statements have been consummated at arm's length. Disclosure is therefore required to compensate for the fact that, due to the related party's involvement, the terms of the transaction may produce an accounting measurement for which a more faithful measurement may not be determinable.

However, transactions of the type discussed in the facts given do not have such problems of measurement and appear to be transacted to provide a benefit to the stockholder through the enhancement or maintenance of the value of the stockholder's investment. The staff believes that the substance of such transactions is the payment of an expense of the company through contributions by the stockholder. Therefore, the staff believes it would be inappropriate to account for such transactions according to the form of the transaction.

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[FR Doc. 2021–26027 Filed 11–30–21; 8:45 am]

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[34] The FASB ASC Master Glossary defines principal owners as ''owners of record or known beneficial owners of more than 10 percent of the voting interests of the enterprise.''

[35] The FASB ASC Master Glossary defines an economic interest in an entity as ''any type or form of pecuniary interest or arrangement that an entity could issue or be a party to, including equity securities; financial instruments with characteristics of equity, liabilities or both; long-term debt and other debt-financing arrangements; leases; and contractual arrangements such as management contracts, service contracts, or intellectual property licenses.'' Accordingly, a principal stockholder would be considered a holder of an economic interest in an entity.

[36] For example, SAB Topic 1.B indicates that the separate financial statements of a subsidiary should reflect any costs of its operations which are incurred by the parent on its behalf. Additionally, the staff notes that AICPA Technical Practice Aids § 4160 also indicates that the payment by principal stockholders of a company's debt should be accounted for as a capital contribution.

[37] However, in some circumstances it is necessary to reflect, either in the historical financial statements or a pro forma presentation (depending on the circumstances), related party transactions at amounts other than those indicated by their terms. Two such circumstances are addressed in Staff Accounting Bulletin Topic 1.B.1, Questions 3 and 4. Another example is where the terms of a material contract with a related party are expected to change upon the completion of an offering (*i.e.,* the principal shareholder requires payment for services which had previously been contributed by the shareholder to the company).

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 135, 138, and 153

[Docket No. USCG–2017–0788]

RIN 1625–AC39

Financial Responsibility—Vessels; Superseded Pollution Funds

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is issuing regulations to expand vessel financial responsibility to apply to all tank vessels greater than 100 gross tons as required by statute, and to make other amendments that clarify and update reporting requirements, reflect current practice, and remove unnecessary regulations. These regulations ensure that the Coast Guard has current information when there are significant changes in a vessel's operation, ownership, or evidence of financial responsibility, and reflects current best practices in the Coast Guard's management of the Certificate of Financial Responsibility program.

DATES: This final rule is effective January 3, 2022.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2017–0788 in the search box and click ''Search.'' Next, in the Document Type

column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: For information about this document call or email Benjamin H. White, National Pollution Funds Center, Coast Guard; telephone 202–795–6066, email *Benjamin.H.White@uscg.mil.*

SUPPLEMENTARY INFORMATION:

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I. Abbreviations

311(k) Fund The fund established by Section 311(k) of the Federal Water Pollution Control Act
CERCLA Comprehensive Environmental Response, Compensation, and Liability Act of 1980
COFR Certificate of Financial Responsibility
CFR Code of Federal Regulations
CIMS Case Information Management System
DHS Department of Homeland Security
eCOFR Electronic Certificate of Financial Responsibility
EEZ Exclusive Economic Zone
FWPCA Federal Water Pollution Control Act
GT Gross Tonnage
IRFA Initial Regulatory Flexibility Analysis
MISLE Marine Information for Safety and Law Enforcement
NPFC National Pollution Funds Center
NPRM Notice of proposed rulemaking
OCSLA Fund Offshore Oil Pollution Compensation Fund
OMB Office of Management and Budget
OPA 90 Oil Pollution Act of 1990
OSLTF Oil Spill Liability Trust Fund
RA Regulatory Analysis
SBA Small Business Administration
U.S. United States
U.S.C. United States Code
§ Section

II. Basis and Purpose, and Regulatory History

Responsible parties for certain vessels must establish and maintain evidence of financial responsibility, under both the Oil Pollution Act of 1990 (OPA 90), as amended, (specifically, 33 U.S.C. 2716) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (specifically, 42 U.S.C. 9608). The evidence of financial responsibility must meet the maximum amount of liability under 33 U.S.C. 2704(a) or (d). Violators of those requirements are subject to various penalties under 33 U.S.C. 2716a and 42 U.S.C. 9609.

The 2010 Coast Guard Authorization Act (Pub. L. 111–281, 124 Stat. 2988 (October 15, 2010)) expands OPA 90 by adding any tank vessel greater than 100 gross tons but less than or equal to 300 gross tons using any place subject to U.S. jurisdiction to the population of vessels subject to the evidence of financial responsibility requirements. The Coast Guard is amending the Code of Federal Regulations (CFR) to reflect that statutory change.

The Coast Guard had previously issued Certificate of Financial Responsibility (COFR) regulations at 33 CFR part 138, subpart A, which apply to vessels over 300 gross tons, as well as certain other vessels depending on how and where they are operated. The Coast Guard has modernized and simplified its COFR program since those regulations were established. Certain aspects of the COFR program are improved, particularly in the COFR requirements for reporting changes in vessel operation, ownership, or evidence of financial responsibility that affected the basis of the Coast Guard's decision to issue a COFR. Finally, the structure of the COFR regulations and some of their provisions, including the rules for applying vessel gross tonnage, have been modernized to reflect changes in the law and Coast Guard practice, since OPA 90's initial legislation.[1] These changes increase flexibility for operators and remove unnecessary administrative paperwork burdens to the public and to National Pollution Funds Center (NPFC).

A. Purpose of COFR Regulations

Under OPA 90, each responsible party (owners, operators, and demise charters) for a vessel from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone (EEZ), is jointly and severally liable for the specified removal costs and damages up to prescribed limits of liability.[2] Similar requirements pertaining to hazardous substances apply to owners and operators of vessels and facilities under 42 U.S.C. 9607 of CERCLA.

Under OPA 90 and CERCLA, the responsible parties for certain categories of vessels must establish and maintain evidence of financial responsibility in accordance with regulations promulgated by the Secretary. The purpose of this requirement is to ensure that, in advance of an oil pollution incident or a hazardous substance release, the responsible parties for the vessels in the specified categories have the financial ability to meet their potential liabilities under OPA 90 and CERCLA up to the applicable limits of liability.

Under 33 U.S.C. 2716 evidence of financial responsibility is required for the following categories:

(1) Vessels greater than 300 gross tons (except a non-self-propelled vessel that does not carry oil as cargo or fuel) using any place subject to the jurisdiction of the United States.

(2) Vessels using the waters of the EEZ to transship or lighter oil destined for a place subject to the jurisdiction of the United States (U.S.).

(3) Tank vessels greater than 100 gross tons using any place subject to the jurisdiction of the United States.

B. History of COFR Regulations

Initially, the Coast Guard established COFR regulations in 33 CFR part 138 with an interim rule published July 1, 1994 (59 FR 34210) followed by a final rule published March 7, 1996 (61 FR 9264). In 2008 the Coast Guard amended the COFR regulations and placed them in a newly created subpart A of part 138 (73 FR 53691, September 17, 2008).[3] In addition to making several other changes, that final rule removed a requirement that responsible parties carry an original or authorized copy of the current COFR aboard each covered vessel, because improved technology enabled the Coast Guard to view vessel COFRs electronically.

This 2021 rule follows our consideration of comments on a Notice of Proposed Rulemaking (NPRM) published on May 13, 2020 (85 FR

[1] This final rule conforms the COFR regulatory text to the Coast Guard's ''Tonnage Regulations Amendments'' final rule (81 FR 18701, March 31, 2016), which amended the U.S. tonnage regulations in 46 CFR part 69.

[2] OPA 90 defines ''liable'' and ''liability'' as ''the standard of liability which obtains under section 1321 of this title [Section 311 of the FWCPA].'' 33 U.S.C. 2701(17). Liability under Section 311, in turn, ''has been determined repeatedly to be strict, joint and several.'' H.R.Rep. No. 101–653, at 780 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780, 1990 WL132747.

[3] That rule expanded part 138's heading to ''Financial Responsibility for Water Pollution (Vessels) and OPA 90 Limits of Liability (Vessels and Deepwater Ports)'' and dedicated subpart B to the last half of the revised heading—limits of liability for vessels and deepwater ports under OPA 90.

28802) proposing further changes to part 138, subpart A. Six comments were received that raised seven issues. No public meeting was requested and none was held.

C. History of Fund Regulations in 33 CFR Part 135 and Subpart D of 33 CFR Part 153

The Coast Guard added part 135, titled ''Offshore Oil Pollution Compensation Fund,'' to 33 CFR in 1979 (44 FR 16860, March 19, 1979) and it added subpart D, titled ''Administration of the Pollution Fund,'' to 33 CFR part 153 in 1971 (36 FR 7009, April 13, 1971). This rule removes 33 CFR part 135 and subpart D of 33 CFR part 153, which concern management of two pollution funds for which OPA 90 repealed the authorities. The two defunct funds are the Offshore Oil Pollution Compensation Fund (OSCLA Fund) in 33 CFR part 135 and the Federal Water Pollution Control Act (FWPCA) Section 311(k) Fund (311(k) Fund) in subpart D of 33 CFR part 153.

On November 1, 2011, the Coast Guard published a notice of inquiry (76 FR 67385) soliciting public comment on whether to remove 33 CFR part 135.[4] We received no adverse comments; there were three comments supporting the removal of part 135. No comments were received during the 2020 NPRM comment period addressing the removal of either 33 CFR part 135 or subpart D of 33 CFR part 153. This rule removes those portions of the CFR.

III. Discussion of Comments and Changes

The Coast Guard received six comment submissions raising seven issues during the 90-day public comment period for the proposed rule, which closed on August 11, 2020. The letters we received during the public comment period were from three COFR guarantors, a regional citizen group, an insurance trade association and an insurance underwriter. The following discussion summarizes the public comments we received and our responses to the comments. In general, commenters were very supportive of the changes. Three regulatory changes from those we proposed were made based on the comments received.

Supportive comments. One commenter generally supports proposed changes that would assist vessel operators and the U.S. Coast Guard National Pollution Funds Center (NPFC) in effectively managing the Certificate of Financial Responsibility Program. Another commenter further supports reporting GT tonnage measurement systems and submitting the GT certifying document upon request.

Terminology comments. Two commenters addressed terminology clarifications in section 138.30 of the proposed rule. While one commenter was supportive of terminology clarifications, the other commenter cited the term ''responsible party'' as an example of terminology that could lead to confusion if the definitions were not compatible with the relevant statutes. The Coast Guard agrees with this commenter and as proposed, had modified some definitions to cross reference to the relevant statutes but notes that the definition of ''responsible party'' had non-substantive changes in the proposed rule to better align with OPA 90.

Improved technology comments. A commenter supports our proposed revisions to the COFR regulations to incorporate improved management practices and technological advances in 138.60. The changes include several minor changes in 138.60 to make it easier for operators to file information electronically, by explicitly allowing scanned documents and email or faxed submissions. The rule also modifies past technical amendments to implement Electronic COFRs, which makes it easier to keep COFR information updated as vessel operations change. This will increase flexibility for operators and remove unnecessary administrative paperwork burdens to the public.

Director's discretion to grant a waiver comment. One commenter notes that proposed section 138.60(e) appears to restrict the discretion available to the Director in the granting of exceptions, and does not permit the granting of a waiver if an application is made where a vessel is set to arrive within 21 days from the application date. Accordingly, the commenter recommends that a variation of the original ''discretion'' language contained in the existing rule be retained for the proposed Section 138.150 prior notice requirements. We agree with the commenter that the discretionary language is too restrictive, and are removing the written request requirement for requesting an exception under 138.60(e). The phrase ''only upon written request, submitted as provided in paragraph (c) and (d) of this section, in advance of the deadline and'', has been removed from the regulatory text, as well as the sentence: ''the Director will not grant a deadline exception request that does not set forth the reasons for the request and that does not give NPFC sufficient time to consider and act on an Application or a request for COFR renewal before the COFR is required.'' The Director may now grant an exception for good cause shown.

Surety Bonds comment. One commenter expressed concern with removing the reference to surety bonds from section 138.110, stating that they disagree with the assertion that a surety is unnecessary because it has rarely been used to meet the financial responsibility requirement. We disagree with this commenter. While this final rule removes the surety bond as a specifically mentioned method for establishing and maintaining evidence of financial responsibility, surety bonds are still a viable option. They have not been eliminated as an acceptable method; they may still be permitted under the ''other guaranty methods for establishing evidence of financial responsibility'' provided that the COFR Operator completes the requirements 138.110(f) and upon the Director's acceptance of that method. We did not make a change from the proposed rule based on this comment.

Reason for termination of guaranty comments. One commenter supports the inclusion of the reporting requirement of the reason for termination of a guaranty by a guarantor in 138.110(a)(3)(i). Another commenter disagrees, stating that requiring guarantors to report information, such as reasons for canceling a guaranty would make them become an enforcement mechanism for the Coast Guard, and would require them to breach non-disclosure agreements with customers. We disagree with the latter commenter. The regulatory text in 138.110(a)(3)(i) requests the guarantor provide NPFC the reason for termination, if known. It is not intended to make the guarantor engage in any type of an enforcement mechanism on behalf of the Coast Guard. We did not make a change from the proposed rule based on this comment.

Evidence of financial responsibility comments. One commenter seeks clarification on the new provisions in section 138.110(b)(2)(i)—in particular, they ask what evidence is actually required to establish ability to issue COFR guarantees and to what levels? The regulation is not specific as to what evidence is required, nor should it be. It offers a few items as examples that will influence the decision, but largely maintains NPFC's discretion. The purpose and focus of the regulation is to provide general guidelines, but also allow for flexibility, subject to the Director's discretion. The commenter

[4] The notice of inquiry was initially published as part of the Coast Guard's Claims Procedures Under the Oil Pollution Act of 1990 rulemaking. However, this rulemaking was closer to completion, so the removal of 33 CFR part 135 has been included with this rulemaking.

further states that when and if these rule changes take effect, it would appear that a request for initial determination of acceptability to serve as COFR Insurance Guarantor must be made 90 days before issuing a guaranty. That statement is correct. Finally, the commenter asks whether this is only for a new guarantor. That is, will existing approvals be grandfathered in or is the new provision essentially a revocation of all existing guarantors who must restart the process before the rule can take effect? Under the final rule, prior COFR insurance guarantors do not lose their status and do not have to restart the process. It was never NPFC's intention to revoke all existing guarantors and start over; those guarantors already approved will continue to be approved. We did not make a change from the proposed rule based on this comment.

The same commenter states that while it has no objection to having to establish continued acceptability of asset levels each year as set forth in section 138.110(b)(2)(ii), any requirement that guarantors report on themselves is vague and nebulous. Without guidance in the proposed rule, guarantors will be unable to determine what constitutes material changes in financial condition that need to be reported. We disagree with this commenter. A guarantor should know if their financial situation has changed or if other major changes have occurred that should be reported, such as a change that would impair their ability to fully satisfy their financial responsibility obligations under OPA 90, or a material condition that affects their ability to pay claims, or incur the expense of paying for cleanup. If there is no change, the guarantor should be able to report ''no change.''

Withdrawal of application comments. Two commenters note that a COFR Operator is permitted under proposed section 138.140(a) to withdraw an Application for a COFR at any time prior to issuance of a COFR and suggests that section should be amended to include and permit the withdrawal of any Application made on behalf of the COFR Operator or responsible party, including by a COFR guarantor. We agree that a COFR Guarantor should also have the ability to withdraw an application for a COFR at any time prior to its issuance. As a result, we will be revising the regulatory text in 138.140(a) to add the clause ''or anyone authorized to act on their behalf'' after ''A COFR Operator.'' Section 138.140(a) will now read: A COFR Operator, or anyone authorized to act on their behalf, may withdraw an Application at any time prior to issuance of the COFR.

Reporting requirements comments. While two commenters support the changes in 138.150, several commenters oppose them. An opposing commenter believes these requirements are unrealistic, unreasonable, and impracticable and thus should be revised to deal with the realities of the industry without compromising the purposes for which COFR guaranties are issued. That same commenter continues by stating that the 21-day and 3-day prior reporting requirements are in many cases unrealistic and unworkably inconsistent with how vessels are scheduled to call in the United States. The commenter gave an example of a foreign vessel without a COFR which suddenly must make a call to a U.S. port, either for a repair or a spot charter to receive goods from a U.S. port, causing that vessel to apply for a COFR opportunistically.

We disagree with this commenter. The scenario that this commenter describes does not apply to the revised 138.150. The 21-day notifications in 138.150(b) requiring issuance of a new COFR and 3-day notification in 138.150(c) not requiring issuance of a new COFR refer to pre-existing COFRs, which must now be either replaced, or updated, based on a change of circumstances in the pre-existing COFR. The scenario of a foreign vessel without a COFR requiring a COFR prior to entry into a U.S. port will follow the procedures set forth in 138.60 and 138.70 for issuance of a new COFR. A ''waiver'' is still available under 138.60(e)(3), permitting the Director to grant an exception to a deadline for good cause shown.

Two commenters allege that the reporting requirements in 138.150(b) are duplicative. One commenter states that COFR guarantors should not be required to report changes that have already been reported to the Director by a COFR Operator, even though the COFR guarantor will receive notice of such changes (and thus in the ordinary course of its business) pursuant to section 138.150(b). Otherwise an unnecessary double reporting requirement will exist in the new regulations. The other commenter almost reiterates the previous commenter, stating that it is noted that COFR Operators are required by section 138.150(b) to give notice to their COFR guarantors, at the same time that they give notice to the Director, of changes that may require issuance of a new COFR. The commenter continues by saying that COFR guarantors should not be required to report the same changes, which have already been reported to the Director by a COFR Operator. Finally, the commenter says that otherwise, an unnecessary and redundant reporting requirement will exist in the new regulations. The commenters presume that the operator has reported the information to the Coast Guard. If the Coast Guard receives the information from two different sources, it will validate the information received.

Four commenters expressed concern with the reporting requirement imposed on them in proposed section 138.150(d). The commenters' principal concern is that the new reporting requirement requires guarantors to report changes to vessels that the guarantor can't possibly give notice until they themselves are given notice by the vessel operator. A secondary concern held by the commenters is that the new reporting requirement will require guarantors to breach non-disclosure agreements in place with customers should it take effect. NPFC agrees with the group of commenters regarding section 138.150(d). As a result, we are amending the regulatory text to limit a guarantor's obligation to report material changes in prior COFR Applications to information of which it becomes aware in the ordinary course of its business. We have inserted ''once known, or should have known, in the ordinary course of business,'' after the phrase ''explaining the reason for the intended termination.'' The final sentence ''In addition, each guarantor (or, if there are multiple guarantors, each lead guarantor) must give the Director notice by email or other electronic means as soon as possible before any other change occurs that would require new evidence of financial responsibility or issuance of a new COFR under paragraph (b) of this section.'' has been deleted.

Several suggestions were made that were outside of the scope of this rulemaking, and therefore we will not address them here.

IV. Discussion of the Rule

After considering these comments received on the NPRM published May 13, 2020 (85 FR 28802), we are issuing this final rule that revises 33 CFR part 138, subpart A, and removes the superseded regulations in 33 CFR parts 135 and 153. We explain specific changes this final rule introduces below.

A. Overview of Changes to Existing COFR Regulations

Following is an overview of revisions to 33 CFR part 138, subpart A:

(1) *Evidence of financial responsibility for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons.* As required by 33 U.S.C. 2716(a)(3), we extend the

regulatory requirement to establish and maintain evidence of financial responsibility to any tank vessel greater than 100 gross tons but less than or equal to 300 gross tons using any place subject to the jurisdiction of the United States.

(2) *Reporting requirements.* We also reorganize, clarify, and update the reporting requirements for submitting a COFR Application. Examples of new requirements include documenting evidence of financial responsibility submitted in support of an Application or a request for COFR renewal and adding into regulatory text the current practice of guarantor notification.

This set of changes—including § 138.150, which is dedicated to reporting requirements and expressly links those requirements to enforcement provisions—aims to address instances in which COFR Operators fail to report changes to their status, as was previously required by 33 CFR 138.90(e). These failures included failing to report a vessel's financial changes in a timely manner, failing to report a vessel transfer to a new owner, and failing to secure a guaranty and apply for a new COFR—and had resulted in compliance gaps. These previous gaps compromised emergency responses where an inability to confirm financial responsibility had caused untimely responses to oil spills and undermined the COFR program.

Lastly, these revisions ensure that the Director receives the most current and accurate information when issuing a COFR. These revisions improve the Coast Guard's ability to verify vessel compliance with COFR regulations. For example, if an owner sells a vessel located in a place subject to U.S. jurisdiction, the new owner is now a responsible party and is immediately subject to the COFR program. However, enforcing compliance with the COFR program's requirements depends on the Coast Guard knowing about the vessel transfer. The regulatory revisions mitigate the risk of uninsured responsible parties and derelict vessels.

(3) *Revise COFR regulations to incorporate improved management practices and technological advancements.* We also amend the COFR regulations to reflect changes in the NPFC's management of the COFR program. The revisions include the following:

- Expressly authorizes COFR Operators, guarantors, and agents for service of process to submit signed scanned documents;
- Permits COFR Operators submitting Applications or requests for COFR renewal by email or fax to pay the COFR Application and certification fees up to 21 days after submission. This method replaces the requirement to pay certification fees before the NPFC issues the COFR;
- Updates and simplifies the provisions that detail how to apply gross tonnage assigned under different measurement systems. This reflects changes in the law since OPA 90's initial legislation and conforms the regulatory text to the Coast Guard's ''Tonnage Regulations Amendments'' final rule (81 FR 18701, March 31, 2016), which amended the U.S. tonnage regulations in 46 CFR part 69;
- Adds new provisions describing the COFR program's procedures for determining the acceptability of COFR guarantors; and
- Implements the Electronic COFR (eCOFR). These regulatory changes help manage the COFR program more effectively, reduce the burden to the public, and accommodate the frequent changes in vessel operation during the normal course of maritime commerce.

(4) *Clarifies terminology.* Terminology in COFR regulations is now consistent with applicable law and COFR program business practices. These changes included using terms of art consistently and simplifying terminology.

B. Discussion of Specific Changes to Existing COFR Regulations

Table 1 provides a section-number crosswalk between the existing COFR regulations and those in this final rule. The crosswalk assists the reader in comparing those currently in the CFR with those that will become effective January 3, 2022. Following table 1 is a discussion of the substantive changes, including new requirements or updates to the rule that match current Coast Guard practice. We applied plain language doctrine required by Executive Order 13563 to make these regulations easier to understand.

TABLE 1—CROSSWALK OF EXISTING COFR REGULATIONS AND THOSE IN THIS FINAL RULE

Existing COFR regulations	Final rule COFR regulations
Part 138—Financial Responsibility for Water Pollution (Vessels) and OPA 90 Limits of Liability (Vessels, Deepwater Ports and Onshore Facilities).	Part 138—Evidence of Financial Responsibility for Water Pollution (Vessels) and OPA 90 Limits of Liability (Vessels, Deepwater Ports and Onshore Facilities).
Subpart A—Financial Responsibility for Water Pollution (Vessels)	Subpart A—Evidence of Financial Responsibility for Water Pollution (Vessels).
§ 138.10 Scope	§ 138.10 Scope and purpose.
§ 138.15 Applicability	§ 138.20 Applicability.
§ 138.20 Definitions	§ 138.30 Definitions.
§ 138.30 General	§ 138.40 General requirements.
§ 138.30(c) through (f)	§ 138.50 How to apply vessel gross tonnages.
§ 138.40 Forms	§ 138.60 Forms and submissions; ensuring submission timeliness.
§ 138.45 Where to apply for and renew Certificates	§ 138.60 Forms and submissions; ensuring submission timeliness.
§ 138.50 Time to apply	§ 138.80 Applying for COFR.
§ 138.60 Applications, general instructions	§ 138.80 Applying for COFR.
§ 138.65 Issuance of Certificates	§ 138.70 Issuance and renewal of COFR.
§ 138.70 Renewal of Certificates	§ 138.90 Renewing COFR.
§ 138.80 Financial responsibility, how established	§ 138.110 How to establish and maintain evidence of financial responsibility.
§§ 138.80(f) [untitled] and 138.85 Implementation schedule for amendments to applicable amounts by regulation.	§ 138.100 How to calculate a total applicable amount.
§ 138.90(a)–(c) Individual and Fleet Certificates	§ 138.80 Applying for COFR.
§ 138.90(d) and (e), untitled	§ 138.150 Reporting requirements.
§ 138.100 Non-owning operator's responsibility for identification	§ 138.160 Non-owning COFR Operator's responsibility for identification.
§ 138.110 Master Certificates	§ 138.80 Applying for COFR.
§ 138.120 Certificates, denial or revocation	§ 138.140 Application withdrawals, COFR denials and revocations.
§ 138.130 Fees	§ 138.120 Fees.

TABLE 1—CROSSWALK OF EXISTING COFR REGULATIONS AND THOSE IN THIS FINAL RULE—Continued

Existing COFR regulations	Final rule COFR regulations
§ 138.140 Enforcement	§ 138.170 Enforcement.
§ 138.150 Service of process	§ 138.130 Designating agents for service of process.

§ 138.10 Scope and Purpose

The scope of subpart A § 138.10(a)(2) includes the standards and procedures the Coast Guard uses to determine guarantor acceptability. In addition, the scope of subpart A § 138.10(a)(3) includes the reporting requirements for guarantors. These changes for submitting evidence of financial responsibility on behalf of the COFR Operator reflect current practice.

§ 138.20 Applicability

As required by statute, § 138.20(a)(1) extends the applicability of the rule to include tank vessels greater than 100 gross tons but less than or equal to 300 gross tons, regardless of whether it is transshipping or lightering oil. This provision expands the population of vessels under 300 gross tons that are required to establish and maintain evidence of financial responsibility under 33 U.S.C. 2716. The existing regulation includes any tank vessel using the waters of the EEZ to transship or lighter oil destined for a place subject to the jurisdiction of the United States, but if a tank vessel is not engaged in transshipping or lightering, the existing regulation has an exception for those that are 300 gross tons or less.

In § 138.20(a)(2) through (a)(4), we extend the applicability of the rule to include guarantors, responsible parties other than the COFR Operator, and agents of process. This action is in accordance with current practice.

§ 138.30 Definitions

We cross-referenced additional statutory and regulatory definitions, added new regulatory definitions, amended regulatory definitions, and removed definitions that were not used.

The following definitions reflect substantive changes from existing regulations:

Applicant and certificant: We replaced the confusing terms ''applicant'' and ''certificant'' with the term ''COFR Operator'' throughout the COFR regulations. This action promotes consistency with the COFR program's business practice that authorizes the COFR Operator designated in the ''Application'' to represent the responsible parties for purposes of compliance with the COFR program.

COFR Operator: We redefined ''COFR Operator'' to clarify when we are referring to the operator who is liable in the event of an incident or a release. We also replaced the previous term ''Operator'' with the term ''responsible party.'' This rule defines the term ''responsible party,'' for purposes of OPA 90 and CERCLA evidence of responsibility, by cross-reference to the relevant statute, and includes all those persons who meet the definition. This replacement of the term ''operator'' with the terms ''responsible party'' and ''COFR Operator'' makes clear that the designation of a ''COFR Operator'' to act on behalf of the responsible parties for purposes of the COFR program does not limit or preclude other responsible parties from being operators within the meaning of OPA 90 or CERCLA. We also expressly clarify that, when there is more than one responsible party, the COFR Operator is the operator designated and authorized by all the vessel's responsible parties to act on their behalf to comply with the COFR program.

Fleet Certificate and Individual Certificate: A new definition for the term ''Fleet Certificate'' parallels the definition of ''Master Certificate,'' and a new definition for the term ''Individual Certificate,'' so that COFR regulations will include definitions for all three types of Certificates issued by the Director.

Financial guarantor: We revise the definition to make clear that a financial guarantor cannot also be a self-insurer of a vessel, but that it is possible for the self-insurer of one vessel to be the financial guarantor for a different vessel.

Owner: We remove the prior regulatory definition of ''owner.'' It did not accurately reflect current law, and it was not clear that a separate regulatory definition of ''owner'' is needed or helpful, as both OPA 90 and CERCLA define the term ''owner'' and we now cross-reference those definitions.

Tank vessel: We removed the regulatory definition of ''tank vessel,'' cross-referencing the OPA 90 statutory definition in § 138.30(a), and moved the exceptions to applicability to § 138.20(d)(3).

Vessel: We removed the regulatory definition of ''vessel'' and cross-reference in § 138.30(a) the statutory definitions that appear in OPA 90 and CERCLA. This is because there are slight differences in the OPA 90 and CERCLA definitions, specifically in the reference to public vessels in OPA 90. Therefore, although other provisions of the existing COFR regulations resolve these differences, we believe the better way to resolve the wording differences is to cross-reference the statutory definitions. This approach ensures that COFR-regulation definitions will always be consistent with OPA 90 and CERCLA.

§ 138.50 How To Apply Vessel Gross Tonnages

The previous COFR regulations provided instructions to apply different gross tonnage measurements for three different purposes: (1) To determine whether a tonnage threshold applies; (2) to calculate a vessel's OPA 90 and CERCLA applicable amounts of financial responsibility; and (3) to determine the vessel's OPA 90 and COFR limits of liability. However, these provisions were complex, and had been difficult to apply, in part because they were developed and established prior to the full coming into force of the International Convention on Tonnage Measurement of Ships (June 23, 1969) on July 18, 1994. Furthermore, the 2010 Coast Guard Authorization Act included amendments that updated, clarified, and eliminated inconsistencies in the tonnage measurement law. The Coast Guard implemented these amendments in the 2016 rule,[5] which also incorporated changes to help provide a suitable framework for tonnage-based regulations, allowing the Coast Guard to specify tonnage thresholds more clearly. This rule maintains the purposes of applying gross tonnage measurements explained in the COFR regulations.

This rule separates provisions for applying vessel gross tonnage in § 138.50 and clarifies and simplifies the language while conforming with the 2016 amendments to the U.S. tonnage regulations. We added a table to illustrate use of gross tonnages assigned under the two overarching tonnage measurement systems provided for by U.S. law.[6]

[5] ''Tonnage Regulations Amendments'' final rule (81 FR 18701, March 31, 2016).

[6] These systems are under the Convention Measurement System, which expresses gross tonnage as ''GT ITC,'' and the Regulatory Measurement System, which expresses gross tonnage as ''GRT.''

In § 138.50(f), regardless of the tonnage reported on the Application, the appropriate tonnage-certifying document as provided for under the U.S. tonnage regulations, such as a tonnage certificate or completed Simplified measurement application, governs in determining the evidence of financial responsibility applicable amounts, except when the responsible parties or guarantors knew or should have known that the applicable tonnage certificate was incorrect. In the event of an oil pollution incident or hazardous substance release, the tonnage-certifying document governs the applicable limit of liability. This information is vital to the COFR program because the guaranty is to the certified tonnage at the time of the incident, and addresses what happens if a vessel undergoes a modification that affects the tonnage after a COFR Operator submits an Application. This approach also creates certainty by removing the implication that a tonnage re-measurement at the time of an incident can supersede liability and financial responsibility as reflected on the tonnage-certifying document.

The addition in § 138.50(g) also requires COFR Operators to submit, upon request, the original or a copy of the tonnage certifying document(s). The rule captures the fact that, in some circumstances, vessels may be assigned tonnage under both measurement systems.

§ 138.60 Forms and Submissions; Ensuring Submission Timeliness

To remain consistent with current practice, § 138.60(a) notes that forms can be completed online or downloaded. This is the Coast Guard's preference for submitting eCOFR Applications. If you submit electronic images, please note that, currently, our system only accepts the following imaging programs: PDF, JPEG, and TIFF. Because of delays associated with mail processing and security, submission of forms by mail is discouraged.

Section 138.60(c)(2) also removes the option for hand-delivering submissions because of the prohibition of hand delivery under U.S. Government mail security restrictions. Also, § 138.60(e) makes clear that the timeliness of submissions is solely the responsibility of the person making the submission.

Section 138.60(e)(3) was revised after comment to continue waivers, which permit the Director to grant an exception to a deadline for good cause shown.

§ 138.70 Issuance and Renewal of COFR

Section 138.70(b) removes the express requirement to pay fees before the issuance of a COFR. This reflects the NPFC's current business practice when the COFR Operator submits the application via fax or email.

Section 138.70(e) states that certain tonnage information will be posted to the NPFC's COFR website, including the measurement system(s) used, which under § 138.80(a)(1), the applicant is required to provide.

§ 138.80 Applying for COFRs

Section 138.80 reflects the removal of a requirement to pay fees before the issuance of a COFR when Applications are submitted by email or fax by cross-referencing § 138.120's new paragraph (a)(3)(i) that allows payment to be made within 21 days of the Application. This allows flexibility for the Director to issue COFRs when the Application is complete and evidence of financial responsibility has been established, and before the NPFC receives payment. The COFR Operator must, however, ensure the fees are paid within 21 days of submission of the Application to avoid adverse consequences specified in § 138.120(a)(4).

Section 138.80(a)(1)(i)(C) also clarifies that Master Certificates do not name any specific vessel, but do state the maximum tonnages for the largest vessel for which the COFR Operator may be responsible. Without that requirement, we will not have a record of coverage if an incident occurs in the intervening period between the Application and the first periodic report of covered vessels.

Section 138.80(a)(1)(iv) requires the COFR Operator to include a report with the Application providing information on the vessels covered by the Master Certificate. The rule also explains what information the COFR Operator must provide to the Director if a vessel has been assigned tonnages under both measurement systems. The inclusion of both assigned tonnages for vessels with more than one should avoid delay of the application process and the effective date of the guaranty.

Additionally, § 138.80(a)(1)(iv)(B) requires that certain Master Certificate application information be updated, including a listing of vessels that are no longer covered. This establishes the termination of the guaranty date. Finally, to assist in keeping this information up to date, if during a 6-month reporting period a vessel is transferred to another responsible party, the updated report must list the date and place of transfer and the contact information of the responsible party to whom the vessel was transferred.

Unlike the previous application instruction section, § 138.60, § 138.80(d) does not require an original signature page for applications submitted by email or fax. Instead, the COFR Operator may submit a legible scan of the signature page.

§ 138.100 How To Calculate a Total Applicable Amount

Section 138.100(c) states that when statute or regulation adjusts limits of liability, the COFR Operator must establish and maintain evidence of financial responsibility in an amount equal to or greater than the amended total applicable amount, as provided in § 138.240(a).

§ 138.110 How To Establish and Maintain Evidence of Financial Responsibility

The rule removes from the regulation the surety bond as a specifically mentioned method for establishing and maintaining evidence of financial responsibility. This method is still permitted as falling under the ''other method'' provision in paragraph (f).

Section 138.110(a) explains that the guarantor continues to be liable and must provide coverage for 30 days following NPFC receipt of a notice of cancellation and not from the date the guarantor issues the notice. The rule moves this provision previously contained on the COFR guaranty forms into the regulation and reflects a current and important NPFC business practice. The guarantor will provide the reason for termination as part of its notice of cancellation, if known. Additionally, § 138.110(a) requires COFR Operators, guarantors, and self-insurers to notify the Director of any material change in submitted information, including any material change in the guarantor or self-insurer's financial position. A material change is a change that will affect the basis of the Director's approval of the guarantor or evidence of financial responsibility. This notification is required immediately when a change occurs, rather than within 10 days of the change as specified in the previous rule.

Section 138.110(b) describes the current practice for establishing and maintaining the acceptability of COFR insurance guarantors. This will entail the guarantor submitting information on its structure, business practices, history, financial strength, and other information as requested by the Director. This process involves an initial determination followed by annual submission by each COFR insurance guarantor.

Section 138.110(c) clarifies the net worth and working capital requirements for financial guarantors to reflect current practice. Previously, the NPFC did not add the total applicable amount of each vessel owned by one operator; rather, it based evidence of financial responsibility on the operator's vessel with the greatest total applicable amount. This rule requires net worth and working capital be based on the aggregate total applicable amounts.

Section 138.110(f) changes the submission date for requesting another guaranty method for establishing evidence of financial responsibility from 45 to 90 days prior to the date the COFR is required. The NPFC needs this additional 45 days to review the financial documentation and communicate with the potential guarantor.

§ 138.120 Fees

Section 138.120 eliminates a previous requirement that the application fee must be paid before the Director will issue a COFR. This adds flexibility and convenience for COFR Operators, especially if they are underway and want to enter U.S. navigable waters or U.S. EEZ. It further explains that failure to pay fees in a timely manner may result in denial or revocation of COFR, debt collection, or other enforcement. Finally, it amends the fee refund procedures in the case of overpayment. The Director will refund overpayments, because the NPFC will not credit overpayments for the operator's future use or for transfer to another operator anymore.

§ 138.130 Designating Agents for Service of Process

Section 138.130(d) shortens the notification period for a COFR Operator or Guarantor to notify the Director of a new agent for service of process from 10 days to 5 days. This shortened period reflects efficiencies relating to electronic notifications in place of mailed notifications.

§ 138.140 Application Withdrawals, COFR Denials and Revocations

Section 138.140 is revised to reflect current business practice. It adds a provision noting that the COFR Operator, or anyone authorized to act on their behalf, may withdraw an Application at any time before issuance of the COFR. It also includes the failure to designate and maintain a U.S. agent for service of process to the list of cases in which the Director may deny an Application or revoke a COFR. The section revision also clarifies that the Director may deny an Application or revoke a COFR after obtaining additional information, such as transfer to a new operator, vessel renaming, guaranty termination or cancellation, or disapproval of the guarantor, and it adds a duty to remedy violations where a COFR for a vessel expires. Finally, it adds a provision specifying that where a COFR is revoked because 30 days have elapsed following the date the Director receives a guarantor's notice of termination, the Director may reinstate the COFR if the guarantor promptly notifies the Director that the guarantor rescinded the termination and there was no gap in coverage. This will align the regulation to the COFR guaranty forms.

§ 138.150 Reporting Requirements

The rule merges reporting requirements into this one section. It also revises the regulatory text to emphasize prior notices of changes that will require a new COFR before the change occurs. Section 138.150 identifies the information that must be reported to the Director no later than 21 business days before a new COFR is required for permanent vessel transfers and other changes requiring issuance of a new COFR, and information that need only be reported 3 business days before implementing the change for changes not requiring issuance of a new COFR. Changes that require issuance of a new COFR include, but are not limited to: A permanent vessel transfer, change of COFR Operator, vessel name change, change in the vessel's gross tonnage, or termination of guaranty. As a result of comments, § 138.150(d) was revised to require that each guarantor (or, if there are multiple guarantors, each lead guarantor) must give the Director 30 days notice before terminating a guaranty as provided in § 138.110(a)(3), explaining the reason for the intended termination, once known, or should have known, in the ordinary course of business. The further requirement to give the Director notice before any other change occurs that will require new evidence of financial responsibility or issuance of a new COFR under paragraph (b) has been eliminated.

C. Removal of 33 CFR 138.90(f)

Existing paragraph § 138.90(f) contains a non-regulatory provision dealing with the temporary transfer of custody of an unmanned barge that has a COFR issued under subpart A of part 138. The COFR Operator who transfers the barge continues to be liable under OPA 90, CERCLA, or both, and continues to maintain on file with the Director acceptable evidence of financial responsibility with respect to the barge. The provision encourages the temporary transferee to require the transferring COFR Operator to acknowledge in writing that the transferring COFR Operator agrees to remain responsible for pollution liabilities. Since we received no adverse comments, we have removed § 138.90(f) because the existing COFR remains in effect in respect to that vessel, and a temporary new COFR is not required.

D. Removal of 33 CFR Part 135 and Subpart D of 33 CFR Part 153

This document removes 33 CFR part 135 and subpart D of 33 CFR part 153 because OPA 90 repealed the legal authorities for them. These rules are outdated and are removed.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on these statutes or Executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. A regulatory analysis (RA) follows.

As explained in this section, this rule imposes some quantified costs, and create qualitative benefits, which the Coast Guard believes justifies the costs.

1. Analysis of Alternatives

Alternative 1: No action.

The ''No Action'' alternative makes no regulatory changes to the evidence of financial responsibility regulations in 33 CFR part 138, subpart A. The ''No Action'' alternative is not viable because the statute requires evidence of financial responsibility regulations for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons. At a minimum, a regulation implementing this requirement is required. This alternative reflects the status quo and

therefore has no regulatory cost or benefit.

Alternative 2: Promulgate evidence of financial responsibility regulations for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons (statutory requirement).

Alternative 2 reflects the absolute minimum rulemaking effort to address the statutory requirement in Section 712 of the Coast Guard Authorization Act of 2010. However we did not choose this alternative because, there are other aspects of the Coast Guard's evidence of financial responsibility program that the Coast Guard wants to address such as removing outdated regulatory text, providing updates that reflect current practices and taking into account technological improvements that will provide better clarity to the public as well as reduce confusion. This alternative has the least net benefits of all of the proposed alternatives. This alternative reflects the most costly aspect of the rulemaking and is included in all of the proposed alternatives because it is a statutory provision.

Alternative 3: Promulgate evidence of financial responsibility regulations for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons (statutory requirement) and for deepwater ports (discretionary requirement).

Alternative 3 adds promulgating evidence of financial responsibility regulations for deepwater ports to Alternative 2. The Coast Guard considered proposing financial responsibility regulations for deepwater ports as part of this rulemaking. The deepwater port industry is experiencing increased activity in the liquefied natural gas deepwater port industry sector, raising questions about how existing laws and policies regarding these facilities would apply. These issues do not impact vessel evidence of financial responsibility, however, and could create complexity and potentially delay the mandated regulation of tank vessels greater than 100 gross tons but less than or equal to 300 gross tons. In addition, currently only one liquefied natural gas deepwater port is in operation and it uses less than 100 gallons of oil, whereas other designs might pose a greater risk of oil spills. Additional time is necessary to analyze the effects of liquefied natural gas regulation on the economy, maritime safety, and the environment. The only other deepwater port in operation, an oil deepwater port called the Louisiana Offshore Oil Port, is self-insured, and provides evidence of financial responsibility sufficient to meet its maximum liability under OPA 90 under grandfathered requirements of the Deepwater Port Act of 1974.

After evaluating this alternative, the Coast Guard decided not to develop deepwater port financial responsibility regulations at this time. Postponing evidence of financial responsibility regulations for deepwater ports will not impact maritime safety or the environment. Currently, there is no established market that provides and maintains evidence of financial responsibility for deepwater ports. If the market decides to pursue these ventures in the future, the costs and benefits will be analyzed accordingly as part of a future rulemaking.

Alternative 4 (Preferred alternative) Promulgate evidence of financial responsibility regulations for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons (statutory requirement); require COFR Operators and guarantors to submit additional information to the Coast Guard; make conforming amendments reflect current practices (discretionary requirement); and remove subpart D of 33 CFR part 153 D and 33 CFR part 135 from the CFR (discretionary requirement).

Alternative 4 addresses the statutory requirement to require tank vessels greater than 100 gross tons but less than or equal to 300 gross tons to establish and maintain financial responsibility. It also provides necessary updates to the current financial responsibility regulations to reflect current practices that have evolved over the past two decades, taking into account technological improvements as well as changes in policy. Lastly, this alternative removes 33 CFR part 135 and subpart D of 33 CFR part 153, both of which regulate two defunct funds, the OCSLA Fund and the 311(k) Fund.

In addition to the regulatory costs and benefits associated with Alternative 2, this alternative adds two aspects with no cost: Conforming regulations to current practice and removing two defunct portions of the CFR, providing intangible benefits of eliminating confusion for the public, as well as ensuring that the regulations reflect how the Coast Guard's financial responsibility program currently operates. Additionally, a small amount of regulatory cost is associated with the requirement to require COFR Operators and guarantors to provide additional information to the Coast Guard. Although the benefits of this alternative are qualitative, they will help to eliminate confusion and provide more clarity to the public while providing much needed information to the Coast Guard.

2. Regulatory Changes

We are amending the vessel evidence of financial responsibility regulations at 33 CFR part 138, subpart A, to:

1. Require financial responsibility to now include all tank vessels greater than 100 gross tons but less than or equal to 300 gross tons.

2. Require additional information from the COFR Operator and guarantor. The revisions include:

- Reporting of gross tonnage measurement system used and submission of a copy of the tonnage certifying document, upon request;
- Electronic submissions;
- Reporting of reason for termination of guaranty by a guarantor, if known; and
- Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

3. Conform regulations to current practice. The revisions include:

- How to apply vessel gross tonnages;
- Removal of requirement to pay fees before issuance of a COFR;
- Moving surety bond method to ''other methods'' for establishing and maintaining evidence of financial responsibility;
- Clarification on continuation of guarantor's liability and requirement to provide coverage for 30 days after cancellation of guaranty; and
- Process for establishing and maintaining acceptability of COFR insurance guarantors.

In addition, for the reasons discussed above, we are removing 33 CFR part 135 and subpart D of 33 CFR part 153 which concern management of two defunct pollution funds.

Table 2 shows whether a category of regulatory amendments have a regulatory cost, regulatory benefit, or both. Those amendments that have a regulatory cost or benefit are discussed in detail following the table.

TABLE 2—SUMMARY OF REGULATORY AMENDMENT IMPACTS

	Regulatory cost	Regulatory benefit
Require financial responsibility for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons to establish and maintain evidence of financial responsibility (Statutory):		
Application and certification costs	Yes	Yes
COFR premium costs	Yes	Yes
Require Additional Information from the COFR Operator and guarantor (Discretionary):		
Reporting of gross tonnage measurement systems used and submission of a copy of the tonnage certifying document, upon request.	Yes	Yes
Electronic submissions	No [7]	Yes
Reporting of reason for termination of guaranty by a guarantor	Yes	Yes
Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.	Yes	Yes
Conform regulations to current Practice (Discretionary):		
How to apply vessel gross tonnages	No	Yes
Removal of requirement to pay fees before issuance of a COFR	No	Yes
Moving Surety Bond method to ''other methods'' for establishing and maintaining evidence of financial responsibility.	No	Yes
Clarification on continuation of guarantor's liability and requirement to provide coverage for 30 days after cancellation of guaranty.	No	Yes
Process for establishing and maintaining acceptability of COFR insurance guarantors	No	Yes
Removal of 33 CFR part 135 and subpart D of 33 CFR part 153 (Discretionary):		
Removal of 33 CFR part 135	No [8]	Yes
Removal of subpart D of 33 CFR part 153	No [9]	Yes

3. Regulatory Costs

There are two regulatory costs identified for this rule:

- Regulatory Cost 1: Require the additional tank vessels greater than 100 gross tons but less than or equal to 300 gross tons to establish and maintain evidence of financial responsibility (statutory requirement).
- Regulatory Cost 2: Require additional information from the COFR Operator and guarantor (discretionary requirement).

Discussion of Regulatory Cost 1

The rule requires tank vessels greater than 100 gross tons but less than or equal to 300 gross tons to establish and maintain evidence of financial responsibility.[10] These vessels are required to have COFRs, which results in two types of costs:

- Application and certification costs; and
- COFR premium costs.

Application and Certification Costs: In the first year of the analysis period, the COFR Operator is required to pay an Application fee of $200 and a Certification fee of $100 for each vessel requiring a COFR. A new Certification fee is required every 3 years to renew the COFR.

COFR Premium Costs: The additional operators of tank vessels greater than 100 gross tons but less than or equal to 300 gross tons have to establish and maintain evidence of financial responsibility using one of these several methods: Insurance, Self-insurance, or Financial Guaranty.[11]

Affected Population: According to the Coast Guard's Marine Information for Safety and Law Enforcement (MISLE) database, there are an average of 465 tank vessels using U.S. navigable waters or U.S. EEZ from 2016–2020 that are greater than 100 gross tons but less than or equal to 300 gross tons. Table 3 shows the number of tank vessels greater than 100 gross tons but less than or equal to 300 gross tons per year (2016–2020). Note the data used for the NPRM was 2014–2018. Hence the final rule has updated the data period to most current data.

TABLE 3—NUMBER OF TANK VESSELS GREATER THAN 100 GROSS TONS BUT LESS THAN OR EQUAL TO 300 GROSS TONS

Year	Number of vessels
2016	477
2017	474
2018	474
2019	449
2020	449
Average (2016–2020)	465

[7] Electronic submissions creates cost savings.

[8] Removal of superseded regulatory requirements have no cost. The OCSLA Fund was subsumed by the Oil Spill Liability Trust Fund.

[9] Removal of superseded regulatory requirements have no cost. The 311(k) Fund was subsumed by the Oil Spill Liability Trust Fund.

[10] Regulatory Cost 1 does not include vessels greater than 300 gross tons that are already required to have a COFR.

[11] Historically, the surety bond method has been used in a very few instances. This rule moves this method to the ''other methods'' category of financial responsibility under § 138.110(f).

Cost Summary Regulatory Cost 1

Application and Certification Costs: We assumed the number of future COFR Applications and Certifications, based on the historical average number of vessels in the population from 2016 to 2020 (465 vessels) are constant for the 10-year analysis period.[12] We also assumed that all vessels renew their COFRs every 3 years through the full 10-year analysis period. In the first year of the analysis period, COFR Operators pay an Application fee ($200) and a Certification fee ($100) when applying for a COFR for their vessels. Every 3 years thereafter, COFR Operators pay a Certification fee ($100) when renewing their COFRs. In the first year of the analysis period, the annual cost is calculated by multiplying the number of vessels applying for COFRs (465 vessels) by the cost of the Application ($200) and adding the number of vessels requesting certification (465) multiplied by the cost of certification ($100) to equal $139,500. Every third year thereafter, the cost is calculated by multiplying the number of vessels (465) requesting certification for renewal of their COFRs by the cost of the certification ($100) to equal $46,500.

COFR Premium Costs: It is possible for vessel operators to choose to use the Self-insurance or Financial Guaranty methods of establishing their evidence of financial responsibility, which allows them to use their U.S. business assets. Alternatively, in the case of the Financial Guaranty method, vessels may use the U.S. business assets of a parent, affiliate, or special purpose company as evidence that they are capable of paying for removal costs and damages up to the applicable limit of liability. In those cases, they have made a business decision that the cost of the assuming liability risk under OPA 90 is less than the premium charged by commercial insurance companies. This assessment of OPA 90 risk is company-specific and not quantifiable. Therefore, for the purposes of this analysis, we have assumed that the responsible parties use the Insurance method of establishing and maintaining their evidence of financial responsibility. We received estimates of COFR insurance premium amounts for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons from 4 COFR insurance companies representing over 90 percent of existing COFRs.[13] Based on this survey of guarantors, we estimated that the premiums per vessel range between $300 and $1,000 per year.

Vessel Premium Low Range Cost Estimate: The Coast Guard calculated the vessel premium low range cost estimate by using the following formula:

Number of vessels × cost of premium per vessel per year:

465 vessels × $300 per vessel per year = $139,500 per year

Vessel Premium High Range Cost Estimate: The Coast Guard calculated the vessel premium high range cost estimate by using the following formula:

Number of vessels × the cost of premium per vessel per year:

465 vessels × the $1,000 per vessel per year = $465,000 per year

Discussion of Regulatory Cost 2

This rule requires additional information from the COFR Operator and guarantor that result in three types of costs:

- Reporting of gross tonnage measurement systems used and submission of copy of tonnage certifying document, upon request;
- Reporting of reason for termination of guaranty by a guarantor, if known; and
- Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

Reporting of Gross Tonnage Measurement Systems Used and Submission of a Copy of Tonnage Certifying Document, upon request—Affected Population: All COFR Operators, including those for the tank vessels greater than 100 gross tons but less than or equal to 300 gross tons, will report the gross tonnage measurement systems used when applying for and/or renewing a COFR. The Coast Guard's COFR database indicates that there are 26,163 currently COFRed vessels. Adding the 465 COFRed tank vessels greater than 100 gross tons but less than or equal to 300 gross tons in Regulation Cost 1, and assuming the number of COFRed vessels remains constant during the analysis period, the total number of COFRed vessels equals 26,628.

Master Certificate and Fleet Certificate holders also are required to provide the gross tonnage measurement systems used for the largest vessel covered by the Application. According to the COFR database, there are currently 8 Master Certificates and 12 Fleet Certificates.

COFR Operators also provide a copy of the tonnage certifying document, upon request. We assume that the Coast Guard may request a copy of the tonnage certifying document when there is an incident. According to incident data from the Coast Guard's Case Information Management System (CIMS) database, there was an average of 12 incidents per year involving vessels with COFRs and vessels that are required to have COFRs under this rule over the five year period 2016–2020. We assume that for the analysis period, the number of incidents remains constant with this average.

Reporting of Reason for Termination of Guaranty by a Guarantor—Affected Population: Based on NPFC Vessel Certification Program data on the historical number of annual notices of guaranty termination by guarantors, the Coast Guard estimates that there will be 4,000 per year for the 10-year analysis period.

Reporting Vessel Name Change and Increased Reporting on Location of Vessel When There is a Change in Ownership on Date of change—Affected Population: Based on NPFC Vessel Certification Program historical data, the Coast Guard estimates that there will be 1,000 submissions per year.

Cost Summary Regulatory Cost 2

Reporting of Gross Tonnage Measurement Systems Used and Submission of Copy of Tonnage Certifying Document, upon request: Reporting the gross tonnage measurement systems used with the application and/or requests for COFR renewal results in a negligible cost impact (less than one minute of time) to the COFR Operator and is completed with the Application for the COFR. We do not quantify this cost because it is negligible.

Based on estimates received from COFR insurance guarantors who will submit, upon request, a copy of the tonnage certifying document on behalf of the COFR Operator, COFR Operators requires 15 minutes (0.25 hours) per submission.

Number of submissions per year × number of hours × the labor cost per hour:

12 × 0.25 hours per submission = 3 hours

3 hours per year × $36.64 per hour[14] = $110 per year

[12] This estimate, based on COFR trends for currently COFRed vessels, was validated by subject matter expert in Coast Guard's Vessel Certification Division.

[13] Source: NPFC's COFR database.

[14] Total employer compensation costs for private industry workers averaged, $36.64 per hour worked, found at *Employer Costs for Employee Compensation—March 2021 (bls.gov).* Bureau of Labor Statistics Economic News Release Employer Costs for Employee Compensation news release text. Thursday, March 18, 2021. This wage rate was selected because it is the most general and reflects that the person submitting the information could be any worker whether an administrative assistant or a Chief Executive Officer of a company. Note this wage was adjusted from the NPRM which used a hourly wage rate from December 2017.

Reporting of reason for termination of guaranty by a guarantor: We estimated that it will take 5 minutes (0.08 hours) for the guarantor to add the reason why the guaranty was terminated to the information they already provide to the Coast Guard when they terminate a guaranty.

Number of terminations per year × number of hours per submission × labor cost per hour:

4,000 submissions per year × 0.08 hours per submission × $36.64 per hour = $11,725 per year

Reporting Vessel Name Change and Increased Reporting on Location of Vessel When There is a Change in Ownership on Date of Change: We estimated that it takes an additional 5 minutes (0.08 hours) per submission to provide additional information that is not already required under the current rule.

Number of submissions per year × number of hours per submission × the labor cost per hour:

1,000 submissions per year × the 0.08 hours/submission × the $36.64 per hour [15] = $2,931 per year

Present Value Regulatory Costs (Low Range): We estimated that the 10-year present value of the rule, at a 3-percent discount rate, is $1.6 million. We estimated that the 10-year present value of the rule, at a 7-percent discount rate, is $1.3 million. The estimated annualized discounted cost of the rule, at a 3-percent discount rate, is $189,100. The estimated annualized discounted cost of the rule, at a 7-percent discount rate, is $191,100.

Present Value Regulatory Costs (High Range): We estimated the 10-year present value of the rule, at a 3-percent discount rate, to be $4.5 million. We estimated the 10-year present value of the rule, at a 7-percent discount rate, to be $3.7 million. The estimated annualized discounted cost of the rule, at a 3-percent discount rate, is $525,800. The estimated annualized discounted cost of the rule, at a 7-percent discount rate, is $527,800.

4. Regulatory Benefits

There are four qualitative benefits identified for this rule:

- Regulatory Benefit 1: Require Tank Vessels Greater than 100 Gross Tons to 300 Gross Tons to Establish and Maintain Evidence of Financial Responsibility (statutory requirement).
- Regulatory Benefit 2: Require additional information from the COFR Operator and guarantor (discretionary requirement).
- Regulatory Benefit 3: Conform Regulations to Current Practice (discretionary requirement).
- Regulatory Benefit 4: Removal of 33 CFR part 135 and subpart D of 33 CFR part 153 (discretionary requirement).

Discussion of Regulatory Benefit 1

Oil pollution removal costs and damages for incidents have substantially increased since 1990, even for relatively small-sized discharges. When there is no evidence of financial responsibility, it becomes more likely that the OSLTF will have to pay for at least some of the costs resulting from the incident.[16] When vessels have COFRs, the incident cost amount paid by the responsible party is higher than for vessels that do not have COFRs. This rule adds tank vessels greater than 100 gross tons but less than or equal to 300 gross tons to the vessels that are already required to establish and maintain evidence of financial responsibility.

Of the 10,000 incidents sampled from the Coast Guard's CIMS database during the ''1990 to 2020'' period, 4.99 percent were COFRed vessels and 30.27 percent were non-COFRed vessels.[17] Coast Guard CIMS data show that the Coast Guard recovers 88.64 percent of costs when a vessel was COFRed, and only 17.45 percent of costs when it was not COFRed.

The requirement ensures that the costs are internalized because parties responsible for oil spills are more fully responsible for (moving from less than ⅓ to nearly 100 percent) paying for the oil pollution removal costs and damages and help correct this market failure.[18] Increased recovered cost rates shift the risk and actual costs from the OSLTF to the polluting responsible party.

Discussion of Regulatory Benefit 2

Reporting of Gross Tonnage Measurement Systems Used and Submission of copy of Tonnage Certifying Document, upon request: COFR Operators must submit a copy of the tonnage certifying document upon request.

Providing this additional information with respect to gross tonnage allows the Coast Guard to determine more effectively the limit of liability and applicable amounts of financial responsibility for the incident. In some cases, vessels have tonnage determined under more than one measurement system, depending on a variety of factors, including the vessel's flag, length, voyage type, keel laid, or substantial alteration date, and whether it is self-propelled. This has caused confusion with respect to which measurement system to use to determine the limit of liability and amount of financial responsibility.

Regardless of the tonnage reported on the Application, the tonnage certifying document governs the required evidence of financial responsibility and the limit of liability at the time of the incident (except when the responsible parties or guarantors knew or should have known that the tonnage certificate information was incorrect). Using the tonnage certifying document provides the following benefits: (1) It ensures that the Coast Guard has the most accurate tonnage measurements; (2) it provides the method used to determine tonnage, as well as the tonnage amount; (3) it provides information for foreign flagged vessels that is oftentimes difficult to obtain; and (4) without the applicable tonnage certifying document, if an incident occurred, a re-measurement of tonnage could alter the already determined financial responsibility and limit of liability.

Electronic submissions: The rule allows COFR Operators, guarantors, and agents for service of process to submit signed scanned images, emails, or faxes instead of hard copy signed-in-ink originals. The Coast Guard receives approximately ten of the CG–5586 forms by mail annually. Allowing electronic submissions creates minimal cost savings; however, it provides increased flexibility to COFR Operators, and enhances Coast Guard's recordkeeping goals. This works towards the OMB's goal to maximize the use of electronic technology for collection of information from the public, demonstrated in OMB memorandum M–19–21.

Reporting of reason for termination of guaranty by guarantor: The rule requires the guarantor to include the reason for termination, if known, with the notification for termination of the guaranty. This information provides the Coast Guard with new information about the COFR Operator in the event there is an incident.

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change: The rule ensures that the Coast Guard has the most current information when initially issuing a COFR—especially concerning vessels that, over time, become derelict while in

[15] See footnote 8.

[16] Lawrence I. Kiern, ''Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A review of the Second Decade.'' 36 *Tulane Maritime Law Journal.* 23–24 (2011).

[17] The remaining 64.74 percent of incidents were either facility incidents or incidents where the Coast Guard could not identify the source.

[18] See OMB Circular A–4, page 4 dated September 17, 2003 for a short discussion on market failures and externalities such as environmental problems.

U.S. navigable waters or U.S. EEZ. The revisions also improve the Coast Guard's ability to establish compliance with COFR regulations by more effectively ensuring the responsible party is able to pay its liability and mitigate risks to the OSLTF. For example, if a vessel is sold while using a place subject to U.S. jurisdiction, the new responsible parties become immediately subject to the COFR program. These changes are to ensure that, while the Coast Guard still has regulatory authority over a responsible party and the financial assurances of the guarantor, the Coast Guard receives information relevant to continued compliance before problems arise. However, enforcing compliance with the COFR program's requirements depends on the Coast Guard knowing about the vessel transfer. The regulatory revisions ensure that the Coast Guard receives this information and to mitigate the risk of uninsured responsible parties and derelict vessels.

Discussion of Regulatory Benefit 3

How to apply vessel gross tonnages: This rule updates and simplifies the provisions respecting how to apply gross tonnage measurement methods to reflect changes in the law since OPA 90 was first enacted. This rule is consistent with the Coast Guard's tonnage regulation at 46 CFR part 69 ''Tonnage Regulations Amendments'' (81 FR 18701, March 31, 2016). Hence the update on how gross tonnage measurement is performed simplifies an administrative burden on the COFR Operator.

Removal of requirement to pay fees before issuance of a COFR: The rule allows the COFR Operator to pay the COFR Application and Certification fees up to 21 days after submitting their COFR Application. This adds flexibility and convenience for COFR Operators, especially if they are underway and want to enter U.S. navigable waters or U.S. EEZ.

Moving surety bond method to ''other methods'' for establishing and maintaining evidence of financial responsibility: The rule no longer specifically discusses the surety bond method in the regulations because it is rarely, if ever, used. However, the surety bond method is still available under the ''other methods'' provision in the rule.

Clarification on continuation of guarantor's liability and requirement to provide coverage for 30 days after cancellation of guaranty: The rule explains that the guarantor continues to be liable and must provide coverage for 30 days following NPFC receipt of a notice of cancellation. This requirement is currently contained on the COFR form and reflects a current and important NPFC business practice.

Process for establishing and maintaining acceptability of COFR insurance guarantors: The rule moves the current process for establishing and maintaining acceptability of COFR insurance guarantors into the regulations to make it more transparent to the public. The Coast Guard's longstanding business practice under the existing COFR regulations for determining the acceptability of guarantors is the basis of the procedures set forth in the rule. The rule also provides a process through which a COFR operator may provide new evidence of financial responsibility and obtain approval or continuation of the COFR where the Coast Guard disapproves a guarantor (for example, due to guarantor fraud or financial failure). The provision applies to pending Applications and following the issuance of a COFR.

Discussion of Regulatory Benefit 4

These regulations concern management of two pollution funds—the Offshore Oil Pollution Compensation Fund and the FWPCA Section 311(k) Fund. These provisions are no longer authorized. On November 1, 2011, the Coast Guard published a notice of inquiry (76 FR 67385) soliciting public comment on removing 33 CFR part 135 and we received no adverse comments. This aspect of the rulemaking is necessary to remove unauthorized regulatory requirements and to eliminate potential confusion to the public.

B. Small Entities

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, we have considered whether this rule will have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

An Initial Regulatory Flexibility Analysis (IRFA) was developed in the NPRM (85 FR 28802). There were no public comments received on the IRFA.

The IRFA determined that there are two potential direct costs to small entities that result from this rule:

- Regulatory Cost 1: Require Tank Vessels Greater than 100 Gross Tons to 300 Gross Tons to Establish and Maintain Evidence of Financial Responsibility (Statutory Requirement).
- Regulatory Cost 2: Require Additional Information from COFR Operators and Guarantors (Discretionary Requirement).

The number of small entities affected by Regulatory Cost 1 of the rule and the respective impact on their annual revenue was determined in the IRFA and is summarized in Table 4 below.

TABLE 4—ECONOMIC IMPACT TO SMALL ENTITIES—REGULATORY COST 1

Percent of annual revenue	Number of small entities	Percent of small entities
1% to 2%	0	0
<1%	117	100

The number of small entities affected by Regulatory Cost 2 of the rule and the respective impact on their annual revenue was determined in the IRFA and is summarized in Table 5 below.

TABLE 5—ECONOMIC IMPACT TO SMALL ENTITIES—REGULATORY COST 2

Percent of annual revenue	Number of small entities	Percent of small entities
1% to 2%	0	0
<1%	652	100

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we offer to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

D. Collection of Information

This rule revises a previously approved collection of information (OMB Control Number 1625–0046) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

Title: Financial Responsibility for Water Pollution (Vessels).

OMB Control Number: 1625–0046.[19]

Summary of the Collection of Information: This rule adds additional collection of information requirements to existing OMB Control Number 1625–0046 for: COFR Operators to report gross tonnage and gross tonnage measurement systems used, and submit a copy of their tonnage certifying document, upon request; guarantors to report the reason for termination of a guaranty; and COFR Operators to report vessel name changes and increase reporting on location of vessel when there is a change in ownership on date of change.

Need for Information:

Reporting of gross tonnage measurement systems used and submission of copy of the tonnage certifying document, upon request.

Providing tonnage measurement systems used and submitting the tonnage certifying document, upon request, in the rule, with respect to gross tonnage allows the Coast Guard to determine more effectively the limit of liability and applicable amounts of financial responsibility for the incident. In some cases, the vessel may be assigned tonnage under more than one measurement system depending on a variety of factors including the vessel's flag, length, voyage type, keel laid, or substantial alteration date, and whether it is a self-propelled vessel. This has caused confusion with respect to which method to use to determine limit of liability and amount of financial responsibility.

Regardless of the tonnage reported on the Application, the tonnage certifying document governs the required evidence of financial responsibility and the limit of liability at the time of the incident (except when the responsible parties or guarantors knew or should have known that the tonnage certifying document or certificate of registry was incorrect). Using the tonnage certifying document provides the following benefits: It ensures that the Coast Guard has the most accurate tonnage measurements; it provides the method used to determine tonnage, as well as the tonnage amount; it provides information for foreign flagged vessels that is oftentimes difficult to obtain; and without the applicable tonnage certifying document, if an incident occurred, a re-measurement of tonnage could alter the already determined financial responsibility and limit of liability.

Reporting of reason for termination of guaranty by a guarantor.

The rule requires that the guarantor include the reason for termination, if known, with the notification for termination of the guaranty. This information provides the Coast Guard with information about the COFR Operator that otherwise is not known in the event there is an incident.

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

The additional collection of information in the rule ensures the information the Coast Guard relies on when initially issuing a COFR is up to date and remains current—especially concerning vessels that, over time, become derelict while in U.S. navigable waters or U.S. EEZ. The revisions also improve the Coast Guard's ability to establish compliance with COFR regulations by more effectively ensuring that the responsible party is able to pay its liability and mitigate risks to the OSLTF. For example, if a vessel is sold while using a place subject to U.S. jurisdiction, the new responsible parties become immediately subject to the COFR program. These changes ensure that, while the Coast Guard still has regulatory authority over a responsible party and the financial assurances of the guarantor, the Coast Guard receives information material to continued compliance before problems arise. Enforcing compliance with the COFR program's requirements, however, depends on the Coast Guard knowing about the vessel transfer. The regulatory revisions seek to ensure that the Coast Guard receives this information and to mitigate the risk of uninsured responsible parties and derelict vessels.

Use of Information:

Reporting of gross tonnage measurement systems used and submission of copy of the tonnage certifying document, upon request.

The Coast Guard uses the additional collection of information in the rule to ensure that the gross tonnage of a vessel involved in an incident is accurate to determine its limit of liability and applicable amount of financial responsibility.

Reporting of reason for termination of guaranty by a guarantor.

The Coast Guard uses the additional collection of information in the rule to learn more about a vessel and its COFR Operators in the event of an incident. This new requirement to provide the reason for guaranty termination will reduce the possibility that a guarantor will cancel the guaranty to simply shield themselves from potential liability in the event of an incident.

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

The Coast Guard uses the additional collection of information in the rule to identify a responsible party in the event there is an incident.

Description of the Respondents: The respondents are COFR Operators of vessels and OPA 90 COFR insurance guarantors.

Number of Respondents: The additional collection of information in this rule affects 761 COFR Operators and 14 OPA 90 COFR insurance guarantors.

Frequency of Response:

Reporting of gross tonnage measurement systems used and submission of copy of the tonnage certifying document.

All COFR Operators, including those for the tank vessels greater than 100 gross tons but less than or equal to 300 gross tons in this rule, must report the gross tonnage measurement systems used when applying for a COFR. The Coast Guard's COFR database indicates that there are 26,163 currently COFRed vessels. Adding the 465 COFRed tank vessels greater than 100 gross tons but less than or equal to 300 gross tons in Regulation Cost 1, and assuming the number of COFRed vessels remains constant during the analysis period the total number of COFRed vessels equals 26,628.

Master Certificate and Fleet Certificate holders will also be required to provide the gross tonnage measurement systems used for the largest vessel covered by the Application.

The Coast Guard estimated that COFR Operators will provide information on ⅓ of the vessels with COFRs each year due to the 3-year cycle of the Application process.

[19] *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201909-1625-002.*

Individual Certificates—The Coast Guard's COFR database indicates that, currently, there are 26,163 COFRed vessels. Adding the 465 COFRed tank vessels greater than 100 gross tons to 300 gross tons in Regulation Cost 1 equals 26,628 COFRed vessels.

26,628 COFRed vessels ÷ 3 = 8,876 COFRed vessels per year that will require the submission of the gross tonnage measurement systems used.

Masters Certificates—According to the COFR database, there are currently 8 Master Certificates.

8 Master Certificates ÷ 3 = 3 Master Certificates per year that will require the submission of the gross tonnage measurement systems used for the largest vessel covered by the Application.

Fleet Certificates—According to the COFR database, there are currently 12 Fleet Certificates.

12 Fleet Certificates ÷ 3 = 4 Fleet Certificates per year that will require the submission of the gross tonnage measurement systems used for the largest vessel covered by the Application.

COFR Operators will also provide a copy of the tonnage certifying document, upon request. We assume that the Coast Guard will request a copy of the tonnage certifying document when there is an incident. According to incident data from the Coast Guard's CIMS database, there are an average of 12 incidents per year involving vessels with COFRs and vessels that will be required to have COFRs under this rule over the five year period 2016–2020. We assume that for the analysis period, the number of incidents will remain constant with this average.

Reporting of reason for termination of guaranty by a guarantor.

Based on NPFC Vessel Certification Program data on the historical number of annual notices of guaranty termination by guarantors, the Coast Guard estimates that there will be 4,000 vessels per year for the 10-year analysis period.

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

Based on NPFC Vessel Certification Program historical data, the Coast Guard estimates that there will be 1,000 submissions on vessel name changes and change in location when there is a change in ownership per year.

Burden of Response:

Reporting of gross tonnage measurement systems used and submission of copy of the tonnage certifying document, upon request.

Reporting the gross tonnage measurement systems used with the application and/or requests for COFR renewal will result in a negligible burden (less than one minute of time) to the COFR Operator and will be completed with the Application for or request for renewal of the COFR.

Based on estimates received from COFR insurance guarantors who will submit, upon request, a copy of the tonnage certifying document on behalf of the COFR Operator, COFR Operators will require 15 minutes (0.25 hours) per submission.

Reporting of reason for termination of guaranty by a guarantor.

The Coast Guard estimated that it will take 5 minutes (0.08 hours) for the guarantor to add the reason why the guaranty was terminated to the information they provide to the Coast Guard already when he or she terminates a guaranty.

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

The Coast Guard estimated that it will take an additional 5 minutes (0.08 hours) per submission to provide additional information that is not already required under the current rule.

Estimate of Total Annual Burden:

Reporting of gross tonnage measurement systems used and submission of copy of the tonnage certifying document, upon request.

As stated above in the cost benefit analysis section of the preamble, we do not quantify the cost impact of reporting the gross tonnage measurement systems used because it is negligible and is provided as part of the Application and/or request for COFR renewal.

The cost burden associated with COFR Operators providing, upon request, their tonnage certifying document is calculated as follows:

Number submissions per year × Number of hours × labor cost per hour:

12 × 0.25 hours per submission = 3 hours

3 hours per year × $36.64 per hour = $110 per year

Reporting of reason for termination of guaranty by a guarantor.

Number of terminations per year × number of hours per submission × labor cost per hour:

4,000 submissions per year × 0.08 hours per submission × $36.64 per hour = $11,725 per year

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

Number of submissions per year × number of hours per submission × labor cost per hour:

1,000 submissions per year × 0.08 hours per submission × $36.64 per hour = $2,931 per year

Summary of Information Collection Burden

Table 6 shows the incremental collection burden of the proposed rule and the total proposed collection of information burden for OMB Control Number 1625–0046.

TABLE 6—INCREMENTAL COLLECTION OF INFORMATION BURDEN OF THE RULE AND THE TOTAL COLLECTION OF INFORMATION BURDEN FOR OMB CONTROL NUMBER 1625–0046

	Hours	Dollars (annual)
Incremental Collection of Information of the Rule		
Reporting of gross tonnage measurement systems used, and submission of copy of the tonnage certifying document	3	$110
Reporting of reason for termination of guaranty by a guarantor	320	11,725
Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change	80	2,931
Total	403	14,766

TABLE 6—INCREMENTAL COLLECTION OF INFORMATION BURDEN OF THE RULE AND THE TOTAL COLLECTION OF INFORMATION BURDEN FOR OMB CONTROL NUMBER 1625–0046—Continued

	Hours	Dollars (annual)
Total Proposed Collection of Information for OMB Control Number 1625–0046 (Approved Collection of Information + Incremental Collection of Information of the Rule		
Approved Collection of Information OMB Control Number-0046	3,400	88,500
Incremental Collection of Information of the Rule	403	14,766
Total	3,803	103,266

As required by 44 U.S.C. 3507(d), we will submit a copy of this rule to OMB for its review of the collection of information.

You are not required to respond to a collection of information unless it displays a currently valid OMB control number. OMB has not yet completed its review of this collection. Before the Coast Guard could enforce the collection of information requirements in this rule, OMB would need to approve the Coast Guard's request associated with this rule to collect this information. After OMB completes action on our information collection request, we will publish a **Federal Register** notice describing OMB's decision.

E. Federalism

A rule has implications for federalism under Executive Order 13132 (Federalism) if it has a substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under Executive Order 13132 and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132. Our analysis follows.

It is well settled that States may not regulate in categories reserved for regulation by the Coast Guard. It is also well settled that the categories covered in 46 U.S.C. 3306, 3703, 7101, and 8101 (design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels), as well as the reporting of casualties and any other category in which Congress intended the Coast Guard to be the sole source of a vessel's obligations, are within the field foreclosed from regulation by the States. *See* the Supreme Court's decision in *United States* v. *Locke* and *Intertanko* v. *Locke,* 529 U.S. 89, 120 S.Ct. 1135 (2000). Therefore, because the States may not regulate within these categories, this rule is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132. Our analysis follows.

This rulemaking is based on provisions in OPA 90 and CERCLA; 33 U.S.C. 2716 and 42 U.S.C. 9608, respectively. This rule amends Coast Guard regulations on vessel evidence of financial responsibility and removes certain unnecessary pollution fund regulations. The OPA 90 contains a savings clause that saves to the States the ability to regulate activities contained in Title I of OPA 90, including vessel evidence of financial responsibility requirements. *See* 33 U.S.C. 2718; *United States* v. *Locke* and *Intertanko* v. *Locke,* 529 U.S. 89, 105, 120 S.Ct. 1135, 1146 (2000). Thus, nothing in this rule preempts states from regulating vessel evidence of financial responsibility requirements for oil pollution. However, CERCLA contains an express preemption provision which prohibits States, except under limited circumstances, from requiring vessels to establish or maintain evidence of financial responsibility in connection with liability for the release of a hazardous substance if those vessels maintain evidence of the financial responsibility required under that subchapter (42 U.S.C. 9614(d)). Thus, except under limited circumstances, States cannot regulate requirements for vessel evidence of financial responsibility requirements for hazardous material pollution. The removal of 33 CFR part 135 and subpart D of part 153 removes certain federal pollution fund's regulatory requirements that were superseded by OPA 90 and subsumed by the OSLTF. As the rule clarifies but does not alter the existing, applicable federal law relating to pollution funds, it will not have preemptive impact. Therefore, this rule is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

F. Unfunded Mandates

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Although this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights).

H. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform) to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this rule under Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). This rule is not an economically significant rule and will not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and

responsibilities between the Federal Government and Indian tribes.

K. Energy Effects

We have analyzed this rule under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards will be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. This rule is categorically excluded under paragraph L53 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev 1. Paragraph L53 pertains to congressionally mandated regulations designed to improve or protect the environment. This rule involves expanding vessel financial responsibility to include tank vessels greater than 100 gross tons but less than or equal to 300 gross tons, clarifying and updating the rule's reporting requirements, conforming the rule to current practice, and removing two superseded regulations.

List of Subjects

33 CFR Part 135

Administrative practice and procedure, Continental shelf, Insurance, Oil pollution, Reporting and recordkeeping requirements.

33 CFR Part 138

Hazardous materials transportation, Insurance, Oil pollution, Reporting and recordkeeping requirements, Vessels, Water pollution control.

33 CFR Part 153

Hazardous substances, Oil pollution, Reporting and recordkeeping requirements, Water pollution control.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR chapter 1 as follows:

PART 135—[REMOVED]

■ 1. Under the authority of 14 U.S.C. 503, part 135 is removed.

PART 138—EVIDENCE OF FINANCIAL RESPONSIBILITY FOR WATER POLLUTION (VESSELS) AND OPA 90 LIMITS OF LIABILITY (VESSELS, DEEPWATER PORTS AND ONSHORE FACILITIES)

■ 2. The authority citation for part 138 is revised to read as follows:

Authority: 6 U.S.C. 552(d); 33 U.S.C. 2704, 2716, 2716a; 42 U.S.C. 9608, 9609; E.O. 12580, Sec. 7(b), 3 CFR, 1987 Comp., p. 193; E.O. 12777, Secs. 4 and 5, 3 CFR, 1991 Comp., p. 351, as amended by E.O. 13286, Sec. 89, 3 CFR, 2004 Comp., p. 166, and by E.O. 13638, Sec. 1, 3 CFR, 2014 Comp., p.227; Department of Homeland Security Delegation Nos. 00170.1, Revision 01.2 and 5110, Revision 01. Section 138.40 also issued under the authority of 46 U.S.C. 2103 and 14302.

■ 3. Revise the part heading to read as set forth above.

■ 4. Revise subpart A to read as follows:

Subpart A—Evidence of Financial Responsibility for Water Pollution (Vessels)

Sec.

138.10 Scope and purpose.
138.20 Applicability.
138.30 Definitions.
138.40 General requirements.
138.50 How to apply vessel gross tonnages.
138.60 Forms and submissions; ensuring submission timeliness.
138.70 Issuance and renewal of COFRs.
138.80 Applying for COFRs.
138.90 Renewing COFRs.
138.100 How to calculate a total applicable amount.
138.110 How to establish and maintain evidence of financial responsibility.
138.120 Fees.
138.130 Agents for Service of process.
138.140 Application withdrawals, COFR denials and revocations.
138.150 Reporting requirements.
138.160 Non-owning COFR Operator's responsibility for identification.
138.170 Enforcement.

Subpart A—Evidence of Financial Responsibility for Water Pollution (Vessels)

§ 138.10 Scope and purpose.

(a) *Scope.* This subpart sets forth—

(1) The requirements and procedures each COFR Operator (as defined in § 138.30(b)) must use to establish and maintain the evidence of financial responsibility required by the OPA 90 and CERCLA (both defined in § 138.30), and to obtain Certificates of Financial Responsibility (COFR);

(2) The standards and procedures the Coast Guard uses to determine the acceptability of guarantors;

(3) The procedures guarantors must use to submit evidence of financial responsibility on behalf of the responsible parties for vessels to which this subpart applies;

(4) The requirements for designating and maintaining U.S. agents for service of process;

(5) The requirements for reporting changes affecting compliance with this subpart; and

(6) The enforcement actions that may result from non-compliance with this subpart or OPA 90, CERCLA, or both, referenced in paragraph (a)(1) of this section.

(b) *Purpose.* These requirements ensure that the responsible parties for vessels to which this subpart applies, have sufficient available financial resources to cover their potential liabilities to the United States and other claimants in the following scenarios:

(1) Under OPA 90 in the event of a discharge, or substantial threat of a discharge, of oil; and

(2) In the case of vessels greater than 300 gross tons, under CERCLA in the event of a release, or threatened release, of a hazardous substance.

§ 138.20 Applicability.

(a) *Applicability generally.* This subpart applies—

(1) To the COFR Operator of—

(i) Any vessel over 300 gross tons (except a vessel listed in paragraph (d)(1) or (2) of this section) using the navigable waters of the United States, or any port or other place subject to the

jurisdiction of the United States, including any such vessel using a deepwater port or other offshore facility subject to the jurisdiction of the United States;

(ii) Any vessel of any size (except a vessel listed in paragraph (d)(1) or (3) of this section) using the waters of the Exclusive Economic Zone to transship or lighter oil (whether delivering or receiving) destined for a place subject to the jurisdiction of the United States; and

(iii) Any tank vessel over 100 gross tons (except a vessel listed in paragraph (d)(1) or (3) of this section) using the navigable waters of the United States, or any port or other place subject to the jurisdiction of the United States, including any such tank vessel using a deepwater port or other offshore facility subject to the jurisdiction of the United States;

(2) To a guarantor providing evidence of financial responsibility under this subpart on behalf of one or more of a vessel's responsible parties;

(3) To responsible parties other than the COFR Operator designated to represent the responsible parties for purposes of this subpart; and

(4) To any person serving as a U.S. agent for service of process under this subpart.

(b) *How to apply this part to mobile offshore drilling units.* For the purposes of applying the evidence of financial responsibility required under OPA 90 and this subpart and the limits of liability set forth in subpart B of this part, and in addition to any OPA 90 offshore facility evidence of financial responsibility requirements that may apply under 30 CFR part 553, a mobile offshore drilling unit is treated as—

(1) A tank vessel when it is being used as an offshore facility; and

(2) A vessel other than a tank vessel when it is not being used as an offshore facility.

(c) *How to apply CERCLA evidence of financial responsibility to self-propelled vessels.* For the purposes of applying the evidence of financial responsibility required under CERCLA and for vessels identified in paragraph (a)(1)(i) of this section, this subpart applies to a self-propelled vessel over 300 gross tons even if it does not carry hazardous substances.

(d) *Exceptions.* (1) This subpart does not apply to public vessels.

(2) Paragraph (a)(1)(i) of this section does not apply to any non-self-propelled barge that does not carry oil as cargo or fuel and does not carry hazardous substances as cargo.

(3) Paragraphs (a)(1)(ii) and (iii) of this section do not apply to: any offshore supply vessel; any fishing vessel or fish tender vessel of 750 gross tons or less that transfers fuel without charge to a fishing vessel owned by the same person; any towing or pushing vessel (tug) simply because it has in its custody a tank barge; or any tank vessel that only carries, or is adapted to carry, non-liquid hazardous material in bulk as cargo or cargo residue.

§ 138.30 Definitions.

(a) As used in this subpart, the following terms have the meanings set forth in—

(1) OPA 90 (specifically in 33 U.S.C. 2701): *Claim, claimant, damages, deepwater port, discharge, Exclusive Economic Zone, facility, incident, liable* or *liability, mobile offshore drilling unit, navigable waters, offshore facility, oil, owner or operator, person, remove, removal, removal costs, responsible party, tank vessel, United States,* and *vessel;* and

(2) CERCLA (42 U.S.C. 9601): *Claim, claimant, damages, facility, hazardous substance, liable* or *liability, navigable waters, offshore facility, owner or operator, person, remove, removal, United States,* and *vessel.*

(3) 46 CFR 69.9: *Convention Measurement System, foreign-flag vessel, gross tonnage ITC (GT ITC)*[1] and *gross register tonnage (GRT), tonnage,* and *U.S.-flag vessel.*

(b) As used in this subpart—

Applicable amount means an OPA 90 or CERCLA evidence of financial responsibility amount determined to apply to a vessel as provided under § 138.100.

Application means an ''Application for Vessel Certificate of Financial Responsibility (Water Pollution)'', which the COFR Operator for one or more vessels has completed and verified in eCOFR, as provided in § 138.60(c)(1)(i), or signed, dated, and submitted to the NPFC by one of the submission methods specified in § 138.60(c)(1)(ii) through (iv).

Cargo means goods or materials carried on board a vessel for purposes of transportation, whether proprietary or nonproprietary. A hazardous substance or oil carried solely for use aboard the carrying vessel is not cargo.

CERCLA means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601, *et seq.*).

COFR means a current Certificate of Financial Responsibility (Water Pollution) issued by the Director, under this subpart, as provided in § 138.70, and posted on the NPFC COFR program website *https://npfc.uscg.mil/cofr/default.aspx.*

COFR Operator means a responsible party who conducts, or has responsibility for, the operation of a vessel to which this subpart applies—that is, a person who is an operator as defined in OPA 90 and CERCLA, and, when there is more than one responsible party (including more than one operator), is the operator designated and authorized by all the vessel's responsible parties to act on their behalf for the purpose of complying with this subpart, including submitting (or causing to be submitted) all Applications and requests for COFR renewal, evidence of financial responsibility and reports, and payment of all fees required by § 138.120.

(i) If a vessel has one owner and is operated by that owner, or the owner controls and is responsible for the vessel's operation, the owner is the COFR Operator. In all other cases the person who operates, or controls and is principally responsible for the operation of, the vessel (for example, the demise charterer) is the COFR Operator.

(ii) A person who is responsible, or who agrees by contract to become responsible, for a vessel in the capacity of a builder, repairer, or scrapper, or for the purpose of holding the vessel out for sale or lease, is the COFR Operator. A person who takes possession of, or responsibility for, a newly built, modified, or repaired vessel from a builder or repairer, or who purchases and operates or becomes a demise charterer of a vessel held out for sale or lease, is the COFR Operator.

(iii) A time or voyage charterer who does not assume responsibility for the operation of a vessel is not a COFR Operator for purposes of this subpart.

(iv) The designation of an operator to act as the COFR Operator on behalf of a vessel's responsible parties for purposes of this subpart does not limit who may be determined to be an operator under OPA 90, CERCLA, or both, in the event of an incident or a release.

Day or *days* means calendar days unless otherwise specified.

Director means the person in charge of the U.S. Coast Guard, National Pollution Funds Center (NPFC), or that person's authorized representative.

eCOFR means the electronic Certificate of Financial Responsibility web-based process located on the NPFC COFR program website, *https://npfc.uscg.mil/cofr/default.aspx,* and is

[1] The acronym ''ITC'' refers to the International Tonnage Convention. GT ITC, as defined in 46 CFR 69.9 means the gross tonnage measurement of a vessel as applied under the Convention Measurement System.

the process COFR Operators may use to apply for and renew COFRs.

Evidence of financial responsibility means the demonstration of the financial ability of the responsible parties for a vessel to which this subpart applies to meet their potential liabilities under OPA 90, CERCLA, or both, up to the total applicable amount determined as provided under § 138.100.

Financial guarantor is a type of guarantor and means a business entity or other person providing a financial guaranty under § 138.110(c). A financial guarantor is distinct from a COFR insurance guarantor, a self-insurer, or a surety. A self-insurer, however, may also serve as a financial guarantor for others.

Fish tender vessel and *fishing vessel* have the same meanings as set forth in 46 U.S.C. 2101.

Fleet Certificate means a COFR issued by the Director under this subpart to the COFR Operator of a fleet of 2 or more unmanned, non-self-propelled barges that are not tank vessels and that, from time to time, may be subject to this subpart (for example, a hopper barge over 300 gross tons when carrying oily metal shavings or similar cargo). A Fleet Certificate covers, automatically, all unmanned, non-self-propelled, non-tank barges for which the COFR Operator may from time to time be responsible that does not exceed the maximum gross tonnage indicated on the Fleet Certificate.

Fuel means any oil or hazardous substance used, or capable of being used, to produce heat or power by burning, including power to operate equipment. A hand-carried pump with no more than 5 gallons of fuel capacity, that is neither integral to nor regularly stored aboard a non-self-propelled barge, is not equipment.

Guarantor means any person who has been determined to be acceptable by the Director, as provided in § 138.110, and who is providing evidence of financial responsibility on behalf of one or more of a vessel's responsible parties, other than as a responsible party providing self-insurance under § 138.110(d).

Hazardous material has the same meaning as set forth in 46 U.S.C. 2101.

Individual Certificate means a COFR issued by the Director under this subpart to the COFR Operator for a single vessel.

Insurance guarantor is a type of guarantor and means an insurance company, association of underwriters, ship owners' protection and indemnity association, or other person, serving as a guarantor under § 138.110(b). An *insurance guarantor* is distinct from a self-insurer, a financial guarantor, or a surety.

Master Certificate means a COFR issued by the Director under this subpart to the COFR Operator of one or more vessels that are under the custody of such person solely in the capacity of a builder, repairer, or scrapper, or for the purpose of holding vessels out for sale or lease, where such person does not physically operate the vessels. A Master Certificate covers, automatically, all of the vessels subject to this subpart held by the COFR Operator solely for purposes of construction, repair, scrapping, sale or lease. A vessel which is being operated commercially in any business venture, including the business of building, repairing, scrapping, leasing, or selling (for example, a slop barge used by a shipyard) cannot be covered by a Master Certificate and must have either a current Individual Certificate or, if applicable, a current Fleet Certificate.

Net worth means the amount of all assets located in the United States, less all liabilities anywhere in the world.

NPFC means the U.S. Coast Guard, National Pollution Funds Center. NPFC is the U.S. Government office responsible for administering the OPA 90 and CERCLA vessel COFR program.

Offshore supply vessel has the same meaning as set forth in 46 U.S.C. 2101.

OPA 90 means the Oil Pollution Act of 1990, as amended (33 U.S.C. 2701, *et seq.*).

Public vessel means a vessel owned or demise chartered and operated by the United States, by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce.

Release, for purposes of this subpart, means a release as defined in CERCLA (specifically, 42 U.S.C. 9601), or a threatened release, of a hazardous substance.

Responsible party, for purposes of OPA 90 evidence of financial responsibility, has the same meaning as defined at 33 U.S.C. 2701; and, for purposes of CERCLA evidence of financial responsibility, means any person who is an ''owner or operator,'' as defined at 42 U.S.C. 9601, including any person chartering a vessel by demise.

Self-insurer means a COFR Operator providing evidence of financial responsibility as the responsible party of the subject vessel, as provided under § 138.110(d). A self-insurer is distinct from a guarantor.

Total applicable amount means an evidence of financial responsibility amount that must be demonstrated under this subpart, determined as provided in § 138.100.

Working capital means the amount of current assets located in the United States, less all current liabilities anywhere in the world.

§ 138.40 General requirements.

(a) *Requirement to establish and maintain evidence of financial responsibility.* The COFR Operator of a vessel must establish and maintain (or cause to be established and maintained) evidence of financial responsibility acceptable to the Director using any one of the methods specified in § 138.110, in an amount equal to or greater than the total applicable amount determined under § 138.100 and, in the case of a financial guarantor, as further provided under § 138.110(c)(2) (aggregation of total applicable amounts). The evidence of financial responsibility required by this paragraph must be—

(1) Established as of the date they become a responsible party; and

(2) Continuously maintained for so long as they remain a responsible party.

(b) *Requirement to have a COFR and report changes.* The COFR Operator must apply for and ensure the vessel is covered at all times by a current COFR, by complying with the requirements and procedures set forth in this subpart, including the reporting requirements in § 138.150.

§ 138.50 How to apply vessel gross tonnages.

(a) *Purpose.* This section sets forth the methods for applying vessel gross tonnage to—

(1) Determine whether a vessel exceeds the 100 or 300 gross ton threshold under § 138.20 and OPA 90, CERCLA, or both;

(2) Calculate the OPA 90 and CERCLA applicable amounts of financial responsibility required, as provided in § 138.100; and

(3) Determine the OPA 90 limit of liability under subpart B of this part in the event of an oil pollution incident, and the CERCLA limit of liability under 42 U.S.C. 9607 in the event of a hazardous substance release.

(b) *Both GT ITC and GRT assigned.* For a vessel assigned both gross tonnage ITC (GT ITC) and gross register tonnage (GRT) under 46 CFR part 69, apply the tonnage thresholds in § 138.20 using the assigned GRT tonnage, and determine the applicable amounts of financial responsibility and the limits of liability using the assigned GT ITC tonnage.

(c) *GT ITC or GRT assigned.* For a vessel assigned only a GT ITC or a GRT tonnage under 46 CFR part 69, apply the tonnage thresholds in § 138.20, and

determine the applicable amounts of evidence of financial responsibility and the limits of liability using the assigned GT ITC or GRT tonnage.

(d) *High or low GRT assigned.* For a vessel assigned a high and low GRT tonnage under 46 CFR part 69, subpart D (Dual Regulatory Measurement System), apply the tonnage thresholds in § 138.20, and determine the applicable amounts of financial responsibility and the limits of liability, using the high GRT tonnage.

(e) *Summary.* The use of assigned gross tonnages, as required by paragraphs (b) through (d) of this section, is summarized in the following table.

TABLE 1 TO § 138.50(e)—USE OF ASSIGNED GROSS TONNAGES

Category	Assigned tonnage	
	To apply the tonnage thresholds in § 138.20	To determine applicable amounts under § 138.100 and limits of liability
Vessels Assigned Both GT ITC and GRT	GRT	GT ITC.
Vessels Assigned—		
GT ITC only	GT ITC	GT ITC.
GRT only	GRT	GRT.

(f) *Certified gross tonnage governs.* In the event of an incident or release, the responsible parties and guarantors are governed by the vessel's assigned gross tonnage on the date of the incident. This is as determined under paragraphs (b) through (e) of this section and evidenced on the appropriate tonnage certifying document as provided for under the U.S. tonnage regulations or international conventions (for example, tonnage certificate or completed Simplified measurement application, International Tonnage Certificate (1969)), regardless of what gross tonnage is specified in the Application or guaranty form submitted under this subpart, except when the responsible parties or guarantors knew or should have known that the tonnage certificate information was incorrect (see also § 138.110(h)(1)(iii)).

(g) *Requirement to present tonnage certifying document(s).* Each COFR Operator must submit to the Director, or other authorized United States Government official, upon request, for examination and copying, the original or an unaltered and legible electronic copy of the vessel's applicable tonnage certifying document(s).

§ 138.60 Forms and submissions; ensuring submission timeliness.

(a) *Where to obtain forms.* All forms referred to in this subpart are available at the NPFC COFR program website, *https://npfc.uscg.mil/cofr/default.aspx,* and may be completed online or downloaded.

(b) *Where to obtain information.* Direct all questions concerning the requirements of this subpart to the NPFC at one of the addresses in paragraphs (c)(1)(ii) through (iv) of this section or by calling the NPFC at 202–795–6130.

(c) *How to present Applications and other required submissions.* (1) Provide all submissions required by this subpart to the Director, by one of the following four methods:

(i) Electronically, using the eCOFR process (located at *https://npfc.uscg.mil/cofr/default.aspx*);

(ii) By email, sent to such email address as the Director may specify, attaching legible electronic images scanned in a format acceptable to the Director;

(iii) By fax, sent to 202–795–6123 with a cover sheet specifying the total number of pages, the sender's telephone number, and referencing NPFC telephone number 202–795–6130; or

(iv) By mail, addressed to—

Director, National Pollution Funds Center, ATTN: VESSEL CERTIFICATION, U.S. Coast Guard Stop 7605, 2703 Martin Luther King Jr. Ave. SE, Washington, DC 20593–7605.

(2) Submissions may not be hand delivered to the NPFC.

(3) Do not present submissions by more than one method.

(d) *Required contents of submissions.* Unless otherwise instructed by the Director, all submissions required by this subpart must—

(1) Set forth, in full, the correct legal name of the COFR Operator to whom the COFR is to be, or has been, issued;

(2) Be in English, and

(3) Express all monetary terms in United States dollars.

(e) *Ensuring the timeliness of submissions; requesting deadline exceptions.* (1) Compliance with a submission deadline will be determined based on the day the submission is received by NPFC. If a deadline specified in this subpart falls on a weekend or Federal holiday, the deadline will occur on the next business day.

(2) Ensuring the timeliness of the submissions is the sole responsibility of the person making the submission.

(3) The Director may, in the Director's sole discretion, grant an exception to a deadline specified in this subpart for good cause shown.

(f) *Public access to information.* Financial data and other information submitted to the Director is considered public information to the extent required by the Freedom of Information Act (5 U.S.C. 552) and permitted by the Privacy Act (5 U.S.C. 552(a)).

§ 138.70 Issuance and renewal of COFRs.

(a) *Types of COFRs.* The Director issues the following three types of COFRs as provided further in § 138.80: Individual Certificates, Fleet Certificates and Master Certificates.

(b) *Requirements before issuance and renewal of COFRs.* The Director will issue or renew a COFR only after NPFC receives a completed Application or request for COFR renewal, and satisfactory evidence of financial responsibility.

(c) *COFRs are issued only to designated COFR Operators.* Each COFR of any type is issued only in the name of the COFR Operator designated in the Application or request for COFR renewal.

(d) *Form of issuance.* All COFRs are issued by the Director in electronic form on NPFC's COFR program website (*https://npfc.uscg.mil/cofr/default.aspx*) for a term of no more than 3 years from the date of issuance.

(e) *Information included in COFRs.* The following information is available on NPFC's COFR program website for each COFR issued by the Director:

(1) The name of the COFR Operator;

(2) The date of COFR expiration;

(3) The COFR number;

(4) For an Individual Certificate, the name of the covered vessel, and the

vessel's gross tonnage information, including the measurement system(s) used;

(5) For a Fleet Certificate, the gross tons of the largest unmanned, non-self-propelled, non-tank barge within the fleet, including the measurement systems(s) used; and

(6) For a Master Certificate, the gross tons of the largest tank vessel and largest vessel other than a tank vessel eligible for coverage by the Master Certificate, including the measurement systems(s) used.

§ 138.80 Applying for COFRs.

(a) *How to apply for a COFR.* To apply for a COFR of any type, the COFR Operator must—

(1) Submit, or cause to be submitted, to the Director, by one of the submission methods provided in § 138.60(c):

(i) An Application;

(A) For an Individual Certificate, list the name of the covered vessel, and the vessel's gross tonnage information, including the measurement system(s) used on the application;

(B) For a Fleet Certificate, instead of listing each individual barge, mark the box with the following statement: ''This is an Application for a Fleet Certificate. The largest unmanned, non-self-propelled, non-tank barge to be covered by this Application is [INSERT APPLICABLE GROSS TONS] GT ITC and [INSERT GROSS TONNAGE] GRT''; and

(C) For a Master Certificate, instead of listing each individual vessel, mark the box with the following statement: ''This is an Application for a Master Certificate. The largest tank vessel to be covered by this Application is [INSERT APPLICABLE GROSS TONS] GT ITC and [INSERT APPLICABLE GROSS TONS] GRT, as applicable. The largest vessel other than a tank vessel to be covered by this Application is [INSERT APPLICABLE GROSS TONS] GT ITC and [INSERT APPLICABLE GROSS TONS] GRT, as applicable.''

(ii) The evidence of financial responsibility using one of the guaranty methods provided in § 138.110;

(A) For a Fleet Certificate, the evidence of financial responsibility must be in the total applicable amount, determined as provided in § 138.100, for the largest unmanned, non-self-propelled, non-tank barge to be covered.

(B) For a Master Certificate, the evidence of financial responsibility must be in the total applicable amount determined as provided in § 138.100 for the largest tank vessel and largest non-tank vessel to be covered by the Master Certificate.

(iii) The agent for service of process designations required by § 138.130; and

(iv) All other supporting documentation required by this subpart.

(A) At the time of Application for a Master Certificate, the COFR Operator must submit a report to the Director, indicating: the name; previous name, if applicable; type; gross tonnage and measurement system(s) used, for each vessel covered by the Master Certificate, indicating which vessels, if any, are tank vessels. If a vessel has both a GT ITC and GRT tonnage, specify both gross tonnages.

(B) Six months after receiving a Master Certificate, and every 6 months thereafter, each COFR Operator must submit to the Director, an updated report, separately listing the vessels no longer covered by that Master Certificate. If a vessel has both a GT ITC and GRT, both gross tonnages must be specified. If a vessel has been transferred to another responsible party and the COFR Operator to whom the Master Certificate was issued ceases to be the vessel's operator, the COFR Operator must report the date and place of the transfer, and the name and contact information of the responsible party to whom the vessel was transferred. If the vessels covered by the Master Certificate have not changed from the previous report, the COFR Operator may submit an updated report that indicates no change from previous report.

(2) Pay, or cause to be paid, all fees required by § 138.120.

(b) *Application deadline.* The Director must receive the Application, evidence of financial responsibility, and other required supporting documentation, at least 21 days prior to the date the Certificate is required. The COFR Operator may seek an exception to the 21-day submission deadline only as provided in § 138.60(e)(3).

(c) *Where to obtain Application forms.* COFR Operators may create an Application using the online eCOFR web process (located at *https://npfc.uscg.mil/cofr/default.aspx*) or, if not using eCOFR, may obtain an ''Application for Vessel Certificate of Financial Responsibility (Water Pollution)'' at the same website.

(d) *Requirement to verify, or sign and date, the Application.* (1) The COFR Operator must complete and either verify the Application in eCOFR as provided in § 138.60(c)(1)(i) or, if not using eCOFR, sign and date the hard-copy signature page of the Application and submit the signed Application to the Director, by one of the methods specified in § 138.60(c)(1)(ii) through (iv).

(2) The Application must include the title of the person signing it.

(3) If the person signing the Application is acting under a Power of Attorney, they must include a copy of the Power of Attorney with the Application.

(e) *Requirement to update Applications.* The COFR Operator must report any changes to the Application to the Director in writing, no later than 5 business days after discovery of the change. The Director may require that the COFR Operator submit a revised Application and provide additional evidence of financial responsibility, and pay any additional fees required by § 138.120.

(f) *Amending Fleet and Master Certificates.* Before operating a barge or vessel that exceeds the maximum gross tonnage indicated on the COFR, the COFR Operator must:

(1) Submit a new or amended Application, or a written request to supplement the Application, to reflect the new maximum gross tonnages on the COFR;

(2) Unless the COFR Operator qualifies as a self-insurer at the higher total applicable amount, submit, or cause to be submitted, evidence of financial responsibility using one of the guaranty methods provided in § 138.110 to the Director, demonstrating increased coverage based on the new maximum gross tonnage; and

(3) Pay a new certification fee, as required by § 138.120.

§ 138.90 Renewing COFRs.

(a) The COFR Operator must submit a request for COFR renewal to the NPFC at least 21 days, but no earlier than 90 days, before the expiration date of the current COFR.

(b) The COFR Operator may seek an exception to the 21-day request for COFR renewal submission deadline in paragraph (a) of this section only as provided in § 138.60(e)(3).

(c) The COFR Operator must identify in the request for COFR renewal all changes to the information contained in the initial Application, including the gross ton measurement system(s) used (if not previously provided), the evidence of financial responsibility, and all other supporting documentation previously submitted to the Director, as provided in § 138.150.

§ 138.100 How to calculate a total applicable amount.

The total applicable amount is the sum of the OPA 90 applicable amount determined under paragraph (a) of this section plus the CERCLA applicable amount determined under paragraph (b) of this section.

(a) *OPA 90 applicable amount.* The applicable amount under OPA 90 is equal to the applicable limit of liability determined as provided in subpart B of this part.

(b) *CERCLA applicable amount.* The applicable amount under CERCLA is determined as follows:

(1) For a vessel over 300 gross tons carrying a hazardous substance as cargo, and for any vessel covered under § 138.110(c)(3) or (d)(2)(ii) (calculation of CERCLA applicable amounts for financial guarantors and self-insurers), the greater of $5,000,000 or $300 per gross ton.

(2) For any other vessel over 300 gross tons, the greater of $500,000 or $300 per gross ton.

(c) *Amended applicable amounts.* If an applicable amount determined under paragraph (a) or (b) of this section is amended by statute or regulation, the COFR Operator must establish and maintain evidence of financial responsibility in an amount equal to or greater than the amended total applicable amount, as provided in § 138.240(a).

(d) *OPA 90 and CERCLA applicable amounts and limits of liability.* The responsible parties are strictly, jointly and severally liable, for the costs and damages resulting from an incident or a release, but together they need only establish and maintain an amount of financial responsibility equal to the single limit of liability per incident or release. Only that portion of the evidence of financial responsibility under this subpart with respect to—

(1) OPA 90 is required to be made available by a guarantor for the costs and damages related to an incident where there is not also a release; and

(2) CERCLA is required to be made available by a guarantor for the costs and damages related to a release where there is not also an incident. A guarantor (or a self-insurer for whom the exceptions to a limitations of liability are not applicable), therefore, is not required to apply the entire amount of financial responsibility to an incident involving oil alone or a release involving a hazardous substance alone.

§ 138.110 How to establish and maintain evidence of financial responsibility.

(a) *General requirement; guaranty effective date and termination date.* The COFR Operator of each vessel must submit, or cause to be submitted, to the Director, the evidence of financial responsibility required by § 138.40(a) using one of the methods specified in this section.

(1) If submitted on behalf of the COFR Operator, the guarantor must provide evidence of financial responsibility to the Director.

(2) The effective and termination dates are as follows:

TABLE 1 TO § 138.110(a)(2)—EFFECTIVE AND TERMINATION DATES

Type of certificate	Effective date	Termination date
Individual	Guaranty form submission date	30 days after the date the Director and the COFR Operator receive written notice from the guarantor that the guarantor intends to cancel the guaranty for that vessel.
Fleet	Guaranty form submission date or date COFR Operator becomes a Responsible Party for the vessel.	
Master	Guaranty form submission date or date COFR Operator becomes a Responsible Party for the vessel.	

(3) Termination provisions:

(i) The guarantor must specify the reason for terminating the guaranty in the notice required by this paragraph, if known.

(ii) Termination of the guaranty as to any covered vessel will not affect the liability of the guarantor in connection with an incident or release commencing or occurring prior to the effective date of the guaranty termination.

(4) If, at any time, the information contained in the evidence of financial responsibility submitted under this section changes, or there is a material change in a guarantor or self-insurer's financial position, the guarantor or COFR Operator or self-insurer (as applicable), must report the change to the Director, as provided in § 138.150.

(b) *Insurance guaranty method.* The COFR Operator may establish and maintain evidence of financial responsibility using the insurance guaranty method by submitting an Insurance Guaranty Form to the Director.

(1) Each form must be executed by no more than four COFR insurance guarantors accepted by the Director. A lead underwriter is considered one of the COFR insurance guarantors.

(2) The process for establishing and maintaining the acceptability of a COFR insurance guarantor is as follows:

(i) The COFR insurance guarantor must request an initial determination by the Director of the COFR insurance guarantor's acceptability to serve as a COFR insurance guarantor under this subpart, at least 90 days before the date a COFR is required, by submitting information describing the COFR insurance guarantor's structure, business practices, history, and financial strength, and such other information as may be requested by the Director.

(ii) The Director reviews the continued acceptability of COFR insurance guarantors annually. Each COFR insurance guarantor must submit updates to the initial request submitted under paragraph (b)(2)(i) of this section, annually, within 90 days after the close of the COFR insurance guarantor's fiscal year, describing any material changes to the COFR insurance guarantor's legal status, structure, business practices, history, and financial strength, since the previous year's submission, and providing such other information as may be requested by the Director.

(c) *Financial guaranty method.* The COFR Operator may establish and maintain evidence of financial responsibility using the financial guaranty method by submitting a Financial Guaranty Form to the Director.

(1) Each form must be executed by no more than four financial guarantors accepted by the Director, at least one of which must be a parent or affiliate of the COFR Operator. (*See* paragraph (g) of this section for additional requirements if more than one financial guarantor signs the form.)

(2) The process for establishing and maintaining the acceptability of a financial guarantor is as follows:

(i) The financial guarantor must comply with the self-insurance provisions in paragraph (d) of this section, and the periodic reporting requirements in paragraphs (e)(1) through (4) of this section.

(ii) The financial guarantor must also demonstrate that it maintains net worth and working capital, each in amounts equal to or greater than—

(A) The aggregate total applicable amounts, calculated for each COFR Operator vessel for which the financial guaranty is being provided, based on

each such COFR Operator's vessel with the greatest total applicable amount, plus—

(B) The total applicable amount required to be demonstrated by a self-insurer under this subpart if the financial guarantor is also acting as a self-insurer.

(3) In the case of a vessel greater than 300 gross tons, calculate the CERCLA applicable amount under § 138.100(b)(1) based on a vessel carrying hazardous substances as cargo.

(d) *Self-insurance method.* The COFR Operator may establish and maintain evidence of financial responsibility using the self-insurance method as follows:

(1) Submit to the Director the financial statements specified in paragraphs (e)(1) through (4) of this section for the fiscal year preceding the date the COFR Operator signs the Application or request for COFR renewal.

(2) Demonstrate that the COFR Operator maintains, in the United States, working capital and net worth, each in amounts equal to or greater than the total applicable amount, calculated as follows:

(i) If the self-insurer has multiple vessels, calculate the total applicable amount based on the vessel with the greatest total applicable amount.

(ii) In the case of a vessel greater than 300 gross tons, calculate the CERCLA applicable amount under § 138.100(b)(1) based on a vessel carrying hazardous substances as cargo.

(e) *Reporting requirements for self-insurers and financial guarantors.* (1) Each self-insurer and financial guarantor must submit the following reports to the Director with the Application and annually thereafter, within the deadlines specified in paragraph (e)(4) of this section:

(i) Submit the self-insurer or financial guarantor's annual, current, and audited non-consolidated financial statements prepared in accordance with Generally Accepted Accounting Principles, and audited by an independent Certified Public Accountant in accordance with Generally Accepted Auditing Standards.

(ii) Accompany the financial statements with a declaration from the self-insurer or financial guarantor's chief financial officer, treasurer, or equivalent official, certifying the amount of the self-insurer or financial guarantor's current assets, and the amount of the self-insurer or financial guarantor's total assets included in the accompanying balance sheet, which are located in the United States.

(iii) If the financial statements cannot be submitted in non-consolidated form, submit a consolidated statement accompanied by an additional declaration prepared by the same Certified Public Accountant—

(A) Verifying the amount by which the total assets located in the United States exceed the self-insurer or financial guarantor's total (worldwide) liabilities, and the self-insurer or financial guarantor's current assets located in the United States exceed the self-insurer or financial guarantor's total (worldwide) current liabilities;

(B) Specifically naming the self-insurer or financial guarantor;

(C) Confirming that the amounts so verified relate only to the self-insurer or financial guarantor, apart from any parent or other affiliated entity; and

(D) Identifying the consolidated financial statement to which it applies.

(2) When the self-insurer or financial guarantor's demonstrated net worth is not at least ten times the cumulative total applicable amounts, their chief financial officer, treasurer, or equivalent official must submit to the Director with the Application and semi-annually thereafter, within the deadline specified in paragraph (e)(4) of this section, an affidavit stating that neither their working capital nor net worth fell during the first 6 months of the self-insurer or financial guarantor's current fiscal year, below the cumulative total applicable amounts.

(3) All self-insurers and financial guarantors must—

(i) Submit, upon the Director's request, additional financial information within the time specified; and

(ii) Notify the Director in writing within 5 days following the date the self-insurer or financial guarantor knows, or has reason to know, that its working capital or net worth has fallen below the total applicable amounts.

(4) All required annual financial statements and declarations must be submitted to the Director within 90 days after the close of the self-insurer or financial guarantor's fiscal year. All required semi-annual financial statements and declarations must be submitted to the Director within 30 days after the close of the applicable 6-month period. The Director will grant an extension of the time limits for submissions under this paragraph only as provided in § 138.60(e).

(5) A failure by a self-insurer or financial guarantor to timely submit to the Director any statement, data, notification, or other submission required may result in the Director denying or revoking the COFR, and may prompt enforcement action as provided under § 138.170.

(6) The Director may waive the working capital requirement for any self-insurer or financial guarantor that—

(i) Is a regulated public utility, a municipal or higher-level governmental entity, or an entity operating solely as a charitable, non-profit organization qualifying under the Internal Revenue Code (26 U.S.C. 501(c)), provided that the self-insurer or financial guarantor demonstrates in writing that the waiver would benefit a local public interest; or

(ii) Demonstrates in writing that working capital is not a significant factor in the self-insurer or financial guarantor's financial condition, in which case the self-insurer or financial guarantor's net worth in relation to the required cumulative total applicable amounts, and a history of stable operations, are the major elements considered by the Director.

(f) *Other guaranty methods for establishing evidence of financial responsibility.* (1) The COFR Operator may request that the Director accept a guaranty method for establishing evidence of financial responsibility that is different from one of the methods described in paragraphs (b) through (e) of this section as follows:

(i) The COFR Operator must submit the request to the Director in writing, at least 90 days prior to the date the COFR is required.

(ii) The request must describe in detail: The method proposed; the reasons why the COFR Operator does not wish to (or is unable to) use one of the methods described in paragraphs (b) through (e) of this section; and how the proposed guaranty method assures that the vessel's responsible parties have the financial ability to meet their potential liabilities under OPA 90 and CERCLA in the event of an incident or a release.

(iii) Each COFR Operator making a request under this paragraph must provide the Director a proposed guaranty form that includes all the elements described in paragraphs (g) and (h) of this section.

(2) The Director will not accept a self-insurance method other than the one described in paragraph (d) of this section. The Director also will not accept a guaranty method under this paragraph that merely deletes or alters a requirement or provision of one of the guaranty methods described in paragraphs (b) through (e) of this section (for example, one that alters the termination clause of the Insurance Guaranty).

(3) A Director's decision to accept an alternative guaranty method of establishing evidence of financial responsibility under this paragraph is final agency action.

(g) *Additional rules regarding multiple guarantors.* If more than one guarantor executes the relevant guaranty form, the following rules apply:

(1) If a guarantor's percentage of vertical participation is specified on the relevant guaranty form, the guarantor is subject to direct action and is liable for the payment of costs and damages under OPA 90 or CERCLA, as applicable, only in accordance with the percentage of vertical participation so specified for that guarantor.

(2) Participation in the form of layering (tiers, one in excess of another) is not permitted. Only vertical participation on a percentage basis and participation with no specified percentage allocation is acceptable.

(3) If no percentage of vertical participation is specified for a guarantor on the relevant guaranty form, the guarantor's liability is joint and several for the total of the unspecified portion.

(4) The participating guarantors must designate a lead guarantor having authority to bind all of the participating guarantors for actions required of guarantors under OPA 90 or CERCLA and this subpart, including but not limited to reporting changes in the evidence of financial responsibility as provided in § 138.150(d), receipt of source designations, advertisement of source designations and the responsible party's claims procedures, and receipt and settlement of claims.

(h) *Direct action.* (1) Each guarantor providing evidence of financial responsibility must submit to the Director a written acknowledgment by the guarantor that a claimant (including a claimant by right of subrogation) may assert any claim for costs or damages arising under OPA 90, CERCLA, or both, directly against the guarantor, regardless of whether the claim is asserted in an action in court or other proceeding. The guarantor must also acknowledge that, in the event a claim is asserted directly against the guarantor under OPA 90, CERCLA, or both, the guarantor may invoke only the following rights and defenses—

(i) The incident, release, or both, were caused by the willful misconduct of a responsible party for whom the guaranty was provided;

(ii) All rights and defenses, which would be available to the responsible party under OPA 90, CERCLA, or both, as applicable;

(iii) A defense that the amount of the claim, or all claims asserted with respect to the same incident or release, whether asserted in court or in any other proceeding, exceeds the amount of the guaranty, except when the guaranty is based on the gross tonnage of the vessel (instead of the statutory minimums) and the guarantor knew or should have known that the applicable tonnage certificate was incorrect (see § 138.50(f)); and

(iv) The claim is not one made under OPA 90, CERCLA, or both.

(2) Except when the guaranty is based on the gross tonnage of the vessel (instead of the statutory minimums) and the guarantor knew or should have known that the evidence of financial responsibility or applicable tonnage certificate is incorrect (see § 138.50(f)), a guarantor who provides evidence of financial responsibility under this subpart will be liable, with respect to any one incident or release, or both, as applicable, only for the amount of costs and damages specified in the evidence of financial responsibility.

(3) A guarantor will not be considered to have consented to direct action under any law other than OPA 90 or CERCLA, or to unlimited liability under any law or in any venue, solely because the guarantor has provided evidence of financial responsibility under this subpart.

(4) In the event of any finding that the liability of a guarantor under OPA 90 or CERCLA exceeds the amount of the guaranty provided under this subpart, that guaranty is considered null and void with respect to that excess.

(i) *Process upon disapproval of guarantor.* If the Director intends to disapprove or revoke the approval of a guarantor (for example, due to the guarantor's change in financial position), the Director will notify the COFR Operator of the need to establish new evidence of financial responsibility within a specified period.

(1) If the COFR Operator establishes, or causes to be established, new acceptable evidence of financial responsibility within the period specified by the Director in the notice, the Application if otherwise complete will be approved or the COFR will remain in effect, and the COFR Operator will not have to pay a new Application fee or certification fee.

(2) If the COFR Operator fails to establish, or cause to be established, new acceptable evidence of financial responsibility within the period specified by the Director in the notice, the Director may deny or revoke the COFR and, if revoked, the COFR Operator will have to apply for a new COFR and pay a new certification fee. The COFR Operator's failure to establish, or cause to be established, new acceptable evidence of financial responsibility within the period specified by the Director may also result in enforcement as provided under § 138.170.

§ 138.120 Fees.

(a) *Fee payment methods.* Each COFR Operator applying for a COFR, or requesting a COFR renewal, must pay the fees required by paragraphs (b) and (c) of this section as follows:

(1) All fees required by this section must be paid in United States dollars.

(2) For COFR Operators using eCOFR as provided under § 138.60(c)(1)(i), credit card payment is required.

(3) For COFR Operators submitting Applications and requests for COFR renewal under § 138.60(c)(1)(ii) through (iv) (email, fax, and mail submissions), the fees must be paid by a check, cashier's check, draft, or postal money order, made payable to the ''U.S. Coast Guard''. Cash payments will not be accepted.

(i) For Applications and requests for COFR renewal submitted under § 138.60(c)(1)(ii) and (iii) (email and fax submissions, respectively), all fee payments must be received by the Director no later than 21 days following submission of the Application or request for COFR renewal.

(ii) For Applications and requests for COFR renewal submitted under § 138.60(c)(1)(iv) (mail submissions), all fee payments must be enclosed with the Application or request for COFR renewal.

(4) Any failure to timely pay the fees required by this section may result in COFR denial or revocation, debt collection (see 6 CFR part 11, 44 CFR part 11, and 31 CFR parts 285, and 900 through 904), and such other enforcement under § 138.170 as may be appropriate.

(b) *Application fee.* (1) Except as provided in paragraph (b)(2) of this section, the COFR Operator must pay a non-refundable Application fee of $200 for each Application submitted under this subpart (for each Application for one or more Individual Certificates, for a Fleet Certificate, or for a Master Certificate).

(2) An Application fee is not required when the COFR Operator submits—

(i) A request for an additional Individual Certificate under an existing Application;

(ii) A request to amend an Application;

(iii) A request for Certificate renewal; or

(iv) A request to reinstate a Certificate, if submitted within 90 days following the Certificate's revocation.

(c) *Certification fees.* In addition to the Application fees required by paragraph (b) of this section, each COFR

Operator who submits an Application or request for COFR renewal must pay the following certification fees:

(1) $100 for each vessel listed in, or added to, an Application for one or more Individual Certificates;

(2) $100 for each Application for a Fleet Certificate or Master Certificate; and

(3) $100 for each request for renewal of an Individual Certificate, a Fleet Certificate or a Master Certificate.

(d) *Fee refunds.* (1) A certification fee will be refunded, upon receipt by the Director of a written request, if the Application or request for COFR renewal is denied by the Director, or if the Application is withdrawn by the COFR Operator before the Director issues the COFR.

(2) Overpayments of Application and certification fees will be refunded to the COFR Operator.

§ 138.130 Agents for Service of process.

(a) *Designation of U.S. agents for service of process.* Each COFR Operator and guarantor must designate on the forms submitted a person located in the United States as its U.S. agent for service of process and (in the event of an incident, a release, or both) for receipt of notices of source designation, claims presented under OPA 90, CERCLA, or both, and lawsuits brought under OPA 90, CERCLA, or both.

(b) *U.S. agent for service of process acknowledgment.* Each U.S. agent for service of process designated under paragraph (a) must acknowledge the agency designation in writing unless the agent has already submitted a written master (that is, blanket) agency acknowledgment to the Director showing that the agent has agreed in advance to act as the U.S. agent for service of process for the COFR Operator or guarantor in question.

(c) *How to change the U.S. agent for service of process.* A COFR Operator or guarantor may change a designated U.S. agent for service of process, at any time and for any reason, by submitting a new U.S. agent for service of process designation in accordance with the procedure in paragraph (a), and by causing the new U.S. agent for service of process to submit the agency acknowledgment required by paragraph (b) of this section.

(d) *Replacement of unavailable U.S. agent for service of process.* In the event a designated U.S. agent for service of process becomes unavailable at any time, for any reason, the COFR Operator or guarantor must designate a new U.S. agent for service of process in accordance with the procedures in paragraph (a), within 5 days of the COFR Operator or guarantor becoming aware of such unavailability. In addition, the new U.S. agent for service of process must submit to the Director the agency acknowledgment required by paragraph (b) of this section.

(e) *Service on the Director.* If a designated U.S. agent for service of process cannot be served, then service of process on the Director, as provided in this paragraph, will constitute valid service of process on the COFR Operator or guarantor. Service of process on the Director will not be effective unless the server—

(1) Has sent a copy of each document served on the Director to the COFR Operator or guarantor, as applicable, by registered mail, at the COFR Operator or guarantor's last known address on file with the Director;

(2) Indicates, at the time process is served upon the Director, that the purpose of the mailing is to effect service of process on the COFR Operator or guarantor; and

(3) Provides evidence acceptable to the Director at the time process is served upon the Director, that service was attempted on the designated U.S. agent for service of process but failed, stating the reasons why service on the U.S. agent for service of process was not possible, and that the document was sent to the COFR Operator or guarantor, as required by paragraph (e)(1) of this section.

§ 138.140 Application withdrawals, COFR denials and revocations.

(a) *Application withdrawal.* A COFR Operator, or anyone authorized to act on their behalf, may withdraw an Application at any time prior to issuance of the COFR.

(b) *Application denials and COFR revocations.* The Director may deny an Application or revoke a COFR, and the United States may initiate enforcement under § 138.170, for any failure to comply with the requirements of this subpart, including—

(1) If the COFR Operator, or other person acting on the COFR Operator's behalf, makes a false statement in, or in connection with, any submission required by this subpart;

(2) If the COFR Operator, or other person acting on the COFR Operator's behalf, fails to establish or maintain acceptable evidence of financial responsibility, as required by this subpart;

(3) If the COFR Operator fails to pay the Application and certification fees required by § 138.120;

(4) If the COFR Operator or guarantor fails to designate and maintain a U.S. agent for service of process as required by § 138.130;

(5) If the COFR Operator, or other person acting on the COFR Operator's behalf, fails to comply with, or respond to, lawful inquiries, regulations, or orders of the U.S. Coast Guard pertaining to the activities subject to this subpart;

(6) If the COFR Operator, or other person acting on the COFR Operator's behalf, fails to timely report information required to be reported to the Director under this subpart, including failing to timely submit to the Director statements, data, financial information, notifications, affidavits, or other submissions required by this subpart; or

(7) If the Director obtains information indicating that the Application should be denied or that a new COFR is required (for example, a permanent vessel transfer, new COFR Operator, vessel renaming, guaranty termination, disapproval of a guarantor).

(c) *Procedure for reinstating COFRs following termination of guaranties.* If a COFR is revoked by the Director under paragraph (b)(2) of this section based on the expiration of 30 days following the date the Director receives a guarantor's notice of termination as provided under §§ 138.110(a)(3) and 138.150(d), the Director may reinstate the COFR if the guarantor promptly notifies the Director following the revocation that the guarantor rescinded the termination and that there was no gap in guarantor coverage.

(d) *Notice to COFR Operator of intent to deny an Application or revoke a COFR.* If the Director obtains information indicating that an Application should be denied or that a COFR should be revoked for reasons that the COFR Operator may not be aware of, the Director will notify the COFR Operator, in writing, stating the reason for the intended action.

(1) A notice from the Director that an Application is incomplete will be considered a denial unless the Application is completed by the COFR Operator within the period specified in the notice. A COFR subject to revocation remains valid until the COFR is revoked as provided in § 138.140(d)(2) and (3).

(2) If the Director issues a notice of intent to deny an Application or revoke a COFR due to a violation under paragraph (b) of this section, the COFR Operator may demonstrate compliance to the Director in writing by no later than the date specified by the Director in the notice. If the COFR Operator demonstrates compliance by that date, the Application will remain under consideration, and any current COFR will remain in effect, unless and until

the Director issues a written decision denying the Application or revoking the COFR, as applicable. Otherwise, the Application denial or COFR revocation is effective as of the date specified by the notice.

(3) The denial of an Application or revocation of a COFR does not terminate the guaranty.

(e) *Request for reconsideration.* (1) A COFR Operator may ask the Director to reconsider a denial of the COFR Operator's Application or the revocation of a COFR as follows:

(i) The COFR Operator must submit the request for reconsideration, in writing, to the Director no later than 21 days after the date of the denial or revocation.

(ii) The submission must state the COFR Operator's reasons for requesting reconsideration and include all supporting documentation.

(2) A decision by the Director on reconsideration of an Application denial or a COFR revocation is final agency action. If the Director does not issue a written decision on the request for reconsideration within 30 days after its submission, the request for reconsideration will be deemed to have been denied, and the Application denial or COFR revocation will be deemed to have been affirmed as a matter of final agency action. Unless the Director issues a decision reversing the revocation, the COFR revocation remains in effect.

(f) *Duty to remedy violations.* If the COFR for a vessel expires or is revoked while the vessel is located in the navigable waters, at any port or other place subject to the jurisdiction of the United States, or in the Exclusive Economic Zone, the COFR Operator and the vessel's other responsible parties will be deemed in violation of this subpart. In such event, the COFR Operator or, if unavailable or no longer operating the vessel, the vessel's current responsible parties, must notify the Director within 24 hours, by email or other electronic means. The notice must include the information required by § 138.150(b) and must establish new evidence of financial responsibility, designate a new COFR Operator if applicable, and cure any other violation of this subpart.

§ 138.150 Reporting requirements.

(a) *Report changes of submitted information.* When there is a change in any of the facts contained in an Application, a request for COFR renewal, evidence of financial responsibility, or other submission made under this subpart, the change must be reported, in writing, to the Director. The reports required by this section may be submitted with, but are in addition to, other submissions required by this subpart (for example, Applications, requests for COFR renewal, semi-annual and annual financial reports, Master Certificate reports).

(b) *A 21-day prior reporting requirement of permanent vessel transfers and other changes requiring issuance of a new COFR.* Current COFR Operators of vessels, and owners or operators of vessels not currently in U.S. navigable waters or the U.S. Exclusive Economic Zone, must report to the Director, and (if applicable) to the guarantor, the following information, no later than 21 business days before the new COFR is required:

(1) The number of the current COFR;

(2) The name of the covered vessel;

(3) The type of change planned;

(4) The date the change will take place;

(5) The reason for the change;

(6) For a vessel that will be located in U.S. navigable waters or U.S. Exclusive Economic Zone on the date the change is scheduled to take place, where the vessel will be located on that date (for example, name and location of port);

(7) For a vessel name change, the vessel's new legal name;

(8) For the planned transfer of a vessel to a new responsible party, and even if the transferee's intent is to scrap or otherwise dispose of the vessel, the name and contact information of the responsible party to whom the vessel is being transferred;

(9) For a change of COFR Operator, the name and contact information of the person who will replace the COFR Operator; and

(10) Any other changes in the information previously submitted to ensure the information on record at the NPFC is current.

(c) *Three-day prior reporting of changes not requiring issuance of a new COFR.* In addition to the prior reporting required by paragraph (b) of this section, the COFR Operator must report any change to information contained in a submission to the Director that does not require issuance of a new COFR, by no later than 3 business days before implementing the change, including, but not limited to: Changes to the U.S. agent for service of process (other than termination), a change of a non-operator vessel owner, new contact information, and changes in vessel particulars (for example, flag, measurement, type, and scheduled vessel scrapping).

(d) *Reporting by guarantors.* Each guarantor (or, if there are multiple guarantors, each lead guarantor) must give the Director 30 days notice before terminating a guaranty as provided in § 138.110(a)(3), explaining the reason for the intended termination, once known, or should have known, in the ordinary course of business.

(e) *Enforcement; deadline exceptions.* A failure to timely submit the reports required by this section may result in enforcement actions as provided in § 138.170. Exceptions to the reporting deadlines will only be granted as provided in § 138.60(e).

§ 138.160 Non-owning COFR Operator's responsibility for identification.

(a) Each COFR Operator of a vessel with a COFR, other than an unmanned, non-self-propelled barge, who is not also an owner of the vessel must ensure that the original or a legible copy of the vessel's demise charter-party (or other written document on the owner's letterhead, signed by the vessel owner, which specifically identifies the COFR Operator named on the COFR) is maintained on board the vessel.

(b) The demise charter-party or other document required by paragraph (a) of this section must be presented, upon request, for examination and copying, to the Director or other United States Government official.

§ 138.170 Enforcement.

(a) *Applicability.* Any person who fails to comply with the requirements of this subpart, including the reporting requirements in § 138.150, may be subject to enforcement as provided in this section, including if—

(1) The COFR Operator fails to maintain acceptable evidence of financial responsibility as required;

(2) The name of a covered vessel is changed without reporting the change to the Director as required in § 138.150;

(3) The COFR Operator ceases, for any reason, to be an operator of a covered vessel, including when a vessel is scrapped or transferred to a new owner or operator, and a new Application and report have not been submitted to the Director as required by §§ 138.80 and 138.150; or

(4) The COFR Operator fails to maintain a U.S. agent for service of process.

(b) *Non-compliance.* During a period of non-compliance with this subpart, all use by the vessel of the navigable waters of the United States, of any port or other place subject to the jurisdiction of the United States, or of the Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States, is forbidden.

(c) *Withholding and revoking vessel clearance.* The Secretary of the

Department of Homeland Security will withhold or revoke the clearance required by 46 U.S.C. 60105 of any vessel subject to this subpart that does not have a COFR or for which the evidence of financial responsibility required has not been established and maintained.

(d) *Denying vessel entry, and detention.* The U.S. Coast Guard may deny entry to any port or other place in the United States or the navigable waters, and may detain at any port or other place in the United States in which it is located, any vessel subject to this subpart, which does not have a COFR or for which the evidence of financial responsibility required by this subpart has not been established and maintained.

(e) *Seizure and forfeiture.* In accordance with OPA 90, any vessel subject to this subpart which is found in the navigable waters without a COFR, or for which the necessary evidence of financial responsibility has not been established and maintained as required, is subject to seizure by, and forfeiture to, the United States.

(f) *Administrative and judicial penalties and other relief.* (1) Any person who fails to comply with the requirements of this subpart or the evidence of financial responsibility requirements of OPA 90, CERCLA, or both, including a failure to comply with the reporting requirements in § 138.150, is subject to civil administrative and judicial penalties under OPA 90 and CERCLA, as applicable. In addition, under OPA 90, the Attorney General may secure such relief as may be necessary to compel compliance with OPA 90 and this subpart, including termination of operations.

(2) Under 18 U.S.C. 1001, any person making a false statement in, or in connection with, a submission under OPA 90 or CERCLA or this subpart is subject to prosecution.

(3) Any person who fails to timely pay the fees required by § 138.120 or any other amounts due under OPA 90 or CERCLA or this subpart may also be subject to Federal debt collection under 6 CFR part 11, 44 CFR part 11 and 31 CFR parts 285, and 900 through 904.

PART 153—CONTROL OF POLLUTION BY OIL AND HAZARDOUS SUBSTANCES, DISCHARGE REMOVAL

■ 5. The authority citation for part 153 continues to read as follows:

Authority: 14 U.S.C. 503; 33 U.S.C. 1321, 1903, 1908; 42 U.S.C. 9615; 46 U.S.C. 6101; E.O. 12580, 3 CFR, 1987 Comp., p. 193; E.O. 12777, 3 CFR, 1991 Comp., p. 351; Department of Homeland Security Delegation No. 0170.1.

Subpart D—[Removed]

■ 6. Subpart D, consisting of §§ 153.401 through 153.417, is removed.

Dated: 22 November 2021.

Mark J. Fedor,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Resources.

[FR Doc. 2021–26046 Filed 11–30–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 219

RIN 0596–AD28

National Forest System Land Management Planning; Correction

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Technical correction.

SUMMARY: This document makes technical corrections to Forest Service regulations regarding National Forest System land management planning. The correction reinstates paragraphs that were inadvertently removed from a final rule published on December 15, 2016.

DATES: This correction is effective December 1, 2021.

ADDRESSES: Written inquiries about this correction may be sent to the Director, Ecosystem Management Coordination Staff, USDA Forest Service, 1400 Independence Ave. SW, Mailstop Code 1104, Washington, DC 20250–1104.

FOR FURTHER INFORMATION CONTACT: Ecosystem Management Coordination Staff's Planning Specialist Nick DiProfio at (202) 253–0640 or by email at *nicholas.diprofio@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

On December 15, 2016 (81 FR 90723), the United States Department of Agriculture (Department) published a final rule to amend 36 CFR part 219 (the planning rule) clarifying the direction for plan amendments, and to correct § 219.11(d)(4). The intent of the final rule was to reinstate paragraph (d)(4) in its entirety. The paragraph establishes maximum size openings for even aged harvests which the National Forest Management Act requires (16 U.S.C. 1604 (g)(3)(F)(iv)). Reinstatement of the paragraph was necessary because a sentence that had been included in the paragraph when the rule was issued on April 9, 2012, was inadvertently removed when correcting amendments were made in July 2012 (compare the rule text as set out on April 9, 2012, and July 27, 2012: 77 FR 21260, 21266 and 77 FR 44144, 44145).

However, the December 15, 2016, rule to reinstate the entire paragraph failed to maintain paragraphs (d)(4)(i), (ii), and (iii) as part of § 219.11(d)(4).

Need for Correction

To ensure that § 219.11 is complete, as it was set out when the planning rule was issued in 2012, the Department is issuing a technical correction to § 219.11(d)(4)(i) through (iii) of the planning rule.

List of Subjects in 36 CFR Part 219

Administrative practice and procedure, Environmental impact statements, Indians, Intergovernmental relations, National forests, Reporting and recordkeeping requirements, Science and technology.

Accordingly, 36 CFR part 219 is corrected by making the following correcting amendment:

PART 219—PLANNING

■ 1. The authority citation for part 219 continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 1604, 1613.

Subpart A—National Forest System Land Management Planning

■ 2. Amend § 219.11 by revising paragraph (d)(4) to read as follows:

§ 219.11 Timber requirements based on the NFMA.

* * * * *

(d) * * *

(4) Where plan components will allow clearcutting, seed tree cutting, shelterwood cutting, or other cuts designed to regenerate an even-aged stand of timber, the plan must include standards limiting the maximum size for openings that may be cut in one harvest operation, according to geographic areas, forest types, or other suitable classifications. Except as provided in paragraphs (d)(4)(i) through (iii) of this section, this limit may not exceed 60 acres for the Douglas-fir forest type of California, Oregon, and Washington; 80 acres for the southern yellow pine types of Alabama, Arkansas, Georgia, Florida, Louisiana, Mississippi, North Carolina, South Carolina, Oklahoma, and Texas; 100 acres for the hemlock-Sitka spruce forest type of coastal Alaska; and 40 acres for all other forest types.

(i) Plan standards may allow for openings larger than those specified in

paragraph (d)(4) of this section to be cut in one harvest operation where the responsible official determines that larger harvest openings are necessary to help achieve desired ecological conditions in the plan area. If so, standards for exceptions shall include the particular conditions under which the larger size is permitted and must set a maximum size permitted under those conditions.

(ii) Plan components may allow for size limits exceeding those established in paragraphs (d)(4) introductory text and (d)(4)(i) of this section on an individual timber sale basis after 60 days public notice and review by the regional forester.

(iii) The plan maximum size for openings to be cut in one harvest operation shall not apply to the size of openings harvested as a result of natural catastrophic conditions such as fire, insect and disease attack, or windstorm (16 U.S.C. 1604(g)(3)(F)(iv)).

* * * * *

Dated: November 23, 2021.

Meryl Harrell,

Deputy Under Secretary, Natural Resources & Environment.

[FR Doc. 2021–25947 Filed 11–30–21; 8:45 am]

BILLING CODE 3411–15–P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 19–CRB–0005–WR (2021–2025) COLA (2022)]

Cost of Living Adjustment to Royalty Rates for Webcaster Statutory License

AGENCY: Copyright Royalty Board (CRB), Library of Congress.

ACTION: Final rule; cost of living adjustment.

SUMMARY: The Copyright Royalty Judges announce a cost of living adjustment (COLA) in the royalty rates that commercial and noncommercial noninteractive webcasters pay for eligible transmissions pursuant to the statutory licenses for the public performance of and for the making of ephemeral reproductions of sound recordings.

DATES:

Effective date: January 1, 2022.

Applicability dates: These rates are applicable to the period January 1, 2022, through December 31, 2022.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, (202) 707–7658, *crb@loc.gov*.

SUPPLEMENTARY INFORMATION: Sections 112(e) and 114(f) of the Copyright Act, title 17 of the United States Code, create statutory licenses for certain digital performances of sound recordings and the making of ephemeral reproductions to facilitate transmission of those sound recordings. On October 27, 2021, the Copyright Royalty Judges (Judges) adopted final regulations governing the rates and terms of copyright royalty payments under those licenses for the license period 2021–2025 for performances of sound recordings via eligible transmissions by commercial and noncommercial noninteractive webcasters. See 86 FR 59452.

Pursuant to those regulations, at least 25 days before January 1 of each year from 2022 to 2025, the Judges shall publish in the **Federal Register** notice of a COLA applicable to the royalty fees for performances of sound recordings via eligible transmissions by commercial and noncommercial noninteractive webcasters. 37 CFR 380.10.

The adjustment in the royalty fee shall be based on a calculation of the percentage increase in the CPIU from the CPIU published in November 2020 (260.229), according to the formula: For subscription performances, $(1 + (Cy - 260.229)/260.229) \times \$0.0026$; for nonsubscription performances, $(1 + (Cy - 260.229)/260.229)$ \$0.0021; for performances by a noncommercial webcaster in excess of 159,140 ATH per month, $(1 + (Cy - 260.229)/260.229) \times \$0.0021$; where Cy is the CPI-U published by the Secretary of Labor before December 1 of the preceding year. The adjusted rate shall be rounded to the nearest fourth decimal place. 37 CFR 380.10(c). The CPIU published by the Secretary of Labor from the most recent index published before December 1, 2021, is 276.589.[1] Applying the formula in 37 CFR 380.10(c) and rounding to the nearest fourth decimal place results in an increase in the rates for 2022.

The 2022 rate for eligible transmissions of sound recordings by commercial webcasters is \$0.0028 per subscription performance and \$0.0022 per nonsubscription performance.

Application of the increase to rates for noncommercial webcasters results in a 2022 rate of \$0.0022 per performance for all digital audio transmissions in excess of 159,140 ATH in a month on a channel or station.

As provided in 37 CFR 380.10(d), the royalty fee for making ephemeral recordings under section 112 of the Copyright Act to facilitate digital transmission of sound recordings under section 114 of the Copyright Act is included in the section 114 royalty fee and comprises 5% of the total fee.

[1] This CPI-U was announced on November 10, 2021, by the Bureau of Labor Statistics in its *Consumer Price Index News Release—Consumer Price Index,* available at *https://www.bls.gov/news.release/cpi.htm* at Table 1.

List of Subjects in 37 CFR Part 380

Copyright; Sound recordings.

Final Regulations

In consideration of the foregoing, the Judges amend part 380 of title 37 of the Code of Federal Regulations as follows:

PART 380—RATES AND TERMS FOR TRANSMISSIONS BY ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES AND FOR THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE TRANSMISSIONS

■ 1. The authority citation for part 380 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

■ 2. Section 380.10 is amended by revising paragraph (a) to read as follows:

§ 380.10 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

(a) *Royalty fees.* For the year 2022, Licensees must pay royalty fees for all Eligible Transmissions of sound recordings at the following rates:

(1) *Commercial webcasters:* \$0.0028 per Performance for subscription services and \$0.0022 per Performance for nonsubscription services.

(2) *Noncommercial webcasters:* \$1,000 per year for each channel or station and \$0.0022 per Performance for all digital audio transmissions in excess of 159,140 ATH in a month on a channel or station.

* * * * *

Dated: November 23, 2021.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

[FR Doc. 2021–26062 Filed 11–30–21; 8:45 am]

BILLING CODE 1410–72–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2016–0352 and EPA–HQ–OPP–2019–0560; FRL–8945–01–OCSPP]

Bifenthrin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of bifenthrin in or on multiple commodities which are identified and discussed later in this document. The Interregional Project Number 4 (IR–4) and FMC Corporation requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 1, 2021. Objections and requests for hearings must be received on or before January 31, 2022 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The dockets for this action, identified by docket identification (ID) number EPA–HQ–OPP–2016–0352 and EPA–HQ–OPP–2019–0560, are available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

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

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID numbers EPA–HQ–OPP–2016–0352 and EPA–HQ–OPP–2019–0560 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before January 31, 2022. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID numbers EPA–HQ–OPP–2016–0352 and EPA–HQ–OPP–2019–0560, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of October 18, 2016 (81 FR 71668) (FRL–9952–19), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 6E8482) by IR–4, Rutgers, the State University of New Jersey, 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.442 be amended by establishing tolerances for residues of the insecticide bifenthrin, (2-methyl [1,1′-biphenyl]-3-yl) methyl-3-(2-chloro-3,3,3,-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate, in or on apple, wet pomace at 1.3 parts per million (ppm); avocado at 0.50 ppm; berry, low growing, subgroup 13–07G at 3.0 ppm; *Brassica,* leafy greens, subgroup 4–16B at 15 ppm; caneberry subgroup 13–07A at 1.0 ppm; fruit, citrus, group 10–10 at 0.05 ppm; fruit, pome, group 11–10, except mayhaw, at 0.70 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.20 ppm; nut, tree, group 14–12 at 0.05 ppm; peach, subgroup 12–12B at 0.70 ppm; pepper/eggplant subgroup 8–10B at 0.50 ppm; pomegranate at 0.50 ppm; and tomato, subgroup 8–10A at 0.15 ppm. The October 18, 2016, **Federal Register** document and the Notice of Filing in docket number EPA–HQ–OPP–2016–0352 identified the requested tolerance for tomato subgroup 8–10A as 0.30 ppm. However, IR–4's submitted petition identified a tolerance of 0.15 ppm for tomato subgroup 8–10A. When there is a discrepancy between a tolerance in the submitted Notice of Filing and the submitted petition, EPA uses the tolerance in the petition as the petitioned-for tolerance, which is 0.15 ppm for tomato subgroup 8–10A.

Additionally, the petition requested, upon approval of the above tolerances, to remove the existing tolerances in 40 CFR 180.442(a) in or on *Brassica,* leafy greens, subgroup 5B at 3.5 ppm; caneberry, subgroup 13A at 1.0 ppm; eggplant 0.05 ppm; fruit, citrus, group 10 at 0.05 ppm; grape at 0.20 ppm; groundcherry at 0.5 ppm; nut, tree, group 14 at 0.05 ppm; okra at 0.50 ppm; pear at 0.5 ppm; pepino at 0.5 ppm; pepper, bell at 0.5 ppm; pepper, non-bell at 0.5 ppm; pistachio at 0.05 ppm; strawberry at 3.0 ppm; tomato at 0.15

ppm; and turnip, greens at 3.5 ppm. Finally, the petition requested upon approval of the above tolerances, to remove the existing time-limited tolerances in 40 CFR 180.442(b) in or on, apple at 0.5 ppm; nectarine at 0.5 ppm; and peach at 0.5 ppm. That document referenced a summary of the petition prepared by FMC Corporation and Makhteshim Agan of North America, Inc. (ADAMA), the registrants, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

In the **Federal Register** of February 11, 2020 (85 FR 7708) (FRL–10005–02), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8F8704) by FMC Corporation, 2929 Walnut Street, Philadelphia, PA 19104. The petition requested that 40 CFR 180.442 be amended by establishing tolerances for residues of the bifenthrin, (2-methyl [1,1′-biphenyl]-3-yl) methyl-3-(2-chloro-3,3,3,-trifluoro-1-propenyl)-2,2 dimethylcyclopropanecarboxylate, in or on sunflower (crop subgroup 20B) at 0.01 ppm. That document referenced a summary of the petition prepared by FMC Corporation, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petitions, EPA is establishing some tolerances that vary from what was requested. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

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

A. Toxicological Profile

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

The predominant effects seen in most of the bifenthrin experimental toxicology studies were behavioral changes characteristic of Type I pyrethroids, such as muscle tremors, which are consistent with its mode-of-action (MOA) to activate sodium channels. Additional effects seen in one or more studies included: muscle twitching, decreased grip strength, altered landing foot splay, depressed respiration, increased grooming counts, loss of muscle coordination, staggered gait, exaggerated hind limb flexion, and convulsions at high doses. Decreased body weight and food consumption were also noted in repeat-dosing dietary studies.

In developmental toxicity studies involving rats and rabbits, maternal toxicity was observed (neurological effects) while no developmental effects of biological significance were observed. In the 2-generation reproduction dietary study in the rat, tremors were noted only in females of both generations, with one parental generation rat observed to have clonic convulsions, and no observed effects in the offspring. A developmental neurotoxicity study was also conducted. Clinical signs of neurotoxicity were observed in both the adults and offspring at the same dose levels; therefore, there is no indication of increased qualitative or quantitative susceptibility in the young.

Bifenthrin is classified as a Group C—''possible human carcinogen,'' based on an increased incidence of urinary bladder tumors in mice. However, EPA has determined that quantification of risk using a non-linear approach (*i.e.,* reference dose (RfD)) will adequately account for all chronic toxicity, including potential carcinogenicity, that could result from exposure to bifenthrin for the following reasons. First, the bladder tumors may not be uncommon in mice and are not likely to be malignant. Second, these tumors were observed only in male mice at the highest dose. Third, no evidence of carcinogenicity was observed in bifenthrin carcinogenicity studies in rats. Finally, there is a low concern for mutagenicity based on the overall results of the available mutagenicity tests of bifenthrin.

A complete discussion of the toxicological profile for bifenthrin and the Agency's cancer conclusion as well as specific information on the studies received and the nature of the adverse effects caused by bifenthrin as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found in the documents titled ''Bifenthrin: Revised Human Health Risk Assessment for the Requested Section 3 Registration of Bifenthrin on Pome Fruit Group 11–10 (except Mayhaw), Peach Subgroup 12–12B, Avocado, Pomegranate, *Brassica* Leafy Greens Subgroup 4–16B; and Crop Group Conversions/Expansions for Tomato Subgroup 8–10A, Pepper/Eggplant Subgroup 8–10B, Small Vine Climbing Fruit Subgroup 13–07F, Low Growing Berry Subgroup 13–07G, Citrus Fruit Group 10 to Citrus Fruit Group 10–10, Caneberry Subgroup 13A to Caneberry Subgroup 13–07A, and Tree Nut Group 14 to Tree Nut Group 14–12'' (hereinafter ''Bifenthrin Multiple Crop Human Health Risk Assessment'') and ''Bifenthrin. Human Health Risk Assessment for the Proposed New Use on Sunflower Crop Subgroup 20B'' in docket ID number EPA–HQ–OPP–2016–0352 in regulations.gov.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/

safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticides.*

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

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to bifenthrin, EPA considered exposure under the petitioned-for tolerances as well as all existing bifenthrin tolerances in 40 CFR 180.442. EPA assessed dietary exposures from bifenthrin in food as follows:

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

Such effects were identified for bifenthrin. In estimating acute dietary exposure, EPA used 2003–2008 food consumption data from the United States Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). As to residue levels in food, the acute assessment was refined using distributions and point estimates derived from pesticide data program (PDP) monitoring data, field trial data, percent crop treated (PCT) data, and empirical processing factors.

ii. *Chronic exposure.* A chronic dietary endpoint has not been selected for bifenthrin because repeated exposure does not result in a POD lower than that resulting from acute exposure; therefore, the acute dietary risk assessment is protective of chronic dietary risk. However, since there are residential uses of bifenthrin, a refined chronic dietary exposure assessment was conducted to calculate average (food and drinking water) exposure estimates representing background dietary exposure to support the bifenthrin aggregate risk assessment. The assessment was refined using point estimates derived from PDP monitoring data, field trial data, PCT data, and empirical processing factors.

iii. *Cancer.* As discussed in Unit III.A., EPA has determined that the acute reference dose (RfD) will adequately account for all repeated exposure/chronic toxicity, including potential carcinogenicity, which could result from exposure to bifenthrin. A separate cancer exposure assessment was not conducted.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition c: Data are available on pesticide use and food consumption in a particular area, and the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The acute dietary assessment used the following maximum PCT estimates: Almonds: 40%, artichoke: 65%, green beans (fresh & succulent): 60%, blueberries (all bushberries): 35%, broccoli: 25%, Brussel sprouts: 5%, cabbage: 50%, caneberries: 55%, canola: 25%, cantaloupes: 55%, carrots: 5%, cauliflower: 2.5%, celery: 45%, citrus (all others): 2.5%, corn: 10%, cotton: 20%, cucumbers: 35%, dry beans/peas: 5%, eggplant: 45%, grapefruit: 2.5%, grapes, juice: 10%, grapes, table: 2.5%, grapes, wine: 5%, hazelnuts: 5%, honeydews: 90%, kumquat: 2.5%, lemons: 2.5%, lettuce; 15%, lima beans: 40%, lime: 2.5%, okra: 45%, onions: 5%, oranges, 10%, peanuts: 20%, pears: 2.5%, green peas (fresh & succulent): 50%, pecans: 20%, peppers (all); 30%, pistachios: 55%, potatoes: 15%, pummelo: 2.5%, pumpkins: 25%, soybeans: 10%, spinach: 15%, squash: 25%, strawberries: 70%, sweet corn: 50%, tangerines: 2.5%, tomatoes: 45%, walnuts: 25%, and watermelons: 20%. The acute dietary assessment also used the following maximum PCT estimates for some of the new uses: apples: 55%, avocados: 50%, nectarines: 65%, peaches: 35%, and pomegranates: 60%.

The following average PCT estimates for bifenthrin were used to refine the chronic dietary risk assessment for the following crops: Almonds: 25%, artichoke: 30%, green beans (fresh & succulent): 55%, blueberries (all bushberries): 10%, broccoli: 15%, Brussel sprouts: 1%, cabbage: 30%, caneberries: 45%, canola: 10%, cantaloupes: 50%, carrots: 2.5%, cauliflower: 1%, celery: 10%, citrus (all others): 1%, corn: 5%, cotton: 15%, cucumbers: 20%, dry beans/peas: 2.5%, eggplant: 25%, grapefruit: 1%, grapes, juice: 2.5%, grapes, table: 1%, grapes, wine: 2.5%, hazelnuts: 1%, honeydews: 25%, kumquat: 1%, lemons: 1%, lettuce; 10%, lima beans: 20%, lime: 1%, okra: 25%, onions: 2.5%, oranges, 1%, peanuts: 10%, pears: 1%, green peas (fresh & succulent): 30%, pecans: 10%, peppers (all); 20%, pistachios: 35%, potatoes: 10%, pummelo: 1%, pumpkins: 15%, soybeans: 5%, spinach: 2.5%, squash: 20%, strawberries: 55%, sweet corn: 40%, tangerines: 1%, tomatoes: 25%, walnuts: 15%, and watermelons: 15%. The chronic dietary assessment also used the following maximum PCT estimates for some of the new uses: apples: 50%, avocados: 50%, nectarines: 65%, peaches: 35%, and pomegranates: 60%.

A default of 100% CT was used for all livestock and game commodities, freshwater finfish, and all other registered uses where no maximum/average PCT estimates were available. All other commodities included for depicting food handling establishment (FHE) uses were refined with the upper bound estimate of 4.65% for non-fumigant treatments made in FHEs.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS),

proprietary market surveys, and California Department of Pesticide Regulation (CalDPR) Pesticide Use Reporting (PUR) for the chemical/crop combination for the most recent 10 years. EPA uses an average PCT for chronic dietary risk analysis and a maximum PCT for acute dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than 1% or less than 2.5%. In those cases, the Agency would use less than 1% or less than 2.5% as the average PCT value, respectively. The maximum PCT figure is the highest observed maximum value reported within the most recent 10 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%, except where the maximum PCT is less than 2.5%, in which case, the Agency uses less than 2.5% as the maximum PCT.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations are taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which bifenthrin may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for bifenthrin in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of bifenthrin. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide.*

EPA used the limit of solubility as the drinking water input, *i.e.,* the maximum possible residues that could occur in drinking water based on the chemical properties of the compound. EPA used the modeled EDWCs directly in the dietary exposure model to account for the contribution of bifenthrin residues in drinking water as follows: 0.014 ppb was used in the acute assessment and 0.014 ppb was used in the chronic assessment.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Bifenthrin is currently registered for the following uses that could result in residential exposures: Lawns/turf, indoor environments, gardens/trees, pets (dog shampoo), termiticide and indoor/outdoor surface treatment for various residential and commercial premises.

EPA assessed residential exposure using the following assumptions. There is the potential for residential handler and post-application exposures from the use of bifenthrin. These exposures were assessed using the 2012 Residential SOPs and submitted chemical-specific residue data [bifenthrin-specific turf transferable residue (TTR; liquid and granular) and dislodgeable foliar residue (DFR; liquid) data are available]. EPA did not quantitatively assess the outdoor residential handler uses in/around home foundations, outdoor impervious surfaces, wood piles/structures and fence posts. Residential handler exposure assessments were performed for adult homeowners applying bifenthrin ready-to-use products (aerosol, hose-end sprayers and dog shampoos); mixing/loading/applying liquid concentrates; loading/applying granular formulations and applying dust formulations. The application rates for these uses that were quantitatively assessed are equal to or higher than those outdoor uses and thus are protective of the outdoor uses. Dermal and inhalation risk estimates were combined in this assessment because the toxicological effects for these exposure routes were the same. A total aggregate risk index (ARI) was used because the levels of concern (LOCs) for dermal exposure (100) and inhalation exposure (30) are different. ARIs of less than 1 are risk estimates of concern. The ARIs were calculated as follows. *Aggregate Risk Index* (*ARI*) = *1* ÷ [(*Dermal LOC* ÷ *Dermal MOE*) + (*Inhalation LOC* ÷ *Inhalation MOE*)]. All exposures are short-term in nature. There are no dermal or inhalation risk estimates of concern for residential handlers for the registered uses of bifenthrin.

Post-application exposure was assessed for broadcast applications to turf, gardens/trees, indoor environments (carpets and hard floor) and treated pets. Residential post-application exposures are expected to be short-, intermediate- or long-term in duration. Because the single dose and repeat dosing bifenthrin studies show that repeat exposures do not result in lower points of departure, the residential assessments are conducted as a series of acute exposures and the same endpoint is used regardless of duration. Therefore, the acute/single day residential post-application assessments are protective of expected longer-term exposures. Dermal and incidental oral risk estimates were combined because the toxicological effects for these exposure routes were similar [combined Margin of Exposure (MOE) approach used since LOCs are the same].

There were some residential post-application risk estimates of concern identified previously in Registration Review. Specifically, dermal post-application risks were identified for a liquid formulation product with a maximum application rate of 2.3 lb ai/A, and risks were identified for episodic ingestion of granules at application rates greater than 0.34 lb ai/A. As a result, during Registration Review, some bifenthrin labels were amended or canceled to address these risk concerns. The product label for the liquid formulation with the high application rate of 2.3 lb ai/A, which was canceled as of July 2021 (EPA Reg. #279–3152), was never commercialized. Because that product was never sold or distributed, there are no exposures from that product for consideration in the aggregate risk assessment. In addition, 25 granular products were either canceled or amended to require watering in of the product after application when application rates were greater than 0.34 lb ai/A. Although these label changes reduce the risks from ingestion of granules, that use is not included in the aggregate assessment because it is considered an episodic event and not a routine behavior.

The following residential exposure scenarios were selected for aggregation and represent the worst-case risk estimates: Adults contacting treated gardens (dermal exposure); children 1 to

<2 years old contacting treated turf (dermal and incidental oral exposure at the 0.23 lb ai/A rate); children 6 to <11 years old contacting treated gardens (dermal exposure); and children 11 to 16 years old golfing on treated turf (dermal exposure).

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

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

The Agency has determined that the pyrethroids and pyrethrins share a common mechanism of toxicity (*http://www.regulations.gov*; EPA–HQ–OPP–2008–0489–0006). As explained in that document, the members of this group share the ability to interact with voltage-gated sodium channels ultimately leading to neurotoxicity. In 2011, after establishing a common mechanism grouping for the pyrethroids and pyrethrins, the Agency conducted a cumulative risk assessment (CRA) which is available at *http://www.regulations.gov*; EPA–HQ–OPP–2011–0746. In that document, the Agency concluded that cumulative exposures to pyrethroids (based on pesticidal uses registered at the time the assessment was conducted) did not present risks of concern. For information regarding EPA's efforts to evaluate the risk of exposure to this class of chemicals, refer to *https://www.epa.gov/ingredients-used-pesticide-products/pyrethrins-and-pyrethroids.*

Since the 2011 CRA, for each new pyrethroid and pyrethrin use, the Agency has conducted a screen to evaluate any potential impacts on the CRA prior to registration of that use. A new turf use for the pyrethroid, tau-fluvalinate, was assessed after completion of the cumulative, which did impact the worst-case non-dietary risk estimates identified in the 2011 CRA for the turf scenario (Memo, DeLeon, H., D450820, 12/16/2019). However, the overall finding (*i.e.,* that the pyrethroid cumulative risk is below the Agency's level of concern) did not change upon registration of this new use.

To account for the additional uses requiring tolerances in this rule, the Agency has conducted an additional screen, taking into account all previously approved uses and these proposed new uses. The additional uses will not significantly impact the cumulative assessment because dietary exposures make a minor contribution to total pyrethroid exposure relative to residential exposures in the 2011 cumulative risk assessment. Therefore, the results of the 2011 CRA are still valid and there are no cumulative risks of concern for the pyrethroids/pyrethrins.

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* Bifenthrin has been evaluated for potential developmental effects in the rat (following gavage and dietary administration) and in the rabbit (gavage administration). Maternal toxicity included neurological effects (tremors in rats and rabbits; head and forelimb twitching in rabbits). There were no developmental effects of biological significance in either species. The registrant submitted a Developmental Neurotoxicity (DNT) study, which establishes a clear NOAEL for the adult and offspring toxicity. The NOAEL in adults and offspring is similar in magnitude, and the LOAELs are based on the clinical signs of neurotoxicity (dams had tremors and convulsions, offspring had increased grooming counts). Based on targeted testing in the DNT study for common endpoints for bifenthrin, there was no increase in sensitivity in rat pups. However, the Agency has reviewed existing pyrethroid data and concludes that the DNT is not a particularly sensitive study for comparing the sensitivity of young and adult animals to pyrethroids. Some literature studies indicated susceptibility for other pyrethroids, but in context, these studies were conducted at relatively high doses, which may not reflect environmental exposures. The reproductive toxicity of bifenthrin was examined in a 2-generation reproduction dietary study in the rat. Tremors were noted only in females of both generations, with one parental generation rat observed to have clonic convulsions, and no observed effects in the offspring. Overall, there is no indication of increased juvenile sensitivity specifically to bifenthrin.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings.

i. The toxicity database for bifenthrin is complete.

ii. Like other pyrethroids, bifenthrin causes clinical signs of neurotoxicity from interaction with sodium channels. These effects are adequately assessed by the available guideline and non-guideline studies. Bifenthrin is a Type I pyrethroid, and neurotoxic effects characteristic of Type I pyrethroids were observed in adults in most of the bifenthrin toxicity database. Specifically, muscle tremors and decreased motor activity were observed in adults in guideline studies throughout the bifenthrin toxicology database, and hind-limb flexion was observed in adults the dermal study. For these reasons, the tremors seen in juveniles in the 2-generation reproduction study are not considered age-dependent effects.

iii. There was no evidence that bifenthrin resulted in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study. Previously, however, EPA retained a FQPA safety factor of 3X to account for concerns about pharmacokinetic (PK) differences between adults and children. The Agency has re-evaluated the need for an FQPA Safety Factor for human health risk assessments for pyrethroid pesticides based on a review of the available guideline and literature studies as well as data from the Council for the Advancement of Pyrethroid Human Risk Assessment (CAPHRA) program. That recent data, including human physiologically based pharmacokinetic (PBPK) models as well as *in vivo* and *in vitro* data on protein binding, enzyme ontogeny, and metabolic clearance, support the conclusion that the PK contribution to the FQPA safety factor can be reduced to 1X for all populations.

iv. There are no residual uncertainties identified in the exposure databases.

Although the acute dietary exposure estimates are refined, the exposure estimates will not underestimate risk for the established and proposed uses of bifenthrin since the residue levels used are based on either monitoring data reflecting actual residues found in the food supply, or on high-end residues from field trials which reflect the use patterns which would result in highest residues in foods. Furthermore, processing factors used were either those measured in processing studies, or default high-end factors representing the maximum concentration of residue into a processed commodity. EPA made conservative (protective) assumptions to assess exposure to bifenthrin in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by bifenthrin.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to bifenthrin will occupy 15% of the aPAD for infants (<1 year old), the population group receiving the greatest exposure. The acute aggregate risk assessment combines exposures to bifenthrin in food and drinking water only and is equivalent to the acute dietary assessment. There are no acute aggregate risks estimates of concern.

2. *Chronic risk.* The chronic (food and drinking water) exposure assessment for bifenthrin was conducted solely for the purpose of obtaining an average dietary exposure estimate for use in the aggregate assessment. The population subgroup with the highest average dietary exposure estimate is children 1 to 2 years old (0.000189 mg/kg/day).

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

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in an aggregate MOE of 520 for adults (treated gardens). The short-term aggregate assessment for children 1 to less than 2 years old resulted in an MOE of 170 (treated turf at 0.23 lb ai/A). The short-term aggregate assessment for children 6 to less than 11 years old and children 11 to 16 years old resulted in MOEs of 1,600 (treated gardens) and 7,600 (golfing), respectively. Because EPA's level of concern for bifenthrin is an MOE of 100 or lower, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). While there is potential intermediate-term residential exposure, because the single dose and repeat dosing bifenthrin studies show that repeat exposures do not result in lower points of departure, the residential assessments are conducted as a series of acute exposures and the same endpoint is used regardless of duration. Therefore, the short-term aggregate assessment is considered protective of any intermediate-term exposures.

5. *Aggregate cancer risk for U.S. population.* EPA has concluded that the acute reference dose (RfD) will adequately account for all repeated exposures, including carcinogenicity, which could result from exposure to bifenthrin.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (gas chromatography with an electron capture detector (GC/ECD) analyses for determining bifenthrin residues in both plant and livestock commodities) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established any MRLs for bifenthrin in or on apple, wet pomace; avocado; fruit, pome, group 11–10; peach, or pomegranate. The following U.S. tolerances being established are harmonized with the Codex MRLs, which are identified in parentheses: Caneberry subgroup 13–07A at 1 ppm (blackberry, dewberries and raspberries); fruit, citrus, group 10–10 at 0.05 ppm (citrus fruit); and nut, tree, group 14–12 at 0.05 ppm (tree nuts). The U.S. tolerance for pepper/eggplant subgroup 8–10B at 0.5 ppm is harmonized with the Codex MRL on pepper. It is not possible to harmonize with the Codex MRLs of all commodities in the subgroup, including eggplant at 0.3 ppm and dried chili peppers at 5 ppm.

The Codex has established an MRL for bifenthrin in or on grape at 0.3 ppm. The Agency is establishing the tolerance in or on fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.3 ppm (rather than at 0.2 ppm, the existing U.S. tolerance on grape) to harmonize with the Codex MRL on grape.

The Canadian MRL for bifenthrin in or on pear is 0.9 ppm and there are no Codex MRLs for the commodities in the pome fruit crop group. EPA is establishing the U.S. tolerance for fruit, pome, group 11–10, except mayhaw at 0.9 ppm (rather than at the request level of 0.70 ppm based on submitted residue data and the existing U.S. tolerance for

pear) to harmonize with the Canadian MRL.

EPA is establishing the tolerance for tomato subgroup 8–10A at 0.3 ppm (rather than at 0.15 ppm, the existing U.S. tolerance on tomato) to harmonize with the Codex MRL of 0.3 ppm in/on tomato. Additionally, EPA is establishing the tolerance for *Brassica,* leafy greens, subgroup 4–16B at 4 ppm (rather than at 3.5 ppm, the existing U.S. tolerance on *Brassica,* leafy greens, subgroup 5B) to harmonize with the Codex MRL of 4 ppm in/on mustard greens.

It is not possible to harmonize the U.S. tolerance for Berry, low growing, subgroup 13–07G at 3 ppm with the Codex MRL for strawberry at 1 ppm. Reducing the U.S. tolerance would put U.S. growers at risk of having violative residues despite legal use of the pesticide according to the label.

C. Revisions to Petitioned-For Tolerances

EPA is establishing the tolerance at different levels than requested for: Apple, wet pomace; avocado; berry, low growing, subgroup 13–07G; *Brassica,* leafy greens, subgroup 4–16B; caneberry subgroup 13–07A; fruit, pome, group 11–10, except mayhaw; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F; peach subgroup 12–12B; pepper/eggplant subgroup 8–10B; pomegranate; sunflower (crop subgroup 20B) and tomato subgroup 8–10A.

All trailing zeroes have been removed from the proposed tolerances to be consistent with Organization for Economic Cooperation and Development (OECD) Rounding Class Practice. In addition, the proposed apple, wet pomace tolerance of 1.3 ppm has been established at 1.5 ppm because the value determined is rounded following the OECD rounding class practice.

To harmonize with the applicable international MRLs, the tolerances for fruit, pome, group 11–10, except mayhaw; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F; and tomato subgroup 8–10A were established at higher limits than what was proposed.

The petitioner withdrew the change to the use pattern that would have necessitated the change to the tolerance for *Brassica,* leafy greens, subgroup 4–16B from 3.5 ppm to 15 ppm. EPA is establishing the tolerance for *Brassica,* leafy greens, subgroup 4–16B at 4 ppm, based on the crop group conversion of the established tolerance on *Brassica,* leafy greens, subgroup 5B and adjusting it to harmonize with the Codex MRL for mustard greens.

The commodity definition for sunflower (crop subgroup 20B) has been revised to sunflower subgroup 20B and the proposed tolerance at 0.01 has been established at 0.05 based on the current enforcement method limit of quantitation (LOQ).

D. International Trade Considerations

In this rule, EPA is establishing a lower tolerance for bifenthrin residues in or on groundcherry than the current tolerance. The current tolerance for groundcherry is 0.5 ppm, but groundcherry is a commodity in the proposed crop group expansion from tomato to tomato subgroup 8–10A, for which EPA is establishing a new tolerance in this rulemaking at 0.3 ppm. As a result, EPA intends for the allowable residues on groundcherry to be reduced. As discussed in EPA's crop grouping rulemaking, EPA has determined that groundcherry is similar to tomatoes and appropriately categorized in subgroup 8–10A. *See* 72 FR 69150 (Dec. 7, 2007). Based on residue data supporting the 0.3 ppm tolerance for subgroup 8–10A and the similarity of groundcherry to tomatoes, EPA concludes that it is appropriate to reduce the tolerance on groundcherry as well.

In accordance with the World Trade Organization's (WTO) Sanitary and Phytosanitary Measures (SPS) Agreement, EPA intends to notify the WTO of the changes to these tolerances in order to satisfy its obligations under the Agreement. In addition, the SPS Agreement requires that Members provide a ''reasonable interval'' between the publication of a regulation subject to the Agreement and its entry into force to allow time for producers in exporting Member countries to adapt to the new requirement. Accordingly, EPA is establishing an expiration date for the existing tolerance to allow this tolerance to remain in effect for a period of six months after the effective date of this final rule. After the six-month period expires, this tolerance will be reduced or revoked, as indicated in the regulatory text, and allowable residues on groundcherry must conform to the tolerance for subgroup 8–10A.

This reduction in tolerance level is not discriminatory; the same food safety standard contained in the FFDCA applies equally to domestically produced and imported foods. The new tolerance level is supported by available residue data.

V. Conclusion

Tolerances are established for residues of bifenthrin, (2-methyl [1,1′-biphenyl]-3-yl) methyl-3-(2-chloro-3,3,3,-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate, in or on apple, wet pomace at 1.5 ppm; avocado at 0.5 ppm; berry, low growing, subgroup 13–07G at 3 ppm; *Brassica,* leafy greens, subgroup 4–16B at 4 ppm; caneberry subgroup 13–07A at 1 ppm; fruit, citrus, group 10–10 at 0.05 ppm; fruit, pome; group 11–10, except mayhaw at 0.9 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.3 ppm; nut, tree, group 14–12 at 0.05 ppm; peach subgroup 12–12B at 0.7 ppm; pepper/eggplant subgroup 8–10B at 0.5 ppm; pomegranate at 0.5 ppm; sunflower subgroup 20B at 0.05 ppm; and tomato subgroup 8–10A at 0.3 ppm.

The following tolerances are removed as unnecessary due to the establishment of the above tolerances: *Brassica,* leafy greens, subgroup 5B at 3.5 ppm; caneberry subgroup 13A at 1.0 ppm; eggplant at 0.05 ppm; fruit, citrus, group 10 at 0.05 ppm; grape at 0.2 ppm; nut, tree, group 14 at 0.05 ppm; okra at 0.50 ppm; pear at 0.5 ppm; pepino at 0.5 ppm; pepper, bell at 0.5 ppm; pepper, nonbell at 0.5 ppm; pistachio at 0.05 ppm; strawberry at 3.0 ppm; tomato at 0.15 ppm; and turnip, greens at 3.5 ppm.

Additionally, the following Section 18 time-limited tolerances are removed as unnecessary due to the establishment of the above permanent tolerances: Apple at 0.5 ppm; avocado at 0.50 ppm; nectarine at 0.5 ppm; peach at 0.5 ppm; and pomegranate at 0.50 ppm.

Finally, EPA is setting a six-month expiration date for the current groundcherry tolerance at 0.5 ppm.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in response to petitions submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), nor is it considered a regulatory action under Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action

does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: November 10, 2021.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

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

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

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

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

■ 2. Amend § 180.442 by:

■ a. In the table in paragraph (a)(1)

■ i. Adding in alphabetical order the commodities: ''Apple, wet pomace''; ''Avocado''; ''Berry, low growing, subgroup 13–07G''; ''*Brassica,* leafy greens, subgroup 4–16B'';

■ ii Removing the commodities: ''*Brassica,* leafy greens, subgroup 5B''; ''Caneberry subgroup 13A''; ''Caneberry subgroup 13–07A'';

■ iv. Removing the commodities ''Eggplant''; ''Fruit, citrus, group 10'';

■ v. Adding in alphabetical order the commodities ''Fruit, citrus, group 10–10''; ''Fruit, pome, group 11–10, except mayhaw''; ''Fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F'';

■ vi. Removing the commodity ''Grape'';

■ vii. Revising the entry for ''Groundcherry''

■ viii. Removing the commodity ''Nut, tree, group 14'';

■ ix. Adding in alphabetical order the commodity ''Nut, tree, group 14–12'';

■ x. Removing the commodity ''Okra'';

■ xi. Adding in alphabetical order the commodity ''Peach subgroup 12–12B''

■ xii. Removing the commodities ''Pear''; ''Pepino''; ''Pepper, bell''; ''Pepper, nonbell'';

■ xiii. Adding in alphabetical order the commodity ''Pepper/eggplant subgroup 8–10B'';

■ xiv. Removing the commodity ''Pistachio''

■ xv, Adding in alphabetical order the commodity ''Pomegranate'';

■ xvi. Removing the commodity ''Strawberry'';

■ xvii. Adding in alphabetical order the commodity ''Sunflower subgroup 20B'';

■ xviii. Removing the commodity ''Tomato'';

■ xix. Adding in alphabetical order the commodity ''Tomato subgroup 8–10A''; and

■ xx. Removing the commodity ''Turnip, greens''.

■ b. Remove and reserve paragraph (b).

The additions and revisions read as follows.

§ 180.442 Bifenthrin; tolerances for residues.

(a)(1) * * *

Commodity	Parts per million
* * * * * * *	
Apple, wet pomace	1.5
* * * * * * *	
Avocado	0.5
* * * * * * *	
Berry, low growing, subgroup 13–07G	3
* * * * * * *	
Brassica, leafy greens, subgroup 4–16B	4
* * * * * * *	
Caneberry subgroup 13–07A	1

Commodity	Parts per million
* * * * * * *	
Fruit, citrus, group 10–10	0.05
Fruit, pome, group 11–10, except mayhaw	0.9
Fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F	0.3
* * * * * * *	
Groundcherry [2]	0.5
* * * * * * *	
Nut, tree, group 14–12	0.05
* * * * * * *	
Peach subgroup 12–12B	0.7
* * * * * * *	
Pepper/eggplant subgroup 8–10B	0.5
Pomegranate	0.5
* * * * * * *	
Sunflower subgroup 20B	0.05
* * * * * * *	
Tomato subgroup 8–10A	0.3
* * * * * * *	

[1] There are no U.S. registrations.
[2] This tolerance expires on June 1, 2022.

* * * * *

[FR Doc. 2021–25091 Filed 11–30–21; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 272

[EPA–R06–RCRA–2020–0261; FRL–9240–02–R6]

Louisiana: Incorporation by Reference of Approved State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule codifies in the regulations the prior approval of Louisiana's hazardous waste management program and incorporates by reference authorized provisions of the State's statutes and regulations. The Environmental Protection Agency (EPA) uses the regulations entitled ''Approved State Hazardous Waste Management Programs'' to provide notice of the authorization status of State programs and to incorporate by reference those provisions of the State statutes and regulations that are authorized and that EPA will enforce under the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act (RCRA). The EPA previously provided notices and opportunity for comments on the Agency's decisions to authorize the State of Louisiana program and the EPA is not now reopening the decisions, nor requesting comments, on the Louisiana authorizations as previously published in the **Federal Register** documents specified in Section I.C of this final rule document.

DATES: This regulation is effective January 3, 2022. The Director of the Federal Register approves this incorporation by reference as of January 3, 2022, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–RCRA–2020–0261. All documents in the docket are listed in the *https://www.regulations.gov* index. Although listed in the index, some of the information is not publicly available. *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically through *https://www.regulations.gov.* For alternative access to docket materials, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Alima Patterson, EPA Region 6 Regional Authorization/Codification Coordinator, RCRA Permit Section (LCR–RP), Land, Chemicals and Redevelopment Division, EPA Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270, phone number: (214) 665–8533, email address: *patterson.alima@epa.gov.* The EPA Region 6 office is open from 8:30 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19.

SUPPLEMENTARY INFORMATION:

I. Incorporation by reference

A. What is codification?

Codification is the process of placing a State's statutes and regulations that comprise the State's authorized hazardous waste management program into the Code of Federal Regulations (CFR). Section 3006(b) of RCRA, as amended, allows the EPA to authorize State hazardous waste management programs to operate in lieu of the Federal hazardous waste management regulatory program. The EPA codifies its authorization of State programs in 40 CFR part 272 and incorporates by reference State statutes and regulations that the EPA will enforce under sections 3007 and 3008 of RCRA and any other applicable statutory provisions.

The incorporation by reference of State authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the authorized State program and State requirements that can be

Federally enforced. This effort provides clear notice to the public of the scope of the authorized program in each State.

B. Why wasn't there a proposed rule before this rule?

The EPA is publishing this rule to codify Louisiana's authorized hazardous waste management program without a prior proposal because we believe this action is not controversial. The reason being that, in accordance with section 3006(b) of RCRA, EPA has already evaluated the State's regulatory and statutory requirements and has determined that the State's program meets the statutory and regulatory requirements established by RCRA. The EPA previously provided notices and opportunity for comments on the Agency's decisions to authorize the Louisiana program. The EPA is not now reopening the decisions, nor requesting new comments, on the Louisiana authorizations as previously published in the **Federal Register** documents specified in Section I.C of this final rule document. The previous authorizations form the basis for the codification addressed in this final rule.

C. What is the history of the authorization and codification of Louisiana's hazardous waste management program?

The State of Louisiana initially received final authorization on January 24, 1985, effective February 7, 1985 (50 FR 3348), to implement its base Hazardous Waste Management Program. We granted authorization for changes to their program on November 28, 1989 (54 FR 48889) effective January 29, 1990; August 26, 1991 (56 FR 41958), as corrected October 15, 1991 (56 FR 51762) effective October 25, 1991; November 7, 1994 (59 FR 55368) effective January 23, 1995 (Note: On January 23, 1995 (60 FR 4380), the EPA responded to adverse public comments and affirmed the effective date for the November 7, 1994 final rule. Then on April 11, 1995 (60 FR 18360); the EPA also made administrative corrections for the January 23, 1995 **Federal Register** document); December 23, 1994 (59 FR 66200) effective March 8, 1995; October 17, 1995 (60 FR 53704 and 60 FR 53707) effective January 2, 1996; March 28, 1996 (61 FR 13777) effective June 11, 1996; December 29, 1997 (62 FR 67572 and 62 FR 67578) effective March 16, 1998; October 23, 1998 (63 FR 56830) effective December 22, 1998; August 25, 1999 (64 FR 46302) effective October 25, 1999; September 2, 1999 (64 FR 48099) effective November 1, 1999; February 28, 2000 (65 FR 10411) effective April 28, 2000; January 2, 2001 (66 FR 23) effective March 5, 2001; December 9, 2003 (68 FR 68526) effective February 9, 2004; June 10, 2005 (70 FR 33852) effective August 9, 2005; November 13, 2006 (71 FR 66116) effective January 12, 2007; August 16, 2007 (72 FR 45905) effective October 15, 2007; May 20, 2009 (74 FR 23645) effective July 20, 2009; August 5, 2010 (75 FR 47223) effective October 4, 2010; June 24, 2011 (76 FR 37021) effective August 23, 2011; June 28, 2012 (77 FR 38530) effective August 27, 2012; July 13, 2012 (77 FR 41292) effective September 11, 2012; September 25, 2013 (78 FR 58890) effective November 25, 2013; September 14, 2015 (80 FR 55032) effective November 13, 2015; October 21, 2016 (81 FR 72730) effective December 20, 2016, July 13, 2017 (82 FR 32253) effective September 11, 2017, and December 26, 2018 (83 FR 66143) effective December 26, 2018.

The EPA incorporated by reference Louisiana's then authorized hazardous waste management program effective March 16, 1998 (62 FR 67578), October 4, 2010 (75 FR 47223), September 11, 2012 (77 FR 41292), November 25, 2013 (78 FR 58890), and December 20, 2016 (81 FR 72730).

In this document, the EPA is revising Subpart T of 40 CFR part 272 to include the authorization revision actions effective September 11, 2017 (82 FR 32253) and December 26, 2018 (83 FR 66143).

D. What codification decisions have we made in this rule?

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference of the authorized hazardous waste management program of the State of Louisiana. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Louisiana rules described in the amendments to 40 CFR part 272 set forth in section 272.951. The EPA has made, and will continue to make, these documents available electronically through *https://www.regulations.gov* and in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

The purpose of this **Federal Register** document is to codify the EPA's authorization of Louisiana's base hazardous waste management program and the State's revisions to that program. The document incorporates by reference Louisiana's hazardous waste statutes and regulations and clarifies which of these provisions are included in the authorized and Federally enforceable program. By codifying Louisiana's authorized program and by amending the CFR, the public will be more easily able to discern the status of Federally-approved requirements of the Louisiana hazardous waste management program.

The EPA is incorporating by reference the Louisiana authorized hazardous waste program in Subpart T of 40 CFR part 272. Section 272.951(c)(1) incorporates by reference Louisiana's authorized hazardous waste statutes and regulations. Section 272.951 also references material which is not being incorporated by reference, but which the EPA considered in determining the adequacy of Louisiana's program. Section 272.951(c)(2) references sections of the Louisiana statutes which provide the legal basis for the State's implementation of the hazardous waste management program. In addition, §§ 272.951(c)(5), (6), and (7) reference the Memorandum of Agreement, the Attorney General's Statements, and the Program Description, respectively. These documents are evaluated as part of the approval process of the hazardous waste management program in accordance with subtitle C of RCRA but are not part of the material to be incorporated by reference.

State provisions that are ''broader in scope'' than the Federal program are not incorporated by reference in 40 CFR part 272. For reference and clarity, the EPA lists in 40 CFR 272.951(c)(3) the Louisiana statutory and regulatory provisions that are ''broader in scope'' than the Federal program, and which are not part of the authorized program being incorporated by reference. While ''broader in scope'' provisions are not part of the authorized program and cannot be enforced by the EPA, the State may enforce such provisions under State law. At 40 CFR 272.951(c)(4), EPA lists amendments to Louisiana regulations and Federal rules which are not part of the Louisiana authorized program.

E. What is the effect of Louisiana's codification on enforcement?

The EPA retains its authority under statutory provisions, including but not limited to, RCRA sections 3007, 3008, 3013, and 7003, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions and to issue orders in authorized States. With respect to these actions, the EPA will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than any authorized State analogs to these provisions. Therefore, the EPA is not incorporating by reference such particular, approved Louisiana procedural and enforcement authorities. Section 272.951(c)(2) of 40 CFR lists the

statutory and regulatory provisions which provide the legal basis for the State's implementation of the hazardous waste management program, as well as those procedural and enforcement authorities that are part of the State's approved program, but these are not incorporated by reference.

F. What State provisions are not part of the codification?

The public needs to be aware that some provisions of Louisiana's hazardous waste management program are not part of the Federally authorized State program. These non-authorized provisions include:

(1) Provisions that are not part of the RCRA subtitle C program because they are ''broader in scope'' than RCRA subtitle C (see 40 CFR 271.1(i));

(2) Federal rules adopted by Louisiana but for which the State is not authorized; and

(3) Unauthorized amendments to authorized State provisions.

State provisions that are ''broader in scope'' than the Federal program are not part of the RCRA authorized program and the EPA will not enforce them. Therefore, they are not incorporated by reference in 40 CFR part 272. For reference and clarity, 40 CFR 272.951(c)(3) lists the Louisiana regulatory provisions which are ''broader in scope'' than the Federal program and which are not part of the authorized program being incorporated by reference. ''Broader in scope'' provisions cannot be enforced by the EPA; the State, however, may enforce such provisions under State law.

Additionally, Louisiana's hazardous waste regulations include amendments which have not been authorized by the EPA. Since the EPA cannot enforce a State's requirements which have not been reviewed and authorized in accordance with RCRA section 3006 and 40 CFR part 271, it is important to be precise in delineating the scope of a State's authorized hazardous waste program. Regulatory provisions that have not been authorized by the EPA include amendments to previously authorized State regulations as well as certain Federal rules.

Louisiana has adopted but is not authorized for Federal rules published in the **Federal Register** on July 14, 1986 (51 FR 25422, HSWA provisions only); August 8, 1986 (51 FR 28664); December 1, 1987 (52 FR 45788, requirements addressing Corrective Action for Injection Wells and Post-Closure Permits); and December 17, 2010 (75 FR 78915). In those instances where Louisiana has made unauthorized amendments to previously authorized sections of State code, the EPA is identifying in 40 CFR 272.951(c)(4)(iii) any regulations which, while adopted by the State and incorporated by reference, include language not authorized by the EPA. Those unauthorized portions of the State regulations are not Federally enforceable. Thus, notwithstanding the language in Louisiana hazardous waste regulations incorporated by reference at 40 CFR 272.951(c)(1), the EPA will only enforce those portions of the State regulations that are actually authorized by the EPA. For the convenience of the regulated community, the actual State regulatory text authorized by the EPA for the citations listed at 272.951(c)(4)(ii) (*i.e.,* without the unauthorized amendments) is compiled as a separate document, *Addendum to the EPA-Approved Louisiana Regulatory Requirements Applicable to the Hazardous Waste Management Program, dated December, 2018.* This document is available electronically through *https://www.regulations.gov,* and from EPA Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75207, Phone number: (214) 665–8533.

State regulations that are not incorporated by reference in this rule at 40 CFR 272.951(c)(1), or that are not listed in 40 CFR 272.951(c)(2) (''legal basis for the State's implementation of the hazardous waste management program''), 40 CFR 272.951(c)(3) (''broader in scope''), or 40 CFR 272.951(c)(4) (''unauthorized state amendments''), are considered new unauthorized State requirements. These requirements are not Federally enforceable. After review and analysis of the State's regulations, the EPA has notified the State to seek authorization for the unauthorized rules that the State has adopted and are documented in this **Federal Register** document. The EPA expects the State to include these rules as part of their next Program Revision Application package.

With respect to any requirement pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) for which the State has not yet been authorized, the EPA will continue to enforce the Federal HSWA standards until the State is authorized for these provisions.

G. What will be the effect of Federal HSWA requirements on the codification?

The EPA is not amending 40 CFR part 272 to include HSWA requirements and prohibitions that are implemented by the EPA. Section 3006(g) of RCRA provides that any HSWA requirement or prohibition (including implementing regulations) takes effect in authorized and not authorized States at the same time. A HSWA requirement or prohibition supersedes any less stringent or inconsistent State provision which may have been previously authorized by the EPA (50 FR 28702, July 15, 1985). The EPA has the authority to implement HSWA requirements in all States, including authorized States, until the States become authorized for such requirement or prohibition. Authorized States are required to revise their programs to adopt the HSWA requirements and prohibitions, and then to seek authorization for those revisions pursuant to 40 CFR part 271.

Instead of amending the 40 CFR part 272 every time a new HSWA provision takes effect under the authority of RCRA section 3006(g), the EPA will wait until the State receives authorization for its analog to the new HSWA provision before amending the State's 40 CFR part 272 incorporation by reference. Until then, persons wanting to know whether a HSWA requirement or prohibition is in effect should refer to 40 CFR 271.1(j), as amended, which lists each such provision.

Some existing State requirements may be similar to the HSWA requirement implemented by the EPA. However, until the EPA authorizes those State requirements, the EPA can only enforce the HSWA requirements and not the State analogs. The EPA will not codify those State requirements until the State receives authorization for those requirements.

II. Statutory and Executive Order Reviews

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). This action incorporates by reference Louisiana's authorized hazardous waste management regulations, and imposes no additional requirements beyond those imposed by State law. Therefore, this action is not subject to review by OMB. This action is not an Executive Order 13771 (82FR 9339, February 3, 2017) regulatory action because actions such as this codification of Louisiana's revised hazardous waste program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action 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.*). Because this action incorporates by reference pre-existing requirements

under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely authorizes and incorporates by reference existing State requirements as part of the State RCRA hazardous waste management program without altering the relationship or the distribution of power and responsibilities established by RCRA.

This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA section 3006(b), EPA grants a State's application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a State authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. The requirements being codified are the result of Louisiana's voluntary participation in the EPA's State program authorization process under RCRA Subtitle C. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). ''Burden'' is defined at 5 CFR 1320.3(b).

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Because this rule codifies pre-existing State rules which are at least equivalent to, and no less stringent than existing Federal requirements, and imposes no additional requirements beyond those imposed by State law, and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898.

The Congressional Review Act, 5 U.S.C. 801–808, 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. The EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 272

Environmental protection, Hazardous waste, Hazardous materials transportation, Incorporation by reference, Intergovernmental relations, Water pollution control, Water supply.

Authority: This action is issued under the authority of Sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926 and 6974(b).

Dated: November 5, 2021.

David Gray,

Acting Regional Administrator, Region 6.

For the reasons set forth in the preamble, under the authority at 42 U.S.C. 6912(a), 6926, and 6974(b), the EPA is amending 40 CFR part 272 as follows.

PART 272—APPROVED STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

■ 1. The authority citation for part 272 continues to read as follows:

Authority: Sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

■ 2. Revise § 272.951 to read as follows:

§ 272.951 Louisiana State-Administered Program: Final Authorization.

(a) *History of the State of Louisiana authorization.* Pursuant to section 3006(b) of RCRA, 42 U.S.C. 6926(b), the EPA granted Louisiana final authorization for the following elements as submitted to EPA in Louisiana's base program application for final authorization which was approved by EPA effective on February 7, 1985. Subsequent program revision applications were approved effective on January 29, 1990; October 25, 1991 as corrected October 15, 1991; January 23, 1995 as corrected April 11, 1995; March 8, 1995; January 2, 1996; June 11, 1996; March 16, 1998; December 22, 1998; October 25, 1999; November 1, 1999; April 28, 2000; March 5, 2001; February 9, 2004; August 9, 2005; January 12, 2007; October 15, 2007; July 20, 2009; October 4, 2010; August 23, 2011; August 27, 2012; September 11, 2012; November 25, 2013; November 13, 2015; December 20, 2016; September 11, 2017; and December 26, 2018.

(b) *Enforcement authority.* The State of Louisiana has primary responsibility for enforcing its hazardous waste management program. However, EPA retains the authority to exercise its inspection and enforcement authorities in accordance with sections 3007, 3008, 3013, 7003 of RCRA, 42 U.S.C. 6927, 6928, 6934, 6973, and any other applicable statutory and regulatory provisions, regardless of whether the State has taken its own actions, as well as in accordance with other statutory and regulatory provisions.

(c) *State Statutes and Regulations*—(1) *Incorporation by reference.* The Louisiana statutes and regulations cited in paragraph (c)(1)(i) of this section are incorporated by reference as part of the hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.* The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain copies of the Louisiana regulations that are incorporated by reference in this paragraph from the Office of the State Register, P.O. Box

94095, Baton Rouge, LA 70804–9095; Phone number: (225) 342–5015; website: *www.doa.la.gov/Pages/osr/lac/Code.aspx.* The statutes are available from Thomson Reuters, 610 Opperman Drive, Eagan, Minnesota 55123; Phone: 1–888–728–7677; website: *https://legalsolutions.thomsonreuters.com.* You may inspect a copy at EPA Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270 (Phone number (214) 665–8533), or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

(i) The compilation entitled ''EPA-Approved Louisiana Statutory and Regulatory Requirements Applicable to the Hazardous Waste Management Program'', dated December 2018. Only those provisions that have been authorized by EPA are incorporated by reference. Those provisions are listed in appendix A to this part.

(ii) [Reserved]

(2) *Legal basis.* The following provisions provide the legal basis for the State's implementation of the hazardous waste management program, but they are not being incorporated by reference and do not replace Federal authorities:

(i) Louisiana Statutes Annotated, Revised Statutes, 2017 Main Volume (effective April 23, 2017), Volume 17B, Subtitle II of Title 30, Louisiana Environmental Quality Act: Chapter 1, Section 2002; Chapter 2, Sections 2011.A(1), 2011.B and C, 2011.D (except 2011.D(4), (10)–(12), (16), (19), (20), (23) and (25)), 2011.E–G, 2012, 2013, 2014.A (except 2014.A.3), 2014.2, 2017, 2019.A–C, 2020, 2021, 2022.A (except the first sentence of 2022.A(1)); 2022.B and C; 2022.1(B), 2023 (except phrase ''Except as otherwise provided in this Subsection,'' in 2023.A(1) and 2023.A(2)); 2024, 2025 (except 2025.D, .F(3), .H, and .K), 2026 through 2029, 2033.A–D; Chapter 2–A, Section 2050.8; Chapter 3, Sections 2054.B(1), 2054.B(2)(a); Chapter 9, Sections 2172, 2174, 2175, 2180.A–C, 2181, 2183.C, and .F–.H, 2183.1.B, 2183.2, 2184.B, 2186, 2187, 2188.A and C, 2189.A and B, 2190.A–D, 2191.A–C, 2192, 2193, 2196, 2199, 2200, 2203.B and C, 2204.A(2), A(3) and B; Chapter 13, Sections 2294(6), 2295.C; Chapter 16, Section 2369; Chapter 18, Section 2417.A.

(ii) Louisiana Administrative Code, Title 33, Part I, Office of The Secretary Part I, Subpart 1: Departmental Administrative Procedures: Chapter 5, Sections 501.A, effective October 20, 2007, 501.B, effective October 20, 2005, 502, effective September 20, 2008, and 503 through 511, effective October 20, 2005; Chapter 7, Section 705, effective October 20, 2006; Chapter 19, Sections 1901 through 1909, effective November 20, 2010; Chapter 23, Sections 2303 through 2309, effective October 20, 2009.

(iii) Louisiana Administrative Code, Title 33, Part V, Hazardous Waste and Hazardous Materials, Louisiana Hazardous Waste Regulations, dated January 2018, unless otherwise specified: Chapter 1, Sections 101, 107.A.–.C; Chapter 3, Sections 301, 311.A, 311.C, 315 introductory paragraph, 323.B.3, 323.B.4.d and e; Chapter 5, Section, 503; Chapter 7, Sections 703, 705, 707, 709 through 721; and Chapter 22, Sections 2201.A, 2201.E, 2201.F.

(3) *Related legal provisions.* The following statutory and regulatory provisions are broader in scope than the Federal program, are not part of the authorized program, and are not incorporated by reference:

(i) Louisiana Statutes Annotated, Revised Statutes, 2017 Main Volume (effective April 23, 2017), Volume 17B, Subtitle II of Title 30, Louisiana Environmental Quality Act: Chapter 2, Sections 2014.B and D; Chapter 9, Sections 2178 and 2197.

(ii) Louisiana Administrative Code, Title 33, Part I, Office of The Secretary Part I, Subpart 1: Departmental Administrative Procedures: Chapter 19, Section 1911, effective November 20, 2010.

(iii) Louisiana Administrative Code, Title 33, Part V, Hazardous Waste And Hazardous Materials, Louisiana Hazardous Waste Regulations, dated January 2018, unless otherwise specified: Chapter 1, Sections, 105.D.1.y, 105.O.1.f, 105.O.2.d, 105.R.5, 108.F.5, 108.G.5 and 109 Analogous Product; 109 Analogous Raw Material; 109 Intermediate; Chapter 3, Section 327; Chapter 4, Sections 401 through 409; Chapter 11, Sections 1101.G and 1109.E.7.f; Chapter 13, Section 1313; Chapter 51.

(4) *Unauthorized State amendments and provisions.* (i) Louisiana has adopted but is not authorized to implement the HSWA rules that are listed in the Table in lieu of the EPA. The EPA will enforce the Federal HSWA standards for which Louisiana is not authorized until the State receives specific authorization from EPA.

TABLE 1 TO PARAGRAPH (c)(4)(i)

Federal requirement	**Federal Register** reference	Publication date
Standards for Hazardous Waste Storage and Treatment Tank Systems (HSWA portions) (Rule 28H).	51 FR 25422	July 14, 1986.
Exports of Hazardous Waste (HSWA) (Checklist 31)	51 FR 28664	August 8, 1986.
HSWA Codification Rule 2: Requirements addressing Corrective Action for Injection Wells and Post-Closure Permits (HSWA) (Checklists 44 C and 44G).	52 FR 45788	December 1, 1987.
Removal of Saccharin and its Salts from the Lists of Hazardous Wastes (Non-HSWA) (Checklist 225).	75 FR 78918	December 17, 2010.

(ii) The Federal rules listed in the table below are not delegable to States. Louisiana has adopted these provisions and left the authority to the EPA for implementation and enforcement.

TABLE 2 TO PARAGRAPH (c)(4)(ii)

Federal requirement	**Federal Register** reference	Publication date
Imports and Exports of Hazardous Waste: Implementation of OECD Council Decision (HSWA) (Checklist 152).	61 FR 16290	April 12, 1996.

TABLE 2 TO PARAGRAPH (c)(4)(ii)—Continued

Federal requirement	**Federal Register** reference	Publication date
OECD Requirements; Export Shipments of Spent Lead-Acid Batteries (Non-HSWA) (Checklist 222).	75 FR 1236	January 8, 2010.

(iii) (A) The following authorized provisions of the Louisiana regulations include amendments published in the Louisiana Register that are not approved by EPA. Such unauthorized amendments are not part of the State's authorized program and are, therefore, not Federally enforceable. Thus, notwithstanding the language in the Louisiana hazardous waste regulations incorporated by reference at paragraph (c)(1)(i) of this section, EPA will enforce the State provisions that are actually authorized by EPA. The effective dates of the State's authorized provisions are listed as follows.

TABLE 3 TO PARAGRAPH (c)(4)(iii)(A)

State provision	Effective date of authorized provision
LAC 1111.B.1.c	March 20, 1984.
LAC 1113	March 20, 1984.

(B) The actual State regulatory text authorized by EPA (*i.e.,* without the unauthorized amendments) is available as a separate document, *Addendum to the EPA-Approved Louisiana Regulatory and Statutory Requirements Applicable to the Hazardous Waste Management Program, dated December, 2018.* Copies of the document can be obtained electronically through *https://www.regulations.gov,* and from U.S. EPA Region 6, 1201 Elm Street, Suite 500, Dallas, TX 75207.

(5) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region 6 and the State of Louisiana, signed by the Secretary of the State of Louisiana Department of Environmental Quality (LDEQ) on January 30, 2018 and the EPA Regional Administrator on August 28, 2018 is referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(6) *Statement of Legal Authority.* ''Attorney General's Statement for Final Authorization'', signed by the Attorney General of Louisiana on May 10, 1989 and revisions, supplements and addenda to that Statement dated May 13, 1991, May 3, 1994, December 2, 1994, May 31, 1995, July 24, 1995, November 30, 1995, December 13, 1996, April 15, 1998, January 13, 1999, January 27, 1999, August 19, 1999, August 29, 2000, October 17, 2001, February 25, 2003, December 19, 2005, September 5, 2006, October 9, 2008, January 14, 2010, April 18, 2012, June 11, 2014, July 27, 2016, and July 17, 2017 are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(7) *Program Description.* The Program Description and any other materials submitted as part of the original application or as supplements thereto are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

■ 3. Appendix A to part 272 is amended by revising the listing for ''Louisiana'' to read as follows:

Appendix A to Part 272—State Requirements

* * * * *

Louisiana

The statutory provisions include:

Louisiana Statutes Annotated, Revised Statutes, 2017 Main Volume (effective April 23, 2017), Volume 17B, Subtitle II of Title 30, Louisiana Environmental Quality Act: Chapter 1, Sections 2003, 2004 introductory paragraph, (2)–(4), (7)–(10), (13), (14) (except (14)(b)–(d)), (15), and (18); Chapter 2, Section 2022.A(1), first sentence, 2022.1(A); Chapter 8, Section 2153(1); Chapter 9, Sections 2173 (except 2173(9)), 2183.A, B, D, E, and I, 2183.1.A, 2184.A, 2188.B, 2189.C, 2202, 2203.A, 2204.A(1) and C; Chapter 13, Sections 2295.A and B; Chapter 18, Section 2417.E(5).

Copies of the Louisiana statutes that are incorporated by reference are available from Thomson Reuters, 610 Opperman Drive, Eagan, Minnesota 55123; Phone: 1–888–728–7677; website: *https://legalsolutions.thomsonreuters.com.*

The regulatory provisions include:

Louisiana Administrative Code, Title 33, Part V, Hazardous Waste and Hazardous Materials, Louisiana Hazardous Waste Regulations, Part V, Subpart 1: Department of Environmental Quality—Hazardous Waste, dated January 2018.

Chapter 1—General Provisions and Definitions, Sections 103; 105 (except 105.D.1.y, 105.O.1.f, 105.O.2.d, 105.P, and 105.R.5); 108 (except 108.F.5 and 108.G.5); 109 (except ''Analogous Product'', ''Analogous Raw Material'', ''Batch Tank'', ''Competent Authorities'', ''Concerned Countries'', ''Consignee'', ''Continuous-Flow Tank'', ''Country of Export'', ''Country of Import'', ''Country of Transit'', ''EPA Acknowledgement of Consent'', ''Exporter'', ''Exporting Country'', ''Importer'', ''Importing Country'', ''Intermediate'', ''OECD'', ''Organization for Economic Cooperation and Development (OECD) Area'', ''Primary Exporter'', ''Receiving Country'', ''Recognized Trader'', ''Recovery Facility'', ''Recovery Operations'', ''Transboundary Movement'', and ''Transit Country''); 110 (except 110.G.1 and reserved provisions); 111;

Chapter 3—General Conditions for Treatment, Storage, and Disposal Facility Permits, Sections 303; 305 (except 305.F and .G); 307; 309; 311 (except 311.A and .C); 313; 315.A–.D; 317; 319; 321; 322 (except 322.D.1.g); 323 (except 323.B.3, .B.4.d and .e); 325; 329;

Chapter 5—Permit Application Contents, Sections 501; 505 through 516; 517 (except the following phrases in 517.V: ''or 2271, or a determination made under LAC 33:V.2273,'' and, ''or a determination''); 519 through 528; 529 (except 529.E introductory paragraph through .E.3); 530 through 536; 537 (except reserved provision); 540 through 699;

Chapter 7—Administrative Procedures for Treatment, Storage, and Disposal Facility Permits, Sections 701; 706; 708;

Chapter 11—Generators, Sections 1101 (except 1101.B and .G); 1103; 1105; 1107 (except reserved provision); 1109 (except E.7.f and reserved provision); 1111.A, 1111.B.1 introductory paragraph (except the phrase ''to a treatment, storage, or disposal facility within the United States''), 1111.B.1.a.–.c, 1111.B.1.d (except the phrase ''within the United States''), 1111.B.1.e

(except the phrase ''within the United States''), 1111.B.1.f.–.h, 1111.B.2 (except the phrase ''for a period of at least three years from the date of the report'' and the third and fourth sentences), 1111.C–.E; 1113; 1121; 1199 Appendix A;

Chapter 13—Transporters, Sections 1301 (except 1301.F); 1303; 1305; 1307.A introductory paragraph (except the third sentence), 1307.B, 1307.C (except the last sentence), 1307.D, 1307.E (except the phrase ''and, for exports, an EPA Acknowledgment of Consent'' at 1307.E.2), 1307.F (except the phrase ''and, for exports, an EPA Acknowledgment of Consent'' at 1307.F.2), 1307.G (except 1307.G.4), 1307.H–.N; 1309, 1311, 1315 through 1323;

Chapter 15—Treatment, Storage, and Disposal Facilities, Sections 1501 (except reserved provision); 1503 through 1515; 1516 (except 1516.B.4); 1517 through 1529; 1531 (except 1531.B); 1533; 1535;

Chapter 17—Air Emission Standards, Sections 1701 through 1767; 1799, Appendix Table 1;

Chapter 18—Containment Buildings, Sections 1801; 1802; 1803 (except 1803.B.2);

Chapter 19—Tanks, Sections 1901 through 1907 (except 1907.E.1.e & .f, .E.2.d, .J, and .K), 1909.A–C, 1911 through 1921;

Chapter 20—Integration with Maximum Achievable Control Technology (MACT), Section 2001;

Chapter 21—Containers, Sections 2101 through 2119;

Chapter 22—Prohibitions on Land Disposal, Sections 2201.B–.D, 2201.G (except reserved provision), 2201.H, 2201.I; 2203.A (except ''Cone of Influence'', ''Confining Zone'', ''Formation'', ''Injection Interval'', ''Injection Zone'', ''Mechanical Integrity'', ''Transmissive Fault or Fracture'', ''Treatment'', and ''Underground Source of Drinking Water''), 2203.B; 2205 (except the phrase ''or a determination made under LAC 33:V.2273,'' in 2205.D); 2207; 2208; 2209 (except the phrase ''or a determination made under LAC 33:V.2273,'' in 2209.D.1); 2211; 2213; 2215; 2216 (except the phrase ''or 2271'' in 2216.E.2); 2218 (except the phrase ''or 2271'' in 2218.B.2); 2219; 2221.D–.F; 2223; 2227 (except reserved provision); 2230; 2231.G–.M; 2233; 2236; 2237; 2245 (except 2245.J and .K); 2246; 2247 (except 2247.G and .H); 2299 Appendix (except Tables 4 (Reserved) and 12 (Repealed));

Chapter 23—Waste Piles, Sections 2301 through 2313; 2315 (except the word ''either'' at the end of 2315.B introductory paragraph; the word ''or'' at the end of 2315.B.1; and 2315.B.2); 2317;

Chapter 24—Hazardous Waste Munitions and Explosives Storage, Sections 2401 through 2405;

Chapter 25—Landfills, Sections 2501 through 2523;

Chapter 26—Corrective Action Management Units and Temporary Units, Sections 2601 through 2607;

Chapter 27—Land Treatment, Sections 2701 through 2723;

Chapter 28—Drip Pads, Sections 2801 through 2807; 2809 (except the word ''either'' at the end of 2809.B introductory paragraph; the word ''or'' at the end of 2809.B.1; and 2809.B.2);

Chapter 29—Surface Impoundments, Sections 2901 through 2909; 2911 (except the word ''either'' at end of 2911.B introductory paragraph; and 2911.B.1); 2913 through 2919;

Chapter 30—Hazardous Waste Burned in Boilers and Industrial Furnaces, Sections 3001 through 3007; 3009 (except reserved provision); 3011 through 3025; 3099 Appendices A through L;

Chapter 31—Incinerators, Sections 3101 through 3121;

Chapter 32—Miscellaneous Units, Sections 3201; 3203; 3205; 3207 (except 3207.C.2);

Chapter 33—Groundwater Protection, Sections 3301 through 3321; 3322 (except 3322.D); 3323; 3325 and Table 4;

Chapter 35—Closure and Post-Closure, Sections 3501 through 3505; 3507 (except 3507.B); 3509 through 3519; 3521 (except 3521.A.3); 3523 through 3527;

Chapter 37—Financial Requirements, Sections 3701 through 3719;

Chapter 38—Universal Wastes, Sections 3801 through 3811; 3813 (except ''Mercury-containing lamp''); 3815 through 3833; 3835 (except the phrase '', other than to those OECD countries . . . requirements of LAC 33:V.Chapter 11.Subchapter B),'' at 3835.A introductory paragraph); 3837 through 3855; 3857 (except the phrase '', other than to those OECD countries . . . requirements of LAC 33:V.Chapter 11.Subchapter B),'' at 3857.A introductory paragraph); 3859 through 3869; 3871 (except the phrase ''other than to those OECD countries . . . requirements of LAC 33:V.Chapter 11.Subchapter B)'' at 3871.A introductory paragraph); 3873 through 3877; 3879 (except 3879.B); 3881; 3883;

Chapter 40—Used Oil, Sections 4001 through 4093;

Chapter 41—Recyclable Materials, Sections 4101; 4105 (except 4105.A.1.a.i and ii; and 4105.A.4); 4139; 4141; 4143 (except the word ''and'' at the end of 4143.B.4; and 4143.B.5); 4145;

Chapter 42—Conditional Exemption for Low-Level Mixed Waste Storage and Disposal, Sections 4201 through 4243;

Chapter 43—Interim Status, Sections 4301 through 4371; 4373 (except the last two sentences ''The administrative authority . . . as demonstrated in accordance with LAC 33:I.Chapter 13.'' in 4373.K.1); 4375; 4377; 4379 (except 4379.B); 4381 through 4387; 4389 (except 4389.C); 4391 through 4397; 4399; 4401 through 4413; 4417 through 4456, 4457.A (except 4457.A.2), 4457.B (except the phrase: ''If the owner or operator . . . he must'' in the introductory paragraph), 4457.C; 4459 through 4474; 4475 (except the word ''either'' at the end of 4475.B introductory paragraph; the word ''or'' at the end of 4475.B.1; and 4475.B.2); 4476 through 4499; 4501 through 4703; 4705 (except the word ''either'' at the end of 4705.B introductory paragraph; the word ''or'' at the end of 4705.B.1; and 4705.B.2); 4707 through 4739;

Chapter 49—Lists of Hazardous Wastes, Sections 4901; 4903; 4907; 4911 through 4915; 4999, Appendices C through E;

Chapter 53—Military Munitions, Sections 5301 through 5311; Louisiana Administrative Code, Title 33, Part VII, Solid Waste, as amended through June 2011; Sections 301.A.2.a; and 315.J.

Copies of the Louisiana Administrative Code as published by the Office of the State Register, P.O. Box 94095, Baton Rouge, LA 70804–9095; Phone: (225) 342–5015; website: *www.doa.la.gov/Pages/osr/lac/Code.aspx.*

* * * * *

[FR Doc. 2021–25499 Filed 11–30–21; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register

Vol. 86, No. 228

Wednesday, December 1, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–1018; Project Identifier MCAI–2021–00902–R]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus Helicopters Model AS332L2 and EC225LP helicopters. This proposed AD was prompted by a report of loss of tightening torque on the nut that attaches the tail gear box (TGB) bevel wheel. This proposed AD would require repetitive inspections (measurements) of the angular clearances of the TGB, and, depending on the findings, replacement of the TGB with a serviceable TGB, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). This proposed AD would also provide terminating action for certain repetitive inspections. 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 January 18, 2022.

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 EASA material that is proposed for IBR in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find the EASA material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. This material is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1018.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1018; 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 EASA AD, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Andrea Jimenez, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (516) 228–7330; email *andrea.jimenez@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–2021–1018; Project Identifier MCAI–2021–00902–R'' 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 Andrea Jimenez, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (516) 228–7330; email *andrea.jimenez@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0184R1, dated October 8, 2021 (EASA AD 2021–0184R1), to correct an unsafe condition for Airbus Helicopters, formerly Eurocopter, Eurocopter France, Aerospatiale, Model AS 332 L2 and EC 225 LP helicopters, all serial numbers.

This proposed AD was prompted by a report of loss of tightening torque on the nut that attaches the TGB bevel wheel. Additionally, the subsequent investigation highlighted that loss of the tightening torque might lead to degradation of the splines between the

tail rotor shaft and the TGB bevel wheel. The investigation is still on-going to identify the root cause of the tightening torque loss. The FAA is proposing this AD to address loss of tightening torque on the nut that attaches the TGB bevel wheel, which, if not corrected, could lead to structural failure of the TGB drive, resulting in reduced, or loss of, control of the helicopter. See EASA AD 2021–0184R1 for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0184R1 requires repetitive inspections (measurements) of the angular clearances of the TGB, and, depending on the findings, additional repetitive inspections (measurements) of the angular clearances of the TGB at a reduced interval and replacement of the TGB with a serviceable TGB. EASA AD 2021–0184R1 provides terminating action for the repetitive inspections at the reduced interval for a helicopter if, during two consecutive inspections, the value of the measured angular clearance remains unchanged for that helicopter.

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

FAA's Determination

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

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in EASA AD 2021–0184R1, described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2021–0184R1 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2021–0184R1 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2021–0184R1 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2021–0184R1. Service information referenced in EASA AD 2021–0184R1 for compliance will be available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1018 after the FAA final rule is published.

Interim Action

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

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 38 helicopters of U.S. Registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of TGB Clearance	2 work-hours × $85 per hour = $170 per inspection cycle.	$0	$170 per inspection cycle.	$6,460 per inspection cycle.

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Action	Labor cost	Parts cost	Cost per product
Replacement of TGB	33 work-hours × $85 per hour = $2,805.	Up to $410,000	Up to $412,805.

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:

Airbus Helicopters: Docket No. FAA–2021–1018; Project Identifier MCAI–2021–00902–R.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 18, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus Helicopters Model AS332L2 and EC225LP helicopters, certificated in any category.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 6400, Tail Rotor System.

(e) Unsafe Condition

This AD was prompted by a report of loss of tightening torque on the nut that attaches the tail gear box (TGB) bevel wheel. The FAA is issuing this AD to address loss of tightening torque on the nut that attaches the TGB bevel wheel, which, if not corrected, could lead to structural failure of the TGB drive, resulting in reduced, or loss of, control of the helicopter.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2021–0184R1, dated October 8, 2021 (EASA AD 2021–0184R1).

(h) Exceptions to EASA AD 2021–0184R1

(1) Where EASA AD 2021–0184R1 requires compliance in terms of flight hours, this AD requires using hours time-in-service.

(2) Where EASA AD 2021–0184R1 refers to August 19, 2021 (the effective date of EASA AD 2021–0184, dated August 5, 2021), this AD requires using the effective date of this AD.

(3) Where the service information referenced in EASA AD 2021–0184R1 specifies sending parts to the manufacturer or an approved repair station to be examined, this AD does not include that requirement.

(4) This AD does not mandate compliance with the ''Remarks'' section of EASA AD 2021–0184R1.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2021–0184R1 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Special Flight Permit

Special flight permits may be permitted provided that there are no passengers on board.

(k) 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 (l)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

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

(l) Related Information

(1) For EASA AD 2021–0184R1, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. This material may be found in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1018.

(2) For more information about this AD, contact Andrea Jimenez, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (516) 228–7330; email *andrea.jimenez@faa.gov.*

Issued on November 23, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–26037 Filed 11–30–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–1015; Project Identifier 2019–CE–014–AD]

RIN 2120–AA64

Airworthiness Directives; DG Flugzeugbau GmbH and 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 DG Flugzeugbau GmbH Model DG–1000T gliders and Schempp-Hirth Flugzeugbau GmbH Model Duo Discus T gliders with a Solo Kleinmotoren GmbH Solo Model 2350C or 2350D engine installed. This proposed AD was prompted by mandatory continuing airworthiness information (MCAI) issued by the aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as failure of the bearing of the upper pulley of the belt driven reduction gear resulting in separation of the propeller from the engine. This proposed AD would require replacing a certain hex-nut and would establish a lift limit for the ball bearing assembly. 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 January 18, 2022.

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 Solo Kleinmotoren GmbH, Postfach 600152, D71050 Sindelfingen, Germany; phone: +49 703 1301–0; fax: +49 703 1301–136; email: *aircraft@solo-germany.com;* website: *http://aircraft.solo-online.com.* You may view this 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–2021–1015; 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–2021–1015; Project Identifier 2019–CE–014–AD'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this 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 Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0029, dated February 8, 2019 (referred to after this as ''the MCAI''), to address an unsafe condition on Solo Kleinmotoren GmbH Solo Model 2350B, 2350BS, 2350C, and 2350D engines. The MCAI states:

> An occurrence was reported of failure of the bearing of the upper pulley of the belt driven reduction gear, resulting in separation of the propeller from the engine.
>
> This condition, if not corrected, could lead to similar occurrences, with possible reduced control of, and damage to, the aircraft.
>
> To address this potential unsafe condition, Solo redesigned the nut securing the pulley bearing on the axle and introduced a life time limit of 15 years for the reduction gear bearings.
>
> For the reason stated above, this [EASA] AD requires replacement of affected parts with serviceable parts, and introduces a life limit for the affected ball bearings.

You may examine the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1015.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Solo Kleinmotoren GmbH Service Bulletin 4603–18, dated January 22, 2019. The service information contains procedures for replacing the hex-nut at the excentric axle and the ball bearing assemblies at the bearing block of the reduction gear. 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 **ADDRESSES**.

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 in This NPRM

This proposed AD would require removing the affected hex-nut from service and replacing it with a flange-nut. This proposed AD would also establish a lift limit of 15 years for the affected ball bearing assemblies.

Differences Between This Proposed AD and the MCAI or Service Information

The MCAI applies to Solo Kleinmotoren GmbH Solo Model 2350B, 2350BS, 2350C, and 2350D engines. None of these model engines have an FAA engine type certificate. However, Model 2350C and Model 2350D engines are certificated by the FAA with the type certificate for certain gliders. This proposed AD would not apply to Solo Kleinmotoren GmbH Solo Model 2350B and 2350BS engines because they are not part of an FAA glider type design.

The MCAI requires replacing an affected ball bearing assembly before it accumulates 15 years since first installation on an engine. This proposed AD would require replacing both ball bearing assemblies simultaneously before either accumulates 15 years since first installation on an engine.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 10 gliders of U.S. registry. The FAA estimates that for gliders with an affected hex-nut, replacement would take about 0.5 work-hour and require a

part costing $95. The average labor rate is $85 per work-hour. Based on these figures, the FAA estimates the cost to replace the hex-nut on U.S. operators to be $1,380 (assuming all 10 gliders have this configuration) or $138 per glider.

In addition, the FAA estimates that for gliders with the affected ball bearing assemblies, replacement would take about 4 work-hours for both ball bearing assemblies and require ball bearing assemblies costing $118 (2 units). The average labor rate is $85 per work-hour. Based on these figures, the FAA estimates the cost of the ball bearing assembly replacement on U.S. operators to be $4,580 (assuming all 10 gliders have this configuration) or $458 per glider.

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:

DG Flugzeugbau GmbH and Schempp-Hirth Flugzeugbau GmbH Gliders: Docket No. FAA–2021–1015; Project Identifier 2019–CE–014–AD.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 18, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to DG Flugzeugbau GmbH Model DG–1000T gliders and Schempp-Hirth Flugzeugbau GmbH Model Duo Discus T gliders, certificated in any category, with a Solo Kleinmotoren GmbH Solo Model 2350C or 2350D engine, all serial numbers, installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 7200, Engine (Turbine/Turboprop).

(e) Unsafe Condition

This AD was prompted by mandatory continuing airworthiness information (MCAI) issued by the aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as failure of the bearing of the upper pulley of the belt driven reduction gear. The FAA is issuing this AD to prevent separation of the propeller from the engine. The unsafe condition, if not addressed, could result in loss of control of the aircraft.

(f) Compliance

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

(g) Actions and Compliance

(1) Within 12 months after the effective date of this AD, remove the nut installed at the excentric axle from service and replace it with a nut in accordance with the Condition section, paragraph a, of Solo Kleinmotoren GmbH Service Bulletin 4603–18, dated January 22, 2019.

(2) Before either ball bearing assembly at the bearing block of the reduction gear accumulates 15 years since first installation on an engine or within 12 months after the effective date of this AD, whichever occurs later, and thereafter at intervals not to exceed 15 years, remove both ball bearing assemblies from service and replace with new (zero hours time-in-service) ball bearing assemblies in accordance with the Condition section, paragraph b, of Solo Kleinmotoren GmbH Service Bulletin 4603–18, dated January 22, 2019.

(3) After replacing the ball bearing assemblies required by paragraph (g)(2) of this AD, record compliance in the aircraft log book. The entry must include: (1) Reduction gear part number (P/N) and serial number; and (2) date ball bearing assemblies were replaced.

(4) As of the effective date of this AD, do not install a hex-nut P/N 0028143 on any engine.

(5) As of the effective date of this AD, do not install ball bearing assembly P/N 0050110 on any engine unless it is new (zero hours time-in-service).

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(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.

(i) 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 European Aviation Safety Agency (EASA) AD 2019–0029, dated February 8, 2019, 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–2021–1015.

(3) For service information identified in this AD, contact Solo Kleinmotoren GmbH, Postfach 600152, D71050 Sindelfingen, Germany; phone: +49 703 1301–0; fax: +49 703 1301–136; email: *aircraft@solo-germany.com;* website: *http://aircraft.solo-online.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 November 19, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–26042 Filed 11–30–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–1017; Project Identifier AD–2021–00495–A]

RIN 2120–AA64

Airworthiness Directives; True Flight Holdings LLC Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all True Flight Holdings LLC Model AA–1, AA–1A, AA–1B, AA–1C, AA–5, AA–5A, and AA–5B airplanes. This proposed AD was prompted by the report of an accident of an airplane with bondline corrosion and delamination of the horizontal stabilizers. This proposed AD would require inspecting the wings, fuselage, and stabilizers for bondline separation, corrosion, and previous repair. This AD would also require repairing or replacing parts and applying corrosion inhibitor as 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 January 18, 2022.

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 True Flight Holdings LLC, 2300 Madison Highway, Valdosta, GA 31601; phone: (229) 242–6337; email: *info@trueflightaerospace.com.* You may view this 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. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1017.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1017; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Fred Caplan, Aviation Safety Engineer, Atlanta ACO Branch, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (404) 474–5507; fax: (404) 474–5606; email: *frederick.n.caplan@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–2021–1017; Project Identifier AD–2021–00495–A'' 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 Fred Caplan, Aviation Safety Engineer, Atlanta ACO Branch, FAA, 1701 Columbia Avenue, College Park, GA 30337. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA received a report of an accident involving a True Flight Holdings LLC Model AA–5 airplane that occurred on January 19, 2021. During flight, the outboard elevator attach bracket on the horizontal stabilizer detached, causing loss of elevator control, flutter, and significant damage to the airplane. An investigation identified corrosion and delamination of the airplane skin bondlines around the area of the horizontal stabilizer where the elevator attach bracket was attached, as well as on the trailing edge of the elevator trim tab. Field reports have identified additional instances of corrosion and delamination of skin bondlines around the horizontal stabilizer and other primary structures.

Model AA–1, AA–1A, AA–1B, AA–1C, AA–5, AA–5A, and AA–5B airplanes are similar in design and are constructed using a metal-to-metal bonding process. While the bond adhesive remains structurally sound throughout the aging process, factors such as corrosion and freezing moisture may compromise the structural integrity of some of the bond joints. This can lead to delamination of the skin from the primary structure.

Field reports indicate that bondline inspections are not being adequately performed during routine inspections, which emphasize a visual scanning for problem areas. However, damage can exist with no visual indications, and a mechanic might miss damage in a hidden area. The FAA has determined that a more thorough inspection procedure is necessary to reliably identify corrosion and delamination of bondlines in these critical areas.

This condition, if not addressed, could result in reduced structural integrity of the affected airplane component, with consequent loss of

control of the airplane. The FAA is proposing this AD to address the unsafe condition on these products.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed True Flight Aerospace Service Bulletin SB–195, Revision A, dated June 1, 2021 (True Flight SB–195A). This service information specifies procedures for inspecting the primary structure and flight controls for bondline separation and corrosion and repairing or replacing parts and applying corrosion inhibitor as necessary.

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 **ADDRESSES**.

Other Related Service Information

The FAA also reviewed True Flight Aerospace Service Kit 125, Revision B. This service information specifies procedures for repairing bondline delamination of flight controls and structures.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in True Flight SB–195A as already described, except as discussed under ''Differences Between the AD and the Service Information.''

Differences Between This Proposed AD and the Service Information

This proposed AD would only require the Part A inspections, and not the Part B inspection, from True Flight SB–195A. In addition, True Flight SB–195A specifies reporting information to the manufacturer, and this proposed AD would not.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 2,466 airplanes 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 airplane	Cost on U.S. operators
Inspect for delamination and corrosion.	8 work-hours × $85 per hour = $680 per inspection cycle.	Not applicable	$680 per inspection cycle	$1,676,880 per inspection cycle.

The FAA estimates that it would take 3 work-hours at $85 per work-hour to do the proposed corrosion inhibitor treatment. Parts would cost $104 for a total proposed cost of $359 per airplane. In addition, there could be a wide range of areas that may require repair (fuselage, stabilizers, and wings) for the delaminated bondlines and/or corrosion with potential replacement of the entire component. The FAA has no way of determining the number of airplanes that might need these repairs or the exact costs for corrective actions needed as a result of the proposed inspection, as the damage may vary significantly from airplane to airplane.

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:

True Flight Holdings LLC: Docket No. FAA–2021–1017; Project Identifier AD–2021–00495–A.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 18, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to True Flight Holdings LLC Model AA–1, AA–1A, AA–1B, AA–1C, AA–5, AA–5A, and AA–5B airplanes, all serial numbers, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code: 5330, Fuselage Main, Plate/Skin; 5512, Horizontal Stabilizer, Plate/Skin; 5522, Elevator, Plates/Skin Structure; 5532, Vertical Stabilizer, Plates/Skin; 5542, Rudder, Plate/Skin; 5730, Wing, Plates/Skins.

(e) Unsafe Condition

This AD was prompted by corrosion and delamination of the horizontal stabilizer bondlines. The FAA is issuing this AD to detect and address cracks, buckles, corrosion,

delamination, rust, and previous repair of the wings, fuselage, and stabilizers. The unsafe condition, if not addressed, could result in reduced structural integrity of the affected airplane component with consequent loss of control of the airplane.

(f) Compliance

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

(g) Inspection of Bondlines of the Wings, Stabilizers, and Aft Fuselage

Within 100 hours time-in-service after the effective date of this AD or within 12 months after the effective date of this AD, whichever occurs first, and thereafter at intervals not to exceed 12 months, inspect the wings, stabilizers, and aft fuselage for bondline separation, corrosion, and previous repair and take all necessary corrective action before further flight in accordance with paragraphs A.1. through A.7. in True Flight Aerospace Service Bulletin SB–195, Revision A, dated June 1, 2021. Pay particular attention to the areas listed in paragraphs (g)(1) through (3) of this AD.

(1) Bondlines of the horizontal stabilizer outboard rib at the elevator bearing support assembly.

(2) Bondlines of the elevator trim tab inboard rib.

(3) Bondlines and previous repairs of the trailing edges of the elevator trim tabs, elevators, rudder, ailerons, and wings.

(h) Special Flight Permits

Special flight permits are prohibited.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD.

(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 Fred Caplan, Aviation Safety Engineer, Atlanta ACO Branch, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (404) 474–5507; fax: (404) 474–5606; email: *frederick.n.caplan@faa.gov.*

(2) For service information identified in this AD, contact True Flight Holdings LLC, 2300 Madison Highway, Valdosta, GA 31601; phone: (229) 242–6337; email: *info@ trueflightaerospace.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 November 23, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–26041 Filed 11–30–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2021–0985; Airspace Docket No. 21–ASO–28]

RIN 2120–AA66

Proposed Establishment and Proposed Amendment of Class E Airspace; Key Largo, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E surface airspace to accommodate Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAPs) serving Ocean Reef Club Airport. This action also proposes to amend Class E airspace extending upward from 700 feet above the surface for Ocean Reef Club Airport by updating the geographic coordinates of the airport and correcting the descriptor by replacing AL with FL. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

DATES: Comments must be received on or before January 18, 2022.

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 20590–0001; Telephone: (800) 647–5527, or (202) 366–9826. You must identify the Docket No. FAA–2021–0985; Airspace Docket No. 21–ASO–28, 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 Airspace Policy 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: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone (404) 305–6364.

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 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 establish and amend Class E airspace for Ocean Reef Club Airport, Key Largo, FL to support IFR operations in the area.

Comments Invited

Interested persons are invited to comment on 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 (Docket No. FAA–2021–0985 and Airspace Docket No. 21–ASO–28) and be submitted in triplicate to DOT Docket Operations (see **ADDRESSES** section for the address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Persons 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–2021–0985 Docket No. 21–ASO–28.'' The postcard will be date/

time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this document may be changed in light of the 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 NPRMs

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 the **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 between 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays, at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

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.

The Proposal

The FAA proposes an amendment to 14 CFR part 71 to establish Class E surface airspace within a 4.0-mile radius of Ocean Reef Club Airport to accommodate RNAV SIAPs serving the airport.

This action would also amend Class E airspace extending upward from 700 feet above the surface by updating the airport's geographic coordinates to coincide with the FAA's database, and correcting the airspace descriptor by replacing AL with FL.

Class E airspace designations are published in Paragraphs 6002 and 6005, respectively, 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 Class E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

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 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.

Lists 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 6002 Class E Surface Airspace.

* * * * *

ASO FL E2 Key Largo, FL [NEW]
Ocean Reef Club Airport, FL
(Lat. 25°19′28″ N, long. 80°16′33″ W)

That airspace extending upward from the surface within a 4-mile radius of. Ocean Reef Club Airport. This Class E airspace is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASO FL E5 Key Largo, FL [Amended]
Ocean Reef Club Airport, FL
(Lat. 25°19′28″ N, long. 80°16′33″ W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Ocean Reef Club Airport.

Issued in College Park, Georgia, on November 5, 2021.

Earl Newalu,

Manager, Tactical Operations, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2021–26113 Filed 11–30–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

[DOL Docket No. ETA–ETA–2021–0006]

RIN 1205–AC05

Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor (Department or DOL) is proposing to amend its regulations governing the certification of agricultural labor or services to be performed by temporary foreign workers in H–2A nonimmigrant status (H–2A workers). Specifically, the Department proposes to revise the methodology by which it determines the hourly Adverse Effect Wage Rates

(AEWRs) for non-range occupations (*i.e.,* all occupations other than herding and production of livestock on the range) using a combination of wage data reported by the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS) and the Department's Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) survey, formerly the Occupational Employment Statistics (OES) survey prior to March 31, 2021. For the vast majority of H–2A job opportunities represented by six occupations comprising the field and livestock worker (combined) wages reported by USDA, the proposed regulations will rely on the FLS to establish the AEWRs for these occupations in accordance with the methodology used by the Department for nearly all of the last 30 years. For all other occupations and to address circumstances in which the FLS does not report wage data for the field and livestock worker occupations, the Department proposes to use the OEWS survey to establish the AEWRs for each occupation. These proposed regulations are consistent with the Secretary of Labor's (Secretary) statutory responsibility to certify that the employment of H–2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. The Department believes the proposed methodology will strike a reasonable balance between the statute's competing goals of providing employers with an adequate legal supply of agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed.

DATES: Interested persons are invited to submit written comments on the proposed rule on or before January 31, 2022.

ADDRESSES: You may submit comments electronically by the following method:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions on the website for submitting comments.

Instructions: Include the agency's name and docket number ETA–2021–0006 in your comments. All comments received will become a matter of public record and will be posted without change to *https://www.regulations.gov*. Please do not include any personally identifiable or confidential business information you do not want publicly disclosed.

FOR FURTHER INFORMATION CONTACT: Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5311, Washington, DC 20210, telephone: (202) 693–8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory and Regulatory Framework

The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), establishes an ''H–2A'' nonimmigrant visa classification for a worker ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of temporary or a seasonal nature.'' 8 U.S.C. 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. 1184(c)(1), 1188.[1] Among other things, a prospective H–2A employer must first apply to the Secretary for a certification that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition, and (2) the employment of the H–2A workers in such services or labor will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). The INA prohibits the Secretary from issuing this certification—known as a ''temporary labor certification''—unless both of the above referenced conditions are met and none of the conditions in 8 U.S.C. 1188(b) apply concerning strikes or lock-outs, labor certification program debarments, workers'' compensation assurances, and positive recruitment.

The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary, Employment and Training Administration (ETA), who in turn has delegated that authority to ETA's Office of Foreign Labor Certification (OFLC).[2] In addition, the Secretary has delegated to the Wage and Hour Division (WHD) the responsibility under section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to ensure employer compliance with the terms and conditions of employment under the H–2A program.[3]

Since 1987, the Department has operated the H–2A temporary labor certification program under regulations promulgated pursuant to the INA. The standards and procedures applicable to the certification and employment of workers under the H–2A program are found in 20 CFR part 655, subpart B, and 29 CFR part 501.

An employer seeking H–2A workers generally initiates the temporary labor certification process by filing an H–2A Agricultural Clearance Order, Form ETA–790/790A (job order), with the State Workforce Agency (SWA) in the area where it seeks to employ H–2A workers.[4] In preparing the job order and to comply with its wage obligations under 20 CFR 655.122(l), the employer is required to offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage.[5]

With the exception of brief periods under the 2008 Final Rule[6] and 2020 AEWR Final Rule,[7] discussed in more detail below, the Department has established an AEWR using FLS data for each State in the multistate or single-State crop region to which the State belongs since 1987.[8] Currently, pursuant to the 2010 Final Rule,[9] the AEWR for each State or region is published annually as a single average hourly gross wage that is set using the field and livestock workers (combined) data from the FLS, which is conducted by the USDA's National Agricultural

[1] For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

[2] *See* Secretary's Order 06–2010 (Oct. 20, 2010), 75 FR 66268 (Oct. 27, 2010); 20 CFR 655.101.

[3] *See* Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

[4] 20 CFR 655.121.

[5] 20 CFR 655.120(a).

[6] Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement*, 73 FR 77110 (Dec. 18, 2008) (2008 Final Rule).

[7] As discussed in subsequent sections of this preamble, a federal court in *United Farm Workers* v. *Dept of Labor*, No. 20–cv–01690 (E.D. Cal. Dec. 23, 2020), enjoined the Department from further implementing the 2020 AEWR Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States*, 85 FR 70445 (Nov. 5, 2020) (2020 AEWR Final Rule) two days after its effective date of December 21, 2020.

[8] The FLS collects data for workers directly hired by U.S. farms and ranches in each of 15 multistate labor regions, and the single-State regions of California, Florida, and Hawaii. The FLS does not collect data in other locations, for example, Alaska and Puerto Rico, where an employer may seek to employ H–2A workers.

[9] As discussed more fully below, the Department has utilized the methodology set forth in the 2010 Final Rule since March 15, 2010, except for the two-day period of December 21–22, 2020.

Statistics Service (NASS).[10] The current methodology produces a single AEWR for all agricultural workers in a given State or region, without regard to occupational classification, and no AEWR in geographic areas not surveyed by NASS (*e.g.*, Alaska). At the time of submitting the job order, the employer must agree to pay at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or state minimum wage rate, in effect at the time work is performed, whichever is highest, and pay that rate to workers for every hour or portion thereof worked during a pay period.[11]

B. The Role of AEWRs in the H–2A Program

As explained in prior rulemakings, requiring employers to pay the AEWR when it is the highest applicable wage is the primary way the Department meets its statutory obligation to certify no adverse effect on workers in the United States similarly employed. The AEWR is the rate that the Department has determined is necessary to ensure the employment of H–2A foreign workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed. Specifically, the AEWR is intended to guard against the potential for the entry of H–2A foreign workers to adversely affect the wages and working conditions of agricultural workers in the United States similarly employed. As the Department noted shortly after the creation of the modern H–2A program, a ''basic Congressional premise for temporary foreign worker programs . . . is that the unregulated use of [nonimmigrant foreign workers] in agriculture would have an adverse impact on the wages of U.S. workers, absent protection.'' [12] The potential for the employment of foreign workers to adversely affect the wages of U.S. workers is heightened in the H–2A program because the H–2A program is not subject to a statutory cap on the number of foreign workers who may be admitted to work in agricultural jobs. Consequently, concerns about wage depression from the employment of foreign workers are particularly acute because employers'' access to a potentially unlimited number of foreign workers in a particular labor market and crop activity or agricultural activity could cause the prevailing wage of workers in the United States similarly employed to stagnate or decrease. The Department continues to believe that the use of an AEWR is necessary in order to effectuate its statutory mandate of protecting agricultural workers in the United States similarly employed from the possibility of adverse effects on their wages and working conditions.

Addressing the potential adverse effect that the employment of temporary foreign workers may have on the wages of agricultural workers in the United States similarly employed is particularly important because U.S. agricultural workers are, in many cases, especially susceptible to adverse effects caused by the employment of temporary foreign workers. As discussed in prior rulemakings, the Department continues to hold the view that ''U.S. agricultural workers need protection from potential adverse effects of the use of foreign temporary workers, because they generally comprise an especially vulnerable population . . . with few alternatives in the non-farm labor market.'' [13] As a result, ''their ability to negotiate wages and working conditions with farm operators or agriculture service employers is quite limited.'' [14] The AEWR provides ''a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment.'' [15]

The use of an AEWR, separate from a prevailing wage for a particular crop or agricultural activity, ''is most relevant in cases in which the local prevailing wage is lower than the wage considered over a larger geographic area (within which the movement of domestic labor is feasible) or over a broader occupation/crop/activity definition (within which reasonably ready transfer of skills is feasible).'' [16] The AEWR acts as ''a prevailing wage concept defined over a broader geographic or occupational field.'' [17] The AEWR is generally based on data collected in a multistate agricultural region and an occupation broader than a particular crop activity or agricultural activity, while the prevailing wage is commonly determined based on a particular crop activity or agricultural activity at the State or sub-State level. Therefore, the AEWR protects against localized wage depression that might occur in prevailing wage rates. The AEWR is complemented by the prevailing wage determination process, which serves a related, but distinct purpose. The prevailing wage, as determined under current Departmental guidance, provides an additional safeguard against wage depression that could arise in the performance of specific crop or agricultural activities within a regional or local geographic area.

Congress, however, did not ''define adverse effect and left it in the Department's discretion how to ensure that the [employment] of farmworkers met the statutory requirements.'' [18] Thus, the Department has discretion to determine the methodological approach that best allows it to meet its statutory mandate.[19] The INA ''requires that the Department serve the interests of both farmworkers and growers—which are often in tension. That is why Congress left it to [the Department's] judgment and expertise to strike the balance.'' [20] There is no statutory requirement that the Department set the AEWR at the highest conceivable point, nor at the lowest, so long as it serves its purpose. The Department may also consider factors relating to the sound administration of the H–2A program in deciding how to set the AEWR. For the reasons discussed below, the Department is proposing an approach that is reasonable and strikes an appropriate balance under the INA.

C. Recent Rulemaking

As part of a comprehensive H–2A program notice of proposed rulemaking (2019 NPRM) published on July 26, 2019, the Department proposed to adjust the methodology used to establish the AEWRs in the H–2A program. That approach would have provided occupation-specific hourly AEWRs for non-range occupations [21] (*i.e.,* all occupations other than herding and production of livestock on the range) in each State using data reported by FLS for the occupation, if available, or data reported by the OES (now OEWS) survey for the occupation in the State,

[10] Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States*, 75 FR 6883 (Feb. 12, 2010) (2010 Final Rule); Interim Final Rule, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States*, 52 FR 20496 (Jun. 1, 1987) (1987 IFR).

[11] 20 CFR 655.120(l).

[12] Interim Final Rule, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States*, 52 FR 20496, 20505 (Jun. 1, 1987).

[13] Proposed Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States*, 74 FR 45905, 45911 (Sep. 4, 2009).

[14] *Id.*

[15] *Id.*

[16] 75 FR 6883, 6892–6893.

[17] *Id.* at 6893.

[18] *AFL-CIO, et al.* v. *Dole*, 923 F.2d 182, 184 (D.C. Cir. 1991).

[19] *United Farmworkers* v. *Solis*, 697 F. Supp. 2d 5, 8–11 (D.D.C. 2010).

[20] *Dole*, 923 F.2d at 187.

[21] Range occupations are subject to a monthly AEWR, as set forth in 20 CFR 655.211(c).

if FLS data was not available.[22] The Department explained that establishing AEWRs based on data more specific to the agricultural services or labor being performed under the Standard Occupational Classification (SOC) system would better protect against adverse effect on the wages of workers in the United States similarly employed. For example, the Department expressed concern that the AEWR methodology under the 2010 Final Rule may have an adverse effect on the wages of workers in higher paid non-range occupations, such as supervisors of farmworkers and construction laborers, whose wages may be inappropriately lowered by use of a single hourly AEWR based on the wages collected for occupations covering field and livestock workers.[23]

The Department received thousands of comments on the proposed changes to the methodology for setting the AEWRs in the 2019 NPRM. The commenters represented a wide range of stakeholders interested in the H–2A program, and the Department received comments both in support of and in opposition to the proposed changes to establish occupation-specific hourly AEWRs for non-range occupations. A detailed discussion of the public comments as well as further background on the 2019 NPRM, specifically related to the hourly AEWR determinations, is available in the Department's 2020 AEWR Final Rule and will not be restated here.[24]

On September 30, 2020, USDA publicly announced its intent to cancel the planned October data collection and November publication of the Agricultural Labor Survey (ALS) and Farm Labor reports (better known as the FLS).[25] The 2020 AEWR Final Rule revised the AEWR methodology to account for public comments received on the 2019 NPRM proposals and the USDA announcement that NASS did not plan to release its November 2020 report containing the annual gross hourly wage rates for field and livestock workers (combined), which was necessary for the Department to establish and publish the hourly AEWRs for the next calendar year period on or before December 31, 2020, under the existing 2010 Final Rule methodology. In revising the AEWR methodology in the 2020 AEWR Final Rule, the Department acknowledged that USDA had suspended FLS data collection on at least two prior occasions, and the USDA decision to cancel the October data collection and release of the report planned for November 2020 was the subject of ongoing litigation.[26] Given the uncertainty regarding the future of the FLS and to ensure AEWRs for each State were published before the end of calendar year 2020, the Department published the 2020 AEWR Final Rule on November 5, 2020, with an effective date of December 21, 2020.

The 2020 AEWR Final Rule set the 2021 AEWR for field and livestock worker occupations at the 2020 AEWR rates, which were based on results from the FLS wage survey published in November 2019, and provided for those AEWRs to adjust annually, starting at the beginning of calendar year 2023, using the BLS Economic Cost Index (ECI), Wages and Salaries. For all other occupations, and for geographic areas not included in the FLS, the 2020 AEWR Final Rule set the 2021 AEWR at the statewide annual average hourly gross wage for the occupation reported by the OEWS survey or, where a statewide average hourly gross wage is not reported, the national average hourly gross wage for the occupation reported by the OEWS survey, to be adjusted annually based on the OEWS survey.

D. Need for New Rulemaking

On October 28, 2020, the U.S. District Court for the Eastern District of California in *United Farm Workers, et al.* v. *Perdue, et al.,* No. 20–cv–01452 (E.D. Cal. filed Oct. 13, 2020), preliminarily enjoined USDA from giving effect to its decision to suspend the October 2020 FLS data collection and cancel its November 2020 publication of the FLS.[27] Additionally, on December 23, 2020, in *United Farm Workers* v. *Dep't of Labor,* No. 20–cv–01690 (E.D. Cal. filed Nov. 30, 2020), the same court issued an order enjoining the Department from further implementing the 2020 AEWR Final Rule.[28] On January 12, 2021, the court issued a supplemental order requiring the Department to publish the AEWRs for 2021 in the **Federal Register** on or before February 25, 2021, using the methodology set forth in the 2010 Final Rule, and to make those AEWRs effective upon their publication.[29] After NASS completed its data collection, USDA published the FLS report on February 11, 2021.[30] Shortly thereafter, the Department published the 2021 AEWRs on February 23, 2021, with an immediate effective date, pursuant to the court's January 12, 2021 supplemental order.[31]

In the litigation challenging the Department's 2020 AEWR Final Rule, the court recognized that the Department has broad discretion in determining the methodology for setting the AEWR so long as the Department's approach is sufficiently explained.[32] However, the court ultimately granted the plaintiffs'' Motion for Preliminary Injunction, concluding that the plaintiffs were likely to succeed on their claim that the Department failed to justify freezing wages for two years prior to indexing wages using the ECI.[33] According to the court, while the Department recognized ''the importance of the AEWR reflecting the market rate'' throughout the 2020 AEWR Final Rule,[34] it failed to adequately explain a departure from its longstanding use of the FLS to set AEWRs for field and livestock workers ''to ensure that U.S. 'workers receive the greatest potential protection from adverse effects on their wages and working conditions, including the adverse effect of being denied access to the opportunity to earn a higher equilibrium wage that would have resulted as the market (perhaps slowly) adjusted in the absence of the

[22] *See* Proposed Rule, *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States,* 84 FR 36168, 36171 (July 26, 2019) (2019 NPRM).

[23] *Id.* at 36180–36185.

[24] *See* 85 FR 70445, 70447–70465.

[25] *Notice of Revision to the Agricultural Labor Survey and Farm Labor Reports by Suspending Data Collection for October 2020,* 85 FR 61719 (Sept. 30, 2020); USDA NASS, *Guide to NASS Surveys: Farm Labor Survey, https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor* (last modified Dec. 10, 2020); *see also USDA NASS, USDA NASS to Suspend the October Agricultural Labor Survey* (Sept. 30, 2020), *https://www.nass.usda.gov/Newsroom/Notices/2020/09-30-2020.php.*

[26] 85 FR 70445, 70446.

[27] *United Farm Workers* v. *Perdue,* 2020 WL 6318432 (E.D. Cal. Oct. 28, 2020); *see also United Farm Workers* v. *Perdue,* 2020 WL 6939021 (E.D. Cal. Nov. 25, 2020) (denying USDA's motion to modify or dissolve the inunction).

[28] Order Granting Plaintiffs'' Motion for a Preliminary Injunction, *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* No. 20–cv–1690 (E.D. Cal.), ECF No. 37.

[29] Supplemental Order Regarding Preliminary Injunctive Relief, *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* No. 20–cv–1690 (E.D. Cal. Jan. 12, 2021), ECF No. 39.

[30] *See* USDA, Farm Labor Report (Feb. 11, 2021), *https://downloads.usda.library.cornell.edu/usda-esmis/files/x920fw89s/f7624565c/9k420769j/fmla0221.pdf; see also Notice of Reinstatement of the Agricultural Labor Survey Previously Scheduled for October 2020,* 85 FR 79463 (Dec. 10, 2020).

[31] *See Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2021 Adverse Effect Wage Rates for Non-Range Occupations,* 86 FR 10996 (Feb. 23, 2021).

[32] Order Granting Plaintiffs'' Motion for a Preliminary Injunction, *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* No. 20–cv–1690 (E.D. Cal.), ECF No. 37 at 17 n.5.

[33] *Id.* at 17.

[34] *Id.*

guest workers.' '' [35] The court rejected the Department's explanation that the new AEWR methodology, as applied to the field and livestock workers, was justified, at least in part, by continued uncertainty about the long-term availability of the FLS, as demonstrated by USDA's decision to suspend the October 2020 data collection. The court determined ''the USDA's FLS Suspension Notice should not factor into this equation, at least with regard to setting the 2021 AEWRs, because the [court] enjoined that decision and [new] FLS data should therefore be available in a timely fashion.'' [36] Accordingly, the court ruled that ''[d]espite claiming that it concluded 'on balance' that use of the FLS was 'not appropriate in this context,' the [Department] has not in fact addressed the impact that freezing'' wages would have on field and livestock workers.[37]

As the court noted, the Department has previously stated that the FLS ''is the only annually available data source that actually uses information sourced directly from [farm employers],'' and its ''broader geographic scope makes the FLS more consistent with both the nature of agricultural employment and the statutory intent of the H–2A program.'' [38] Given that USDA has resumed FLS data collection,[39] and plans to release the next annual data in November 2021,[40] and given the Department's longstanding reliance on the FLS to establish the AEWR, the Department has decided it is appropriate to reassess its decision to no longer rely on annual FLS data for the vast majority of H–2A job opportunities.

Additionally, while the 2020 AEWR Final Rule would have led to higher wages for certain higher skilled workers, the rule also acknowledged that the revised methodology ''may result in the AEWRs for field workers and livestock workers being set at slightly lower levels in future years than would be the case under the [2010 Rule's] methodology.'' [41] The court's order found that, given the Department's statutory mandate to prevent adverse effects, it was likely that plaintiffs would succeed on their claim that the 2020 AEWR Final Rule failed to provide adequate justification for a methodology that could lead to lower wages for field and livestock workers than the wages that would have be produced under the 2010 methodology.[42] Although nominal wages for field and livestock were expected not to decline under the 2020 methodology, the Department acknowledged that the 2021 AEWRs, set pursuant to the 2010 methodology and the FLS published in February 2021, will result in higher wages for the majority of H–2A workers in 2021. Consistent with the court's decision, the Department believes adjustment of the methodology used to establish the required wage rate for the H–2A program will better enable the Department to meet its statutory obligation regarding adverse effect.

The Department has also reviewed the policy underlying the 2020 AEWR Final Rule in light of its statutory mandate, and has determined that two major aspects of the 2020 AEWR Final Rule do not adequately protect against adverse impact: (1) The imposition of a 2-year wage freeze for field and livestock workers at a wage level based on the FLS survey published in November 2019, and (2) the use of the BLS ECI, Wages and Salaries, to annually adjust AEWRs for field and livestock workers annually thereafter. These policy decisions represent a significant departure from how minimum or prevailing wage determinations are issued to employers in other employment-based visa programs administered by the Department, and from how the Department has established the AEWR in the H–2A program for more than 30 years. The Department considers actual, current wage data to be the best source of information for determining prevailing wages, when an appropriate data source is available, and has consistently relied upon such information in determining minimum or prevailing wages in the other employment-based visa programs it administers. Using a methodology other than actual, current wage data increases the likelihood of permitting employers to pay wages that are not reflective of market wages, which undermines the Department's mandate to prevent an adverse effect on the wages of workers in the United States similarly employed.

However, as discussed above, the Department remains concerned that the use of a single AEWR for all workers in the H–2A program may adversely affect wages in certain occupations. Therefore, the Department proposes utilizing the bifurcated approach set forth in the 2020 rule that set a single AEWR based on the FLS for the vast majority of job opportunities used by employers in the H–2A program—occupational classifications for field workers and livestock workers—while shifting AEWR determinations to the OEWS survey for all other occupations for which the FLS does not adequately collect or consistently report wage data at a State or regional level (*e.g.,* truck drivers, farm supervisors and managers, construction workers, and many occupations in contract employment). Because these other, typically higher paid occupations are not reported in the FLS field and livestock workers (combined) category, an OEWS-based AEWR will better protect against adverse effect. Additionally, as AEWR determinations become more occupation specific, the Department also believes it is appropriate to require that employers pay the highest applicable wage if the job opportunity can be classified within more than one occupation to reduce the potential for employers to misclassify workers and establish greater consistency with prevailing wage determinations in the H–2B program.

Accordingly, the Department has determined these policies must be reconsidered and proposes revisions in this notice of proposed rulemaking (NPRM). The Department has determined that the proposals outlined below reflect an approach that allows the Department to meet its statutory mandate to ensure that workers in the United States are provided an adequate level of wage protection in their employment. The Department took into account the regulations promulgated in 2010, as well as the significant revision of the AEWR provisions in the 2020 AEWR Final Rule, in order to arrive at the approach described below. The Department believes the methodology described below is reasonable and strikes an appropriate balance under the INA.

II. Proposed Changes to the AEWR Determination Methodology

A. Summary of Proposed Revisions

The Department proposes to use the definition of AEWR found in the 2020 AEWR Final Rule. Because that rule has been preliminarily enjoined, and there is uncertainty as to whether that rule will be vacated prior to the issuance of a final rule, the Department seeks comment on the proposal to define the

[35] *Id.* at 18 (quoting 85 FR 70445, 70453) (''However, the closest that the Final Rule gets to addressing the intentional departure from accurate market wages is its statement that 'even if more recent, 2020 FLS wage data were available, relying on it to set 2021 AEWR[s] would only serve to perpetuate the very wage volatility that the Department seeks to ameliorate through this rule.' '').

[36] *Id.*

[37] *Id.* (internal citations omitted).

[38] *Id.* at *4.

[39] USDA NASS, Farm Labor report, *https://usda.library.cornell.edu/concern/publications/x920fw89s?locale=en (last modified May 26, 2021*).

[40] *Id.*

[41] *Id.* at *14.

[42] *Id.* at *14–15, 18.

AEWR as set forth in the 2020 AEWR Final Rule.

The 2010 Final Rule defined the AEWR as ''[t]he annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.'' In the 2019 NPRM, to be consistent with the Department's proposal to adjust the AEWR methodology for non-range occupations, the Department proposed to revise the definition of AEWR to include both the FLS and OEWS survey as sources for determining the AEWR and to reference the new AEWR methodology provision at § 655.120(b). The revised definition in the 2020 AEWR Final Rule clarified that the term AEWR applies to both the hourly rate for non-range occupations, as set forth in § 655.120(b), and to the monthly rate for range occupations, as set forth in § 655.211(c). Second, rather than identifying particular data sources, the revised definition stated that the AEWR is the rate that the OFLC Administrator publishes in the **Federal Register** in accordance with the AEWR-setting methodology and procedural provisions at §§ 655.120(b) and 655.211(c). Finally, the Department made additional nonsubstantive technical revisions to § 655.103(b) in the 2020 AEWR Final Rule for clarity.

In § 655.120(b), for the vast majority of H–2A job opportunities represented by six occupations comprising the field and livestock worker (combined) category within the FLS, the Department proposes to utilize the AEWR methodology set forth in the 2010 Final Rule, which set a single AEWR using the annual average gross hourly wage for field and livestock workers (combined) for the State or region, as determined by the USDA's NASS FLS report, whenever such data is available. For this occupational grouping, the Department proposes to use OEWS wage data in limited circumstances. Specifically, the AEWR would be set using OEWS wage data in circumstances where FLS wage data is unavailable or insufficient to generate a State or regional wage finding. For example, in Alaska and Puerto Rico, where the FLS is not currently conducted and, accordingly, NASS does not report wage data for field and livestock workers (combined), the Department proposes using OEWS wage data to determine the statewide (or statewide equivalent for the District of Columbia and U.S. territories) [43] AEWR for that combination of field and livestock worker occupations, using statewide data, if available, or nationwide data, if the OEWS survey does not report a statewide annual average gross hourly wage for those occupations. Finally, in the event FLS wage data becomes unavailable for the State or region due to future changes in methodology or the survey's suspension or termination, the Department proposes to immediately use OEWS wage data for this occupational grouping to establish the AEWR.

For all other occupations, the Department proposes to use the methodology previously set forth in the 2020 AEWR Final Rule, under which the AEWR will be the statewide annual average gross hourly wage for the occupational classification, as reported by the OEWS survey, or the national annual average hourly wage for the occupational classification reported by the OEWS survey, if the OEWS survey does not report a statewide annual average gross hourly wage for the occupation.

As with the 2020 AEWR Final Rule, the Department proposes to require that if the job duties on the H–2A application (including the job order) do not fall within a single occupational classification, and the occupations involved are subject to different AEWRs, the Department will determine the applicable AEWR at the highest AEWR for the applicable occupational classifications.

Also as with the 2020 AEWR Final Rule, the Department proposes to require that the OFLC Administrator publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to each AEWR via a notice in the **Federal Register**. The Department will update the AEWRs through two separate announcements in the **Federal Register**, one for the AEWRs based on the FLS, and a second for the AEWRs based on the OEWS survey, due to the different time periods for release of these two wage surveys. As discussed below, if a job opportunity may be classified within more than one occupational classification or SOC code, making that job opportunity subject to both FLS- and OEWS-based AEWRs, the employer must pay the highest applicable wage as of the effective date of that AEWR.

B. The Department Proposes To Use the FLS To Establish the AEWR for Field and Livestock Worker Job Opportunities in Most Cases

The Department proposes to use the average gross hourly wage rate for the field and livestock workers (combined) category from the FLS for the State or region to determine the AEWR for field and livestock worker job opportunities, when that data is available.

1. Use of a Single Field and Livestock Workers (Combined) Occupational Category

The FLS field and livestock workers (combined) category encompasses the vast majority of temporary agricultural job opportunities offered in the H–2A program. According to NASS, wage data reported for this category includes workers who ''plant, tend, pack, and harvest field crops, fruits, vegetables, nursery and greenhouse crops, or other crops'' or ''tend livestock, milk cows, or care for poultry,'' including those who ''operate farm machinery while engaged in these activities.'' [44] The FLS field and livestock worker category reports aggregate wage data covering the following Standard Occupational Classification (SOC) titles and codes: Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45–2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (45–2093); Agricultural Equipment Operators (45–2091); Packers and Packagers, Hand (53–7064); Graders and Sorters, Agricultural Products (45–2041); and All Other Agricultural Workers (45–2099). Depending on the agricultural product reported by the employer, wage data collected under the All Other Agricultural Workers occupational classification are assigned to either the livestock worker or field worker major category of the FLS.

Determining AEWRs using a single gross hourly wage for this group of occupations, rather than occupation-specific AEWRs for each occupation encompassed in the field and livestock worker (combined) category, is consistent with the Department's conclusion in the 2010 Final Rule that

[43] OEWS collects wage date from all fifty states as well as the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. *See* BLS, *Occupational Employment and Wage Statistics Overview, https://www.bls.gov/oes/oes_emp.htm* (last modified Mar. 31, 2021) (''The OEWS survey is a federal-state cooperative program between [BLS] and State Workforce Agencies (SWAs). BLS provides the procedures and technical support, draws the sample, and produces the survey materials, while the SWAs collect the data. SWAs from all fifty states, plus the District of Columbia, Puerto Rico, Guam, and the Virgin Islands participate in the survey. Occupational employment and wage rate estimates at the national level are produced by BLS using data from the fifty states and the District of Columbia.'').

[44] USDA NASS, *Crosswalk from the National Agricultural Statistics Services (NASS) Farm Labor Survey Occupations to the 2018 Standard Occupational Classification System, https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/farm-labor-soc-crosswalk* (last visited Aug. 19, 2021).

the skills of many farm laborers are ''adaptable across a relatively wide range of crop or livestock activities and occupations'' because these activities and occupations ''involve skills that are readily learned in a very short time on the job, skills peak quickly, rather than increasing with long-term experience, and skills related to one crop or activity are readily transferred to other crops or activities.'' [45] It also is consistent with the approach taken in the 2020 AEWR Final Rule in response to the significant number of comments [46] opposing the Department's proposal in the 2019 NPRM to use an occupation-specific AEWR for occupations in this category, using the FLS where available, and using the OEWS survey where the FLS does not report a wage for the occupation in the State or region.[47] In the 2020 AEWR Final Rule, the Department retained use of the FLS field and livestock workers (combined) category to determine the AEWR applicable to all field and livestock worker job opportunities in each State, rather than occupation-specific AEWRs for occupations encompassed by the FLS field and livestock workers (combined) category.

The Department proposes to continue using a single gross hourly AEWR applicable to all H–2A job opportunities covered by the occupations in the field and livestock category (combined) in each State, because this approach strikes a reasonable balance between the interests of employers and workers and ensures employment of foreign workers in the vast majority of H–2A job opportunities will not adversely affect agricultural workers in the United States similarly employed. Continuing to use this approach will provide continuity and a reasonable level of predictability and flexibility for employers using the H–2A program while reducing the complexities and business impacts associated with greater occupation-specific determinations, including combination of occupation determinations, on the AEWR applicable to an employer's job opportunity in the vast majority of cases. This approach also provides continuity and a reasonable level of predictability and protection to workers who may move between the occupations in the field and livestock category (combined). In addition, as each of the field and livestock occupations encompass a broad variety of duties, resulting in areas of overlap between the occupations, a worker's duties within a single workday may fall under multiple field and livestock occupations. The proposed approach helps both employers and workers by simplifying the process each uses to ensure that work is correctly compensated. Use of a single AEWR in each State applicable to this occupational grouping will minimize recordkeeping burdens, especially in cases where workers are needed to perform a variety of field and livestock duties, as employers will be required to pay such workers the same wage rate for all of those duties.

2. Use of FLS Data for Field and Livestock Workers (Combined)

The Department proposes to use the FLS field and livestock worker (combined) wage data as the primary source for determining the AEWRs for this grouping of six occupations for several reasons. As noted in prior rulemaking, the FLS is the best available information for determining the AEWRs because it is the only wage survey that collects data from farm and ranch employers.[48] Since 1987, the Department primarily has established an AEWR using the FLS for each State in the multistate or single-State crop region to which the State belongs. The Department continues to believe the FLS is the best available wage source for establishing AEWRs covering the vast majority of H–2A job opportunities, whenever such data is available.

In addition, the Department considers the broad geographic scope of the survey an advantage of the FLS. The FLS consistently collects sufficient data to generate a wage finding for field and livestock workers (combined) in each State or region surveyed, making it a reliable source of wage data year to year. As explained in the 2019 NPRM, the geographic scope of the FLS, covering California, Florida, and Hawaii, and 15 multistate groupings for other States, and the statewide and regional wages issued ''provide[s] protection against wage depression that is most likely to occur in particular local areas where there is a significant influx of foreign workers.'' [49] The broad geographic scope of the FLS is also ''consistent with both the nature of agricultural employment and the statutory intent of the H–2A program,'' reflecting the migratory pattern of employment of many farmworkers over a large region and Congress's recognition of ''this unique characteristic of the agricultural labor market with its statutory requirement that employers recruit for labor in multistate regions as part of their labor market before receiving a labor certification . . . .'' [50] As the Department noted in the 2010 Final Rule, ''[b]y providing a prevailing wage defined over a broader geographic area and over a broader occupational span (all field and livestock workers, rather than a narrow crop or job description), use of the FLS provides a check on the expansion of [the employment of] foreign labor . . . to prevent undermining job opportunities and wages for domestic farm workers'' and ''reflects the view that farm labor is mobile across relatively wide areas.'' [51] For similar reasons, the Department explained that the FLS-based AEWR may serve ''to mobilize domestic farm labor in neighboring counties and States to enter the subject labor market over the longer term and obviate the need to rely on . . . foreign labor on an ongoing basis.'' [52]

3. Use of OEWS Data for Field and Livestock Workers (Combined)

The Department proposes using the OEWS wage data to determine a statewide AEWR for field and livestock workers in the event the FLS cannot report wages to establish a statewide AEWR for the field and livestock workers (combined) category. By using the FLS report as the sole source for establishing AEWRs under the 2010 final rule's methodology, the Department cannot establish an AEWR in all geographic locations where employers may seek to employ H–2A workers (*e.g.,* Alaska or Puerto Rico) due to limitations in the FLS's methodology and estimation procedures. In addition, as it has previously noted, the

[45] 75 FR 6883, 6899–6900.

[46] *See* 85 FR 70445, 70451–70458 (Addressing comments that occupation-specific field and livestock worker wages would reduce wages in common occupations, increase complexity and unpredictability, increase employer recordkeeping burdens and the Department's administrative burden, and create artificial boundaries between similar occupations.).

[47] The Department explained in that NPRM that it could use the FLS to establish an occupation-specific AEWR for many States and regions for SOCs 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and 45–2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals), but an FLS-based AEWR could only be established in some States and regions for several other occupations, including SOCs 45–2041 (Graders and Sorters, Agricultural Products), 45–2091 (Agricultural Equipment Operators), 45–2099 (Agricultural Workers, All Other), 53–7064 (Packers and Packagers, Hand), 11–9013 (Farmers, Ranchers and Other Agricultural Managers), and 45–1011 (First-Line Supervisors of Farm Workers) based on NASS data. 84 FR at 36182.

[48] *See, e.g.,* 84 FR 36168, 36180–36182. USDA NASS provides additional information about the procedures used to collect, analyze, estimate, and disseminate the Farm Labor Survey at *https://www.nass.usda.gov/Publications/Methodology_and_Data_Quality/Farm_Labor.*

[49] 84 FR 36168, 36182.

[50] 75 FR 6883, 6899.

[51] *Id.*

[52] *Id.*

Department does not have direct control over the FLS, and USDA could elect to terminate the survey at some point in the future. USDA has announced its intention to suspend the survey on three occasions, including in 2020,[53] as noted above, and in 2007[54] and 2011[55] due to budget constraints. Thus, in order to ensure continuity in establishing statewide AEWRs, to address situations where the FLS does not currently report a wage,[56] to protect against the possibility of a future decision by USDA to suspend or discontinue collection of the FLS, and other potential circumstances in which FLS wage data may not be available to set an AEWR for the State or region at least once annually, the Department proposes to use a second source of occupational wage data—the OEWS survey—to determine the statewide AEWRs for this grouping of occupations in circumstances where FLS does not report a State or regional wage finding or is otherwise not available.

Although the Department generally prefers to establish AEWRs based on the FLS for this group of occupations for the reasons discussed above, the OEWS survey would become the best available source of wage data to establish AEWRs for field and livestock workers (combined) if the FLS is not available. OEWS survey data is the only other comprehensive and statistically valid set of wage data collected from employers engaged in agricultural activities, tailored to geographic areas and occupations common in the H–2A program, and is most consistent with the occupation-based wage collection of the FLS. Within the agricultural sector of the U.S. economy, the OEWS survey collects employment and gross hourly wage data from employer establishments that support farm production activities. Although they do not represent fixed-site farms and ranches, these establishments employ workers engaged in similar agricultural labor or services as those workers who are directly employed by farms and ranches. In addition, these types of employer establishments (*i.e.,* farm labor contractors) participate in the H–2A program and represent an increasing share of the worker positions certified by the Department on H–2A applications in this grouping of occupations,[57] so data reported by these types of establishments represents the best information available for purposes of establishing the AEWRs where FLS data is unavailable for the occupation. BLS has the capability of providing a single annual average gross hourly wage for field and livestock workers (combined), in this grouping of occupations that mirrors the FLS, at the statewide level based on the OEWS survey data, which the Department will make accessible to the public online. Specifically, BLS can leverage its existing survey standards and estimation procedures to compute statewide and national average gross hourly wages across this grouping of occupations based on employer establishments across industries.[58]

Finally, to further address potential data gaps, the Department proposes that in the event neither the FLS nor the OEWS survey report a statewide annual average hourly gross wage for field and livestock workers (combined) in a particular State, the District of Columbia, or U.S. Territory, the AEWR will be the national annual average hourly gross wage for field and livestock workers (combined) in that State (or equivalent district/territory), as reported by the OEWS survey. Given the anticipated scenarios in which such a data gap may occur, the Department does not propose to use the FLS's national data to establish the AEWR for field and livestock workers (combined) in the event a statewide annual average hourly gross wage for those workers in a particular State is unavailable. Whenever the FLS has published, it consistently reports annual average hourly gross wage findings for field and livestock workers (combined) in 15 multistate and three single-State regions, covering 49 States. The Department anticipates that a national rate would be needed for field and livestock workers (combined) in these 49 States only in the unexpected event the FLS is broadly not available (*e.g.,* due to suspension or termination of the entire survey). In addition, as discussed above, the FLS does not survey Alaska and other geographic areas in which employers may seek to employ H–2A workers. As a result, the FLS' national wage findings do not include wage data for workers in these geographic areas, whereas the OEWS survey consistently reports wage data for these geographic areas. For these reasons, the Department proposes to use the OEWS survey's national annual average hourly gross wage for field and livestock workers (combined) as the AEWR, if neither the FLS nor the OEWS survey report a statewide annual average hourly gross wage for field and livestock workers (combined) in a particular State.

B. The Department Proposes To Use the OEWS Survey To Establish Occupation-Specific AEWRs for All Other Job Opportunities

For job opportunities that do not fall within the FLS field and livestock workers (combined) category, the Department proposes adopting the OEWS-based, occupation-specific AEWR methodology explained in the 2020 AEWR Final Rule. Under this methodology, the AEWR for all occupations other than field and livestock workers will be the statewide annual average hourly wage for the occupational classification, as reported by the OEWS survey. If the OEWS survey does not report a statewide annual average hourly wage for the SOC, the AEWR for that State will be the national annual average hourly wage for the SOC, as reported by the OEWS survey.

The Department is proposing to utilize the OEWS-based methodology for these occupations for the reasons explained below and in the 2020 AEWR Final Rule.[59] In part, while the FLS is the most accurate and comprehensive wage source to determine the AEWRs for field and livestock workers, as noted above, the OEWS survey is a more accurate data source for other agricultural occupations, such as supervisors, that the FLS does not adequately or consistently survey. In addition, the OEWS survey includes occupations that are more often contracted-for services than farmer-employed (*e.g.,* construction, equipment operators supporting farm production), which makes the OEWS data collection from farm labor contractors a better data source for determining AEWRs and protecting against adverse effect for these occupations.

Since 2014, the FLS has collected data by SOC—the same taxonomy that is

[53] 85 FR 61719.

[54] *Notice of Intent to Suspend the Agricultural Labor Survey and Farm Labor Reports,* 72 FR 5675 (Feb. 7, 2007).

[55] *Notice of Intent to Suspend the Agricultural Labor Survey and Farm Labor Reports,* 76 FR 28730 (May 18, 2011).

[56] This situation is rare. The Department's H–2A disclosure data for FY 2020 includes two applications submitted for job opportunities in Alaska and two for job opportunities in Puerto Rico, while disclosure data for FY 2019 includes three for job opportunities in Alaska and one in Puerto Rico.

[57] For example, the proportion of all H–2A worker positions certified by DOL for employment in non-range occupations with employers qualifying as H–2A Labor Contractors (*i.e.,* farm labor contractors) has increased significantly from 33.1 percent in FY 2016 (54,787 positions out of 165,741 positions) to 42.3 percent in FY 2020 (116,472 positions out of 275,430 total positions).

[58] An overview of the OEWS survey methodology is available at *https://www.bls.gov/oes/current/oes_tec.htm.* A more detailed explanation of the survey standards and estimation procedures is available at *https://www.bls.gov/opub/hom/oews/pdf/oews.pdf.*

[59] 85 FR 70445, 70453, 70458–70459.

used for the OEWS survey. However, it does not currently report wage data by SOC. Instead, the FLS aggregates and reports data in four major FLS occupational categories: Field workers, livestock workers, field and livestock workers (combined), and all hired workers. In collaboration with the Department and the OMB, USDA established and implemented a crosswalk from the major FLS categories to the SOC categories.[60] Although the FLS collects data on the wages of supervisors, the FLS has not been able to report a statistically valid wage result for the major FLS category of supervisors.[61] As a result, the wages of supervisors are currently only reported in the ''all hired workers'' category and are not included in the ''field and livestock workers (combined)'' category that the Department uses to establish the AEWR. The FLS also collects data on ''other workers,''[62] though the FLS has not been able to report a statistically valid wage result for this FLS category, and, as a result, wages for ''other workers'' are reported only in the ''all hired workers'' category and are not included in the wages reported in the ''field and livestock workers (combined)'' category. Because the FLS does not consistently report data in all States or regions for each SOC outside of the field and livestock workers category, use of the FLS to determine wages for these occupations would require frequent use of the OEWS survey or another wage source, varying sources from year to year, and resulting in a much higher degree of year-to-year variability in the AEWR than if the OEWS survey is used at the outset for job opportunities not included in the field and livestock workers (combined) category, and this lack of variability will provide greater year-over-year certainty to both workers and employers.

The OEWS survey is a reliable and comprehensive wage survey that consistently produces annual average wages for nearly all SOC outside of the field and livestock workers occupational category. The OEWS survey is among the largest ongoing statistical survey programs of the Federal Government, producing wage estimates for over 800 occupations, and it is used as the primary wage source for prevailing wage determinations in the H–2B temporary non-agricultural labor certification program, as well as other nonimmigrant and immigrant programs. The OEWS program surveys approximately 200,000 establishments every 6 months and over a 3-year period collects the full sample of 1.2 million establishments, accounting for approximately 57 percent of employment in the United States.[63] Every 6 months, the oldest data from the 3-year cycle is removed from the sample, and new data is added. The wages reported in the older data are adjusted by the ECI, which is a BLS index that measures the change in labor costs for businesses. The OEWS survey is primarily conducted by mail, with follow up by phone to nonrespondents or if needed to clarify data.[64] The OEWS average[65] hourly wage reported includes all straight-time, gross pay, exclusive of premium pay, but including piece rate pay.

Similarly to state or regional FLS-based AEWRs for field and livestock workers, the use of an OEWS-based statewide AEWR addresses the Department's concern that the potential for localized wage depression is more pronounced in the H–2A program than in the H–2B program due to both the economic position of agricultural workers and the fact that the H–2A program is not subject to a statutory cap, which allows an unlimited number of nonimmigrant workers to enter a given local area.[66] Thus, a statewide wage is more likely to protect against wage depression from a large influx of nonimmigrant workers that is most likely to occur at the local level. In the limited circumstances in which there is no statewide wage, use of the national annual average hourly wage reported for the particular SOC will ensure an AEWR determination can be made each year without the need for any adjustment method. In addition, and as with the FLS, the OEWS survey also reports a wage that covers activities above a crop activity level, which, as discussed above, is where wage depression from an influx of foreign workers could be most acute.

Shifting AEWR determinations to the OEWS survey for those occupations for which the FLS does not report statistically reliable wage data at a State or regional level also addresses the Department's concern that use of the combined field and livestock worker FLS data to determine the AEWR for all occupations may have an adverse effect on the wages of workers in higher paid agricultural occupations, including truck drivers, farm supervisors and managers, construction workers, and many occupations primarily in contract employment, because OEWS data will provide an occupation-specific wage that does not include data for lower wage occupations and because OEWS data includes farm labor contractor wage data. For example, a worker performing construction labor on a farm under the H–2A program in Ohio must currently be paid at least the AEWR of $15.31 per hour because the worker's wage is determined based on the field and livestock workers (combined) wage, which reflects neither wages paid to agricultural workers engaged in duties typically performed by a construction worker nor wages of workers who perform contract work, which an agricultural construction laborer in the H–2A program is likely to perform. In contrast, if the same construction worker performed identical job duties at a location other than a farm and, therefore, fell under the H–2B program, the required prevailing wage rate based on OEWS data would be approximately $22.73 per hour.[67] This same variance is seen across other non-field and livestock occupations for which H–2A workers are used. For example, the OEWS mean wage in Ohio for first-line supervisors (SOC 45–1011) in 2020 was $27.83, in contrast to the AEWR of $15.31. Given the disparity in wages between the FLS and OEWS survey for these occupations, using the FLS to establish the AEWR for non-field and livestock occupations may cause an adverse effect on the wages of workers in the United States similarly employed, contrary to the Department's statutory mandate. An OEWS-based AEWR based on an occupational classification that accounts for significantly different job duties, but remains broader than a particular crop activity or agricultural

[60] *See Crosswalk from the National Agricultural Statistics Service (NASS) Farm Labor Survey (FLS) Occupations to the 2018 Standard Occupational Classification (SOC) System, available at https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/farm-labor-soc-crosswalk* (last visited Aug. 19, 2021).

[61] Included within the major FLS category of supervisors are Farmers, Ranchers, and Other Agricultural Managers (SOC 11–9013); and First-Line Supervisors of Farm Workers (SOC 45–1011).

[62] Included in the ''other workers'' category are Agricultural Inspectors (SOC 45–2011), Animal Breeders (45–2021), Pest Control Workers (37–2021), and any other agricultural worker not fitting into the categories above, including mechanics, shop workers, truck drivers, accountants, bookkeepers, and office workers who fall within a variety of SOCs and have a wide variety of job duties. Contract and custom workers are excluded from the FLS sample population.

[63] *See* BLS, *Occupational Employment and Wage Statistics Frequently Asked Questions, https://www.bls.gov/oes/oes_ques.htm* (last modified Aug. 13, 2021).

[64] *Id.*

[65] The OEWS uses the term ''mean.'' However, for purposes of this regulation the Department uses the term ''average'' because the two terms are synonymous, and the Department has traditionally used the term ''average'' in setting the AEWR from the FLS.

[66] *See, e.g.,* 75 FR 6883, 6895.

[67] This is the current statewide OEWS wage for the category of Construction Laborer, SOC 47–2061, in Ohio. Under the H–2B program, a local wage for that occupation would be used if available.

activity in a local area, will thus not only provide greater predictability but also better protect workers in the United States in occupations other than field and livestock occupations.

C. The Department Proposes To Assign the Highest AEWR for All SOCs Applicable to Job Opportunities Covering Multiple SOCs

The Department proposes to require that employers pay the highest applicable wage if the job opportunity can be classified within more than one occupation, when those occupations are subject to different AEWRs, as proposed in the 2019 NPRM and adopted in the 2020 AEWR Final Rule.

This requirement would address scenarios in which the combination of duties an employer requires involves different AEWRs. The Department best protects against adverse effect by setting the AEWR applicable to the job opportunity at the highest of the applicable AEWRs. Under this proposal, if the job duties on the H–2A application (including the job order) do not fall within the field and livestock worker (combined) occupational grouping, the Department will determine the applicable AEWR based on the highest AEWR for all applicable occupational classifications. In the event an employer's job opportunity requires the performance of duties encompassed by two or more distinct occupational classifications subject to different AEWRs (*e.g.,* a field and livestock worker (combined) occupation and an SOC occupation not encompassed in the field and livestock worker (combined) occupational group, or two SOC occupations both of which are not encompassed in the field and livestock worker (combined) occupational group), the Department will assign the highest AEWR among all applicable occupational classifications to reduce the potential for job misclassification by the employer and effectuate the purpose of the AEWR (*i.e.,* prevent adverse effect to the wages of workers in the United States similarly employed).

The proposal, discussed above, to determine a single statewide AEWR for all job opportunities in the field and livestock workers (combined) occupational grouping will minimize use of this provision because a job opportunity involving a combination of occupations that are all encompassed within the field and livestock workers (combined) will be subject to a single AEWR, regardless of which of the particular SOCs applicable to the field and livestock workers (combined) occupational category may be involved. For example, a job opportunity involving duties properly classified under SOC 45–2091 (Agricultural Equipment Operators) and duties properly classified under SOC 45–2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals) would be subject only to the field and livestock workers (combined) AEWR and the provision regarding combination of occupations with different AEWRs would not be relevant, as a single AEWR applies to the job opportunity.

Under this proposal, the SWA will continue to review job orders—and SOCs therein—in the first instance and determine the appropriate SOC code for the job opportunity when it reviews an employer's job order for compliance with 20 CFR part 653, subpart F, and 20 CFR part 655, subpart B. The SWA will enter the SOC code assigned to the employer's job opportunity in Section I, Items 4 and 5, of the Form ETA–790, *Agricultural Clearance Order.* After the employer files its *H–2A Application for Temporary Employment Certification,* the OFLC Certifying Officer (CO) will review the employer's application and job order, including SOC coding. The CO may determine a different SOC coding is necessary, for example, based on additional information received during processing. The CO evaluates each job opportunity on a case-by-case basis, considering the totality of the information in an H–2A application and job order, to determine the appropriate SOC code. In making a determination, the CO compares the duties of the employer's job opportunity with SOC definitions and tasks that are listed in the Department's Occupational Information Network (O*NET). Where similar tasks appear in more than one SOC code (*e.g.,* driving or maintenance and repair of farm equipment), the CO considers other factual information in the employer's application and job order. For example, for job opportunities involving driving duties, the CO will look at factors such as the type of equipment involved (*e.g.,* pickup trucks, custom combine machinery, or semi tractor-trailer trucks; makes and models of machines to be used), the location where the work will be performed (*e.g.,* on a farm or off), and the qualifications and requirements for the job opportunity in order to determine the most appropriate SOC code to assign to the employer's job opportunity.

Generally, a job opportunity corresponds with a single SOC code if all of the duties fall within a single occupation and the qualifications, requirements, and other factors are consistent with that occupation. For example, a job opportunity for workers to solely perform hand harvesting activities would match with a single occupation, SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), absent factors indicating other SOCs (*e.g.,* a required machinery repair certification). In the event the job opportunity cannot be classified within a single SOC, the CO will assign a combination of occupations—more than one SOC code—to the employer's job opportunity. As noted above, the Department anticipates that the majority of H–2A job opportunities will be classifiable in one of the SOC occupations associated with the FLS field workers and livestock workers (combined) category, or a combination of those SOCs, since the H–2A program requires that job opportunities constitute agricultural labor or services, as defined by the Fair Labor Standards Act and Internal Revenue Code. Jobs classified within one of these codes or a combination of these codes will receive the AEWR applicable to field and livestock workers (combined). If different AEWRs apply to the SOCs, the CO will use the highest AEWR of the applicable AEWRs.

As explained in the 2020 AEWR Final Rule, a job opportunity involving driving duties may be properly classified under SOC 45–2091 (Agricultural Equipment Operators), SOC 53–3032 (Heavy and Tractor-Trailer Truck Drivers), or a combination of the two, depending on the duties described in the employer's job order. A job opportunity for workers to drive tractors and other mechanized, electrically powered or motor-driven equipment on farms to plant, cultivate, and harvest a crop (including driving tractors in and out of fields carrying bins and driving forklifts to transfer and stack bins of full product onto trailers), which requires 12 months of experience operating such equipment, would be properly classified under SOC 45–2091 and subject to the field and livestock worker (combined) FLS-based AEWR. In contrast, a job opportunity for workers to drive semi tractor-trailer trucks to and from specified destinations within an area of intended employment (including maneuvering trucks into and out of loading and unloading positions as well as driving in both on-road (paved) and off-road conditions), which requires 12 months of experience operating such equipment and a valid Class A CDL or equivalent, would be properly classified under SOC 53–3032 and subject to the OEWS-based, occupation-specific AEWR. In the event an employer seeks

workers to both drive tractors and other mechanized, electrically powered or motor-driven equipment on farms and semi tractor-trailer units, as described above, the employer's job opportunity constitutes a combination of SOC 45–2091 and SOC 53–3032, subject to either the field and livestock worker (combined) FLS-based AEWR applicable to SOC 45–2091 or the OEWS-based, occupation-specific AEWR applicable to SOC 53–3032, whichever is a higher rate per hour.

As noted in the 2019 NPRM and 2020 AEWR Final Rule, determining the appropriate occupational classification is an important component of the Department's decision to move to occupation-specific wages for job opportunities not classifiable within the field and livestock (combined) occupational grouping. Use of the highest applicable wage in these cases reduces the potential for employers to misclassify workers than if the Department permitted employers to pay different AEWRs for job duties falling within different occupational classifications on a single *Application for Temporary Employment Certification.* This proposal also reduces an employer's recordkeeping burdens with respect to wages. Under the proposal, for example, employers who currently file a single *Application for Temporary Employment Certification* covering multiple workers and a wide variety of duties might instead choose to file separate *Applications for Temporary Employment Certification* and limit the duties of the job opportunities in each *Application for Temporary Employment Certification* to a single occupational classification. The employer would then pay a separate wage rate based on the duties of each job opportunity included in the separate *Applications for Temporary Employment Certification,* which reduces the potential for misclassification and lowers recordkeeping burdens, as employers would only need to track the highest wage among distinct occupational classifications, if applicable. This policy is also consistent with the way the Department determines prevailing wage rates for jobs that cover multiple SOCs in other employment-based visa programs.

D. The Department Proposes To Publish FLS-Based AEWRs and OEWS-Based AEWRs Coinciding With Those Surveys' Publication Schedules

As with the 2020 AEWR Rule, the Department proposes to require that the OFLC Administrator publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to each AEWR as a notice in the **Federal Register**. The Department proposes to make the updated AEWRs effective through two announcements in the **Federal Register**, one for the AEWRs based on the FLS (*i.e.,* effective on or about January 1), and a second for the AEWRs based on the OEWS survey (*i.e.,* effective on or about July 1), due to the different time periods for release of these two wage surveys.

The Department anticipates that only one of the two AEWR adjustment notifications may impact an employer's wage obligations during the work contract period. Given the Department's proposal to determine the AEWR for the majority of H–2A job opportunities using the field and livestock worker (combined) wage reported by FLS, most H–2A certifications would be subject only to the FLS-based AEWR adjustment in January. Further, due to the seasonal nature of temporary agricultural labor or services, many H–2A employment periods begin and end between FLS-based AEWR adjustments. Only in the circumstance in which a job opportunity constitutes a combination of occupations that involves both an FLS-based AEWR and an OEWS-based AEWR would two AEWR adjustment notices potentially impact an employer's wage obligations.

E. The Department's Decision Not To Use ECI-Adjusted AEWRs

In proposing to annually adjust the AEWRs based on the annual publication of new FLS and OEWS data, the Department is proposing not to use the ECI to adjust AEWRs as the 2020 AEWR Final Rule had done, and is not contemplating use of a similar index for several reasons. First, the FLS—the Department's preferred wage source for establishing the AEWR for field and livestock workers—is again available, eliminating the Department's primary impetus for electing to use the ECI to adjust AEWRs in future years under the 2020 AEWR Final Rule. Second, the Department proposes to leverage OEWS survey data for this group of occupations instead of using of the ECI, as OEWS data is more consistent with the FLS data category used to set the AEWRs. As noted above, BLS now will provide the Department wage data for field and livestock workers (combined), based on the OEWS survey, to determine the AEWR for these occupations in each State or region where the FLS is not available or does not report wage data for workers in a particular geographic area. In those cases where the FLS is not available, the Department believes that using the OEWS survey rather than the ECI best allows the Department to prevent adverse effect as required under the INA because the OEWS survey provides data more specifically tailored to geographic areas and occupations common in the H–2A program and is more consistent with the FLS. In particular, though the ECI provides a stable measure of annual increases in the wages of private sector workers generally, the ECI does not report the annual change in wages of field and livestock workers specifically, and does not provide wage data for agricultural workers in particular geographic areas. Both the FLS and OEWS survey provide data more specifically tailored to U.S. agricultural workers and the States and regions where these workers are employed, making these sources more effective in ensuring that the temporary employment of foreign workers in field and livestock job opportunities will not adversely affect the wages of workers in the United States similarly employed. In addition, OEWS data includes wage data from farm labor contractors, who increasingly provide labor or services to growers both in the predominant field and livestock workers (combined) occupational group and in occupations that are less common in the H–2A program.

While the Department remains sensitive to concerns of employers regarding increases in the FLS-based AEWRs, the Department believes, for the reasons discussed above, that the approach proposed in this rulemaking best allows the Department to fulfill its statutory mandate. The concerns about AEWR increases also appear overstated when considering long-term historical trends in agricultural worker wages and the agricultural labor market. Long-term data on growth in the AEWRs shows that with the exception of the AEWRs for Hawaii, Oregon, and Washington, growth in the AEWRs from 2010 through 2019 was lower than growth from 2000 to 2010 and substantially lower in many States. Considering top user States as examples, the total AEWR increase from 2010 through 2019 compared to 2000 through 2010 was lower in four of the five top States.[68]

Moreover, despite higher-than-average wage increases in some recent years, farmworkers remain among the lowest paid workers in the United States. The USDA Economic Research Service (ERS) recently reported that the gap between farmworker and non-farmworker wages

[68] 3.95% lower in California, 3.07% lower in Florida, 8.34% lower in Georgia, 6.07% lower in North Carolina, and 6.07% higher in Washington, based on an average of annual changes in the AEWR over the past two decades.

is ''slowly shrinking, but still substantial,'' noting that the average farmworker wage in 1990 ''was just over half the average real wage in the nonfarm economy for private-sector nonsupervisory occupations,'' but rose to 60% of the non-farmworker wage by 2019, indicating the wage gap decreased by less than 10% over three decades.[69] The ERS data also indicates that labor costs as a share of total gross farm income has not risen significantly over the past two decades, with the ERS concluding that ''[a]lthough farm wages are rising in nominal and real terms, the impact of these rising costs on farmers'' incomes has been offset by rising productivity and/or output prices,'' and adding that ''labor costs as a share of gross cash income do not show an upward trend for the industry as a whole over the past 20 years.'' [70]

AEWR increases above historical averages in recent years also are consistent with a growing agricultural labor shortage that is evidenced by an exponential increase in use of the H–2A program since 2015, USDA data, and recurrent statements by employers and associations that it is increasingly difficult to find U.S. workers for their job opportunities.[71] As the Department has explained in prior rulemaking, basic ''economic theory holds that, under conditions of an emerging labor shortage . . . [wage] adjustments would occur over time and the observed wage would increase by an amount sufficient to attract more workers until supply and demand were met in equilibrium.'' [72] However, ''labor shortages that would normally drive wages up may become distorted by the availability of foreign workers . . . .'' [73] The AEWR methodology in the 2010 Final Rule and the similar FLS-based methodology proposed here provide a wage floor distinct from the local prevailing wage and are intended to ''comput[e] an AEWR to approximate the equilibrium wage that would result absent an influx of temporary foreign workers . . . serv[ing] to put incumbent farm workers in the position they would have been in but for the H–2A program.'' [74]

III. Request for Comments

The Department invites comments on all aspects of the proposed AEWR methodology. Because the 2020 AEWR Final Rule has been preliminarily enjoined, and there is uncertainty as to whether that rule will be vacated prior to the issuance of a final rule, the Department seeks comment on all proposals to mirror provisions found in the 2020 rule. In addition, the Department is interested in comments on the use of the FLS and OEWS survey and the conditions under which each survey should be used to establish the AEWR. For example, the Department is interested in comments on the continued use of a single statewide hourly AEWR for field and livestock worker occupations (combined), rather than occupation-specific statewide AEWRs for each occupation comprising the field and livestock workers (combined) category covered by the FLS. In addition, the Department is interested in comments on use of the OEWS survey to establish the AEWR for field and livestock worker occupations (combined) in the absence of the FLS or where the FLS does not report a wage finding for these occupations in a particular geographic area, as well as the use of the OEWS to establish AEWRs for all job opportunities that do not fall within the FLS field and livestock workers (combined) category. Commenters may address the existence or role of the AEWR, but the Department encourages commenters to focus on the methodology used to determine the AEWR. The Department is not considering eliminating the AEWR or changing the AEWR's role in determinations of an employer's required minimum wage rate in the H–2A program, for reasons explained at length in prior rulemakings, including in the 2020 AEWR Final Rule and 2010 Final Rule.

IV. Administrative Information

A. Executive Order 12866: Regulatory Planning and Review; and Executive Order 13563: Improving Regulation and Regulatory Review

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* OIRA reviewed this proposed rule and has determined that it is a significant—but not economically significant—regulatory action under E.O. 12866.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Outline of the Analysis

Section VI.A.1 describes the need for the proposed rule, and section VI.A.2 describes the process used to estimate the costs of the rule and the general inputs used, such as wages and number of affected entities. Section VI.A.3 explains how the provisions of the proposed rule will result in quantifiable costs and transfers and presents the calculations the Department used to estimate them. In addition, section

[69] USDA Economic Research Services, *Farm Labor, https://www.ers.usda.gov/topics/farm-economy/farm-labor* (last modified Aug. 18, 2021).

[70] *Id.* (The ERS found that for all farms, ''labor costs (including contract labor, and cash fringe benefit costs) averaged 10.4 percent of gross cash income during 2016–18, compared with 10.7 percent for 1996–98.'' At the commodity level, the ERS found that ''[l]abor cost shares have fallen slightly over the past 20 years for the more labor-intensive fruit and vegetable sectors . . . .'').

[71] *See, e.g.,* Steven Zhaniser *et al., Rising Wages Point to a Tighter Farm Labor Market in the United States,* Amber Waves (Feb 15, 2019), *https://www.ers.usda.gov/amber-waves/2019/february/rising-wages-point-to-a-tighter-farm-labor-market-in-the-united-states* (noting that rising real (inflation-adjusted) farm wages in the past four years is a ''prominent indicator of a tighter farm labor market'' and that ''greater employment of nonimmigrant, foreign-born farmworkers through the H–2A'' program is another indicator).

[72] 75 FR 6883, 6891; *see also* Final Rule, *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program,* 80 FR 24146, 24159–24160 (Apr. 29, 2015) (noting that ''if employers experience a shortage of available workers in a particular region or occupation, compensation should rise as needed to attract workers'').

[73] 80 FR 24146, 24158–24159.

[74] 75 FR 6883, 6891.

VI.A.3 describes the unquantified costs of the proposed rule, a description of qualitative benefits, and presents an analysis of distributional impacts of the rule. Section VI.A.4 summarizes the estimated first-year and 10-year total and annualized costs and transfers of the proposed rule. Finally, section VI.A.5 describes the regulatory alternatives that were considered during the development of the proposed rule.

Summary of the Analysis

The Department estimates that the proposed rule will result in costs and transfers. As shown in Exhibit 1, the proposed rule is expected to have an annualized cost of $0.064 million and a total 10-year quantifiable cost of $0.45 million at a discount rate of 7 percent.[75] The proposed rule is estimated to result in annual transfers from H–2A employers to H–2A employees of $30.17 million and total 10-year transfers of $211.87 million at a discount rate of 7 percent.[76]

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND TRANSFERS OF THE PROPOSED RULE

[2020 $millions]

	Costs	Transfers
Undiscounted 10-Year Total	$0.45	$295.00
10-Year Total with a Discount Rate of 3%	0.45	254.20
10-Year Total with a Discount Rate of 7%	0.45	211.87
10-Year Average	0.45	29.50
Annualized at a Discount Rate of 3%	0.53	29.80
Annualized with at a Discount Rate of 7%	0.064	30.17

The total cost of the proposed rule is associated with rule familiarization. Transfers are the results of changes to the AEWR methodology and, more specifically, in H–2A job opportunities where the FLS does not adequately collect or consistently report wage data at a State or regional level. See the costs and transfers subsections of section VI.A.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some costs and benefits of the proposed rule. The Department describes them qualitatively in section VI.A.3 (Subject-by-Subject Analysis) and seek input from the public to help us to reasonably quantify them in the final rule.

1. Need for Regulation

As discussed above, court-issued injunctions prevented USDA from suspending FLS data collection for calendar year 2020 and prevented the Department from further implementing the 2020 AEWR Final Rule on December 23, 2020, resulting in a return to the 2010 Final Rule AEWR methodology. Under the 2010 Final Rule, the FLS wage data is used to determine the AEWRs for all H–2A job opportunities. However, the Department remains concerned that the use of a single AEWR for all job opportunities in the H–2A program may adversely affect the wages of workers in the United States similarly employed in certain occupations where the FLS does not adequately collect or consistently report wage data at a State or regional level. Therefore, the Department proposes using the bifurcated approach set forth in the 2020 AEWR Final Rule that set a single AEWR based on the FLS for the vast majority of job opportunities used by employers in the H–2A program—six occupational classifications covering field workers and livestock workers—while shifting AEWR determinations to the OEWS survey for all other occupations for which the FLS does not adequately collect or consistently report wage data at a State or regional level (*e.g.* , truck drivers, farm supervisors and managers, construction workers, and many occupations in contract employment). As AEWR determinations become more occupation specific, the Department believes it is appropriate to continue requiring that employers pay the highest applicable wage if the job opportunity can be classified within more than one occupational classification to reduce the potential for employers to misclassify workers and establish greater consistency with prevailing wage determinations in the H–2B program.

The Department has also determined that two major aspects of the 2020 AEWR Final Rule are inconsistent with the Department's statutory mandate to protect the wages of workers in the United States similarly employed against adverse effect: (1) The imposition of a 2-year wage freeze for field and livestock workers at a wage level based on the FLS published in November 2019, and (2) using the BLS ECI solely to adjust AEWRs annually thereafter. Accordingly, the Department has determined these policies must be reconsidered and proposes revisions in this NPRM that better meet the statute's twin goals to ensure that employers can access legal agricultural labor while maintaining an adequate level of wage protection for workers in the United States similarly employed.

2. Analysis Considerations

The Department estimated the costs and transfers of the proposed rule relative to the existing baseline (*i.e.,* the current practices for complying, at a minimum, with the H–2A program as currently codified at 20 CFR part 655, subpart B). This existing baseline is consistent with the 2010 Final Rule because the 2020 AEWR Final Rule has been preliminarily enjoined by a federal district court, as explained above, and there is uncertainty as to whether the 2020 AEWR Final Rule rule will be vacated prior to the issuance of this final rule.

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the proposed rule (*i.e.,* costs and transfers that accrue to entities affected). The analysis covers 10 years (from 2022 through 2031) to ensure it captures major costs and transfers that accrue over time. The Department expresses all quantifiable impacts in 2020 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A–4.

[75] The proposed rule will have an annualized cost of $0.18 million and a total 10-year cost of $1.54 million at a discount rate of 3 percent in 2020 dollars.

[76] The proposed rule will have annualized transfer payments from H–2A employers to H–2A employees of $29.80 million and a total 10-year transfer payments of $254.20 million at a discount rate of 3 percent in 2020 dollars.

Exhibit 2 presents the number of affected entities that are expected to be impacted by the proposed rule. The average number of affected entities is calculated using OFLC H–2A labor certification data from 2016 through 2020. The Department provides this estimate and uses it to estimate the costs of the proposed rule.

EXHIBIT 2—NUMBER OF AFFECTED ENTITIES BY TYPE

[FY 2016–2020 average]

Entity type	Number
Annual Unique H–2A Applicants	8,204

Growth Rate

The Department estimated growth rates for applications processed and certified H–2A workers based on fiscal year (FY) 2012–2020 H–2A program data, presented in Exhibit 3.

EXHIBIT 3—HISTORICAL H–2A PROGRAM DATA

Fiscal year	Applications certified	Workers certified
2012	5,278	85,248
2013	5,706	98,814
2014	6,476	116,689
2015	7,194	139,725
2016	8,297	165,741
2017	9,797	199,924
2018	11,319	242,853
2019	12,626	258,446
2020	13,552	275,430

The geometric growth rate for certified H–2A workers using the program data in Exhibit 3 is calculated as 15.8 percent. This growth rate, applied to the analysis timeframe of 2022 to 2031, would result in more H–2A certified workers than projected employment of workers in the relevant H–2A SOC codes by BLS.[77] Therefore, to estimate realistic growth rates for the analysis, the Department applied an autoregressive integrated moving average (ARIMA) model to the FY 2012–2020 H–2A program data to forecast workers and applications, and estimated geometric growth rates based on the forecasted data. The Department conducted multiple ARIMA models on each set of data and used common goodness of fit measures to determine how well each ARIMA model fit the data.[78] Multiple models yielded indistinctive measures of goodness of fit. Therefore, each model was used to project workers and applications through 2031. Then, a geometric growth rate was calculated using the forecasted data from each model and an average was taken across each model. This resulted in an estimated growth rate of 3.1 percent for H–2A applications and 5.6 percent for H–2A certified workers. The estimated growth rates for applications (3.1 percent) and workers (5.6 percent) were applied to the estimated costs and transfers of the proposed rule to forecast participation in the H–2A program.

Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of applicants and the change in burden hours required for rule familiarization in section VI.A.3 (Subject-by-Subject Analysis).

Compensation Rates

In section VI.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of the proposed rule. Exhibit 4 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the proposed rule. The Department used the mean hourly wage rate for private sector Human Resources Specialists (SOC code 13–1071).[79] Wage rates are adjusted to reflect total compensation, which includes nonwage factors such as overhead and fringe benefits (*e.g.,* health and retirement benefits). We use an overhead rate of 17 percent[80] and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2021. For the private sector employees, we use a fringe benefits rate of 42 percent.[81] We then multiply the loaded wage factor by the wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Exhibit 4 throughout this analysis to estimate the labor costs for each provision.

[77] Comparing BLS 2029 projections for combined agricultural workers with a 15.8 percent growth rate of H–2A workers yields estimated H–2A workers that are about 107 percent greater than BLS 2029 projections. The projected workers for the agricultural sector were obtained from BLS's Occupational Projections and Worker Characteristics, which may be accessed at *https://www.bls.gov/emp/tables/occupational-projections-and-characteristics.htm.*

[78] The Department estimated models with different lags for autoregressive and moving averages, and orders of integration: ARIMA(0,2,0); (0,2,1); (0,2,2); (1,2,1); (1,2,2); (2,2,2). For each model we used the Akaike Information Criteria (AIC) goodness of fit measure.

[79] BLS, *May 2020 National Occupational Employment and Wage Estimates: 13–1071—Human Resources Specialist, https://www.bls.gov/oes/current/oes131071.htm* (last modified Mar. 31, 2021).

[80] *See* Cody Rice, U.S. Environmental Protection Agency, Wage Rates for Economic Analyses of the Toxics Release Inventory Program (June 10, 2002), *available at https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[81] *See Employer Costs for Employee Compensation, https://www.bls.gov/news.release/ecec.toc.htm* (last modified Sept. 16, 2021). This shows the ratio of total compensation to wages and salaries for all private industry workers.

EXHIBIT 4—COMPENSATION RATES

[2020 dollars]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
Private Sector Employees					
HR Specialist	N/A	$33.38	$14.02 ($33.38 × 0.42)	$5.67 ($33.38 × 0.17)	$53.08

3. Subject-by-Subject Analysis

The Department's analysis below covers the rule familiarization costs, unquantifiable costs, transfers, and qualitative benefits of the proposed rule. In accordance with Circular A–4, the Department considers transfers as payments from one group to another that do not affect total resources available to society. This proposed rule includes the cost of rule familiarization and transfers associated with the AEWR wage structure from the proposed rule. The Department also described efficiency impacts, payroll and other transition costs, and the distributional impacts that could result from the proposed rule.

Costs

The following section describes the costs of the proposed rule.

Quantifiable Costs

Rule Familiarization

When the proposed rule takes effect, H–2A employers will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year. To estimate the first-year cost of rule familiarization, the Department applied the growth rate of H–2A applications (3.1 percent) to the average number of annual unique H–2A applicants from FY2016 to FY2020 (8,204) to determine the number of unique recurring H–2A applicants impacted in the first year the rule is in effect. The number of unique H–2A applicants (8,459) was multiplied by the estimated amount of time required to review the rule (1 hour).[82] This number was then multiplied by the hourly compensation rate of Human Resources Specialists ($53.08 per hour). This calculation results in a one-time undiscounted cost of $448,973 in the first year after the proposed rule takes effect. In each subsequent year new unique employers (2,199) requesting H–2A certifications will need to review the rule. The growth rate of H–2A applications (3.1 percent) was applied to the number of new unique employer to determine the annual number of new unique H–2A applicants impacted in the remaining years of the analysis. This results in an average annual undiscounted cost of $140,589 in years 2–10 of the analysis. The one-time and continuing costs yield a total average annual undiscounted cost of $171,428. The annualized cost over the 10-year period is $52,633,180,190 and $63,924,192,560 at discount rates of 3 and 7 percent, respectively.

Unquantifiable Costs

a. Efficiency Impacts

The proposed wage methodology is designed to achieve the statute's twin goals of providing employers with an adequate legal supply of agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed. The AEWR provides a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment. In the case of perfect competition, if the proposed rule results in a wage floor above competitive market wages, it will produce some deadweight loss (DWL). In the case of market power, if the proposed rule reduces a wage floor below competitive market wages, it may produce some DWL if employers exercise market power, but otherwise will not. Setting minimum wage rates has implications on economic efficiency that are complicated and difficult to assess because, in certain combinations of SOC codes and geographies, the gross average hourly wage rates used to determine the AEWRs annually for each State under this proposed rule may act as a wage floor that is above competitive market equilibrium wages for certain job opportunities whereas in others imperfect competition may suppress domestic labor markets at quantities below the competitive market equilibrium.

These two impacts are dependent on local labor market conditions, the nature of the agricultural work to be performed and wage payment structure (*i.e.,* fixed hourly pay versus combination of hourly and piece-rate pay), the relation of the AEWR to the regional OEWS wage, as well as the shape and components (*i.e.,* makeup of nonimmigrant foreign and domestic workers) of the combined temporary agricultural employment labor supply curve in the local or regional labor market.

The Department is unable to quantify these efficiency impacts because it does not have data on all local labor market conditions for all occupations, data on foreign labor supply curves, and how these interact with employer demand. The Department seeks public comment on the DWL or other labor market inefficiencies resulting from the proposed rule. The efficiency impact of the proposed rule is limited only to the 2 percent of H–2A workers whose wages the proposed rule will affect, while there would be no change to the DWL for the other 98 percent of H–2A workers.[83] Therefore, the DWL resulting from the proposed rule is likely very small. Because the market equilibrium wages for construction workers, supervisors/managers of farmworkers, and logging equipment operators are above current baseline AEWRs, the proposed rule may create some efficiency gain (or decrease in the DWL) for jobs within the 2 percent when it raises the wage floor from the current baseline AEWRs toward competitive equilibrium wages if employers currently exercise market power to prevent wages from being bid up to competitive equilibrium rates. On the

[82] This estimate reflects the nature of the proposed rule. As a rulemaking to amend parts of an existing regulation, rather than to create a new rule, the 1-hour estimate assumes a high number of readers familiar with the existing regulation.

[83] Under this proposed rule the Department would use the AEWR methodology set forth in the 2010 Final Rule (*i.e.,* setting the annual AEWRs using the gross average hourly wage rate for field and livestock workers (combined)) for the occupations (45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099) which comprise 98 percent of H–2A workers.

other hand, there may be instances in which the new wage floor (depending on the job and geographic area) could be above the market equilibrium wage; this would result in efficiency loss (or increase in the DWL). A DWL occurs when a market operates at less than or more than the market equilibrium output. The AEWR sets compensation in some cases above the equilibrium level and in other cases may set wage levels that allow employers with market power to suppress wage rates below the competitive equilibrium, resulting in a labor shortage. When the AEWR is set above market equilibrium, the higher cost of labor can lead to a decrease in the total number of labor hours purchased in the local labor market. On the contrary, when the AEWR is set below competitive equilibrium and employers have market power, employers may pay below-competitive-equilibrium wage rates, decreasing the total number of worker labor hours purchased in the local labor market. DWL is a function of the difference between the compensation the employers are willing to pay for the hours lost and the compensation employees are willing to take for those hours. In short, DWL is the total loss in economic surplus resulting from a ''wedge'' between the employer's willingness to pay for, and the employees'' willingness to accept work arising from the intervention (in this case the AEWR).

The Department is unable to quantify the DWL without data on the equilibrium wage arising from each locality and occupational code's labor demand and combined immigrant foreign worker and domestic U.S. worker labor supply curves. The below paragraphs qualitatively discuss changes in the AEWR wages that may result in some DWL. In the analysis of wage transfers, only 2 percent of workers would be employed in H–2A job opportunities where the AEWR will change under the proposed rule from the current baseline. For the 98 percent of workers employed in H–2A job opportunities under the six occupational classifications covering field workers and livestock workers reported by the FLS with no change to wages, the proposed rule does not change the DWL and existing labor market efficiencies or inefficiencies from the current baseline.

In some cases the baseline AEWR creates a DWL by setting a minimum wage above the market equilibrium, because the hourly wage represents an annual weighted average across six occupational classifications covering a State or multistate region. Under the proposed rule when the AEWR is annually adjusted, the DWL may increase when the AEWR covering the State or multistate region also increases and remains above market equilibrium. Under the proposed rule this may occur for some, but not all, occupations covering field and livestock workers where the AEWR is determined using the annual weighted statewide gross hourly wage based on the OEWS survey. The OEWS survey does not collect wages for fixed-site farms and ranches but does include data for establishments that support farm production activities (*i.e.,* farm labor contractors) and are engaged in similar agricultural labor or services. Additionally, the types of agricultural establishments included in the OEWS survey, such as farm labor contractors, represent an increasing share of workers certified by the Department on H–2A applications. The OEWS wage for occupations associated with these establishments is unlikely to reflect any wage suppression created by nonimmigrant foreign workers'' willingness to work at lower wages than domestic U.S. workers. Therefore, an AEWR determined for a State based on OEWS wage data may be higher than the baseline AEWR that is based on the FLS and market equilibrium wage for temporary agricultural employment. Therefore, for most SOC code and area combinations, the AEWRs under this proposed rule AEWR, set at the OEWS wage, will serve as a wage floor and may create a DWL in the labor market, as illustrated by Figure 1.

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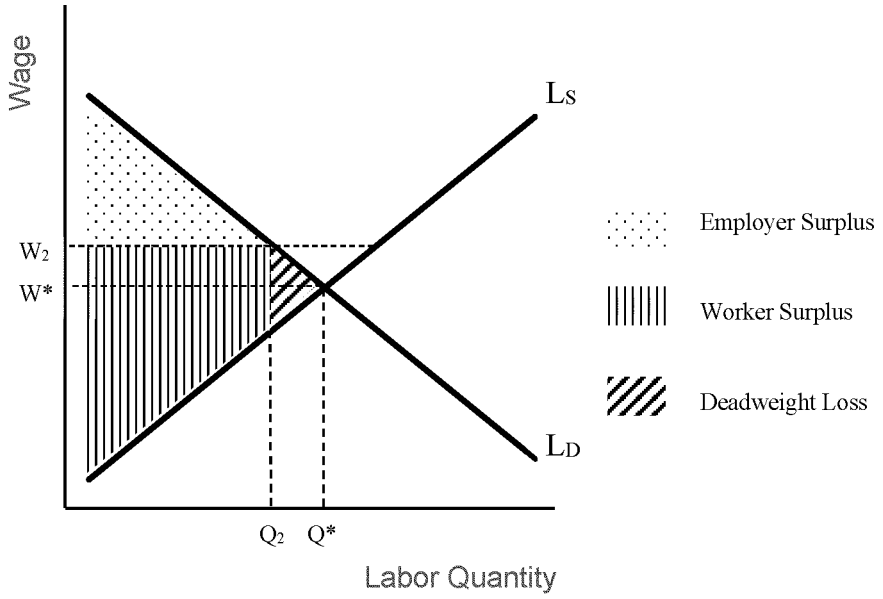

Figure 1: Given a combined nonimmigrant foreign worker and domestic U.S. worker supply curve (L_S) with equilibrium wage W* less than the AEWR set at the OEWS wage (W_2), there will be a DWL in the labor market for that SOC code and area combination.

When employers have market power in the labor market and the AEWR is set below the domestic competitive market equilibrium wage, then there may be a DWL in the associated U.S. labor market. In the H–2A program there are

some combinations of occupations and geographic areas where this can occur. For example, workers in higher paid occupations and occupations that are typically performed off farm yet qualify under the H–2A program (*e.g.,* logging operations) have a baseline wage set by the FLS that is substantially below the U.S. market equilibrium according to OEWS data covering the State. Under the proposed rule the AEWR will be increased for these occupations to the State-level OEWS.[84] In addition, workers in occupations that continue to have an AEWR set by the FLS, but in areas where FLS data for a given year cannot be reported, will have the AEWR set by a weighted average OEWS wage for field and livestock worker occupations which may be below market wage rates for a specific SOC code and geographic area combination.[85] In these examples, some U.S. employers that do not compete with other employers for workers may set wage rates below competitive equilibrium at a wage level that balances the revenue gains from an additional worker against the cost of raising wages for all employees to attract that marginal worker. Some U.S. and foreign workers who would be willing to work at competitive equilibrium wages may not be willing to work at a lower wage. In these cases, a DWL is produced in the U.S. labor market, but under the proposed rule that DWL is reduced because of the higher AEWR (see Figure).

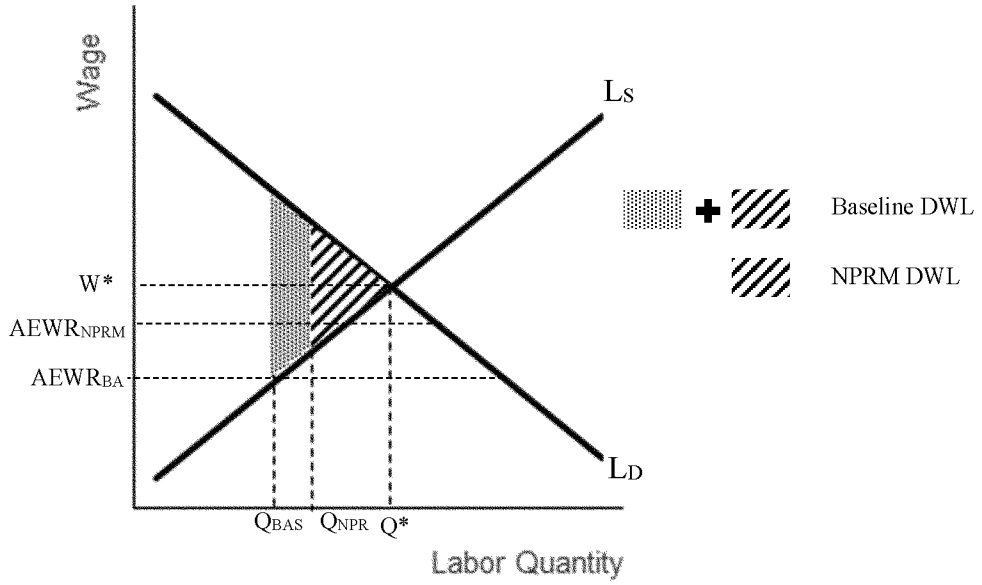

Figure 2: For some SOC code and area combinations the proposed rule may reduce DWL in the U.S. labor market. Under the baseline the wage set at $AEWR_{BASE}$ allows for the legal hiring of foreign workers below the competitive labor market equilibrium wage rate (W*). In a competitive market, employers will bid up wages to W*. If employers do not compete with other employers for workers, they may be able to keep wages below W* even though it creates a labor shortage. With a large supply of workers who lack bargaining power willing to work at the $AEWR_{BASE}$ wage rate, but others unwilling, the total number of workers willing to work at that wage rate is Q_{BASE}, which is below the competitive equilibrium quantity of workers Q*. This results in the Baseline DWL. Under the proposed rule the wage set at $AEWR_{NPRM}$ is increased, closer to the competitive labor market equilibrium wage rate (W*). More workers (Q_{NPRM}) are willing to work at this rate and the DWL in the U.S. labor market decreases to the NPRM DWL.

When labor markets are competitive, an AEWR set below the U.S.-only labor market equilibrium wage rate in absence of foreign labor, but above the market equilibrium, with both domestic and foreign labor, results in DWL for the United States because it reduces domestic employer surplus more than it increases domestic worker surplus. In a competitive labor market with no AEWR, there will be no DWL. Figure 3 illustrates this in a simplified case where domestic and foreign agricultural workers are perfect substitutes, and an infinite supply of foreign agricultural workers are willing to work at wage rate $W_{FOREIGN}$ below the U.S.-worker-only market equilibrium wage rate $W_{US\text{-}ONLY}$. The competitive market equilibrium will equal $W_{FOREIGN}$ and domestic employers will hire a combination of $Q_{EFFICIENT_US}$ domestic workers and ($Q_{EFFICIENT_TOTAL} - Q_{EFFICIENT_US}$) foreign workers. U.S. DWL will be zero because U.S. total surplus (U.S. employer surplus + U.S. worker surplus) is maximized.

[84] For example, Mobile Heavy Equipment Mechanics, Except Engine (49–3042, in ME) has a 2021 AEWR of $14.99 and under the proposed rule would have an OEWS wage of $22.85.

[85] For example, Agricultural Workers, All Other (45–2099, in SOC) has a 2021 AEWR of $11.81. If the FLS data was unavailable it would have a weighted average OEWS wage of $14.18 and the OEWS wage for that specific occupation is $16.51. Thus, the weighted average OEWS wage would be below the actual market wage for that occupation.

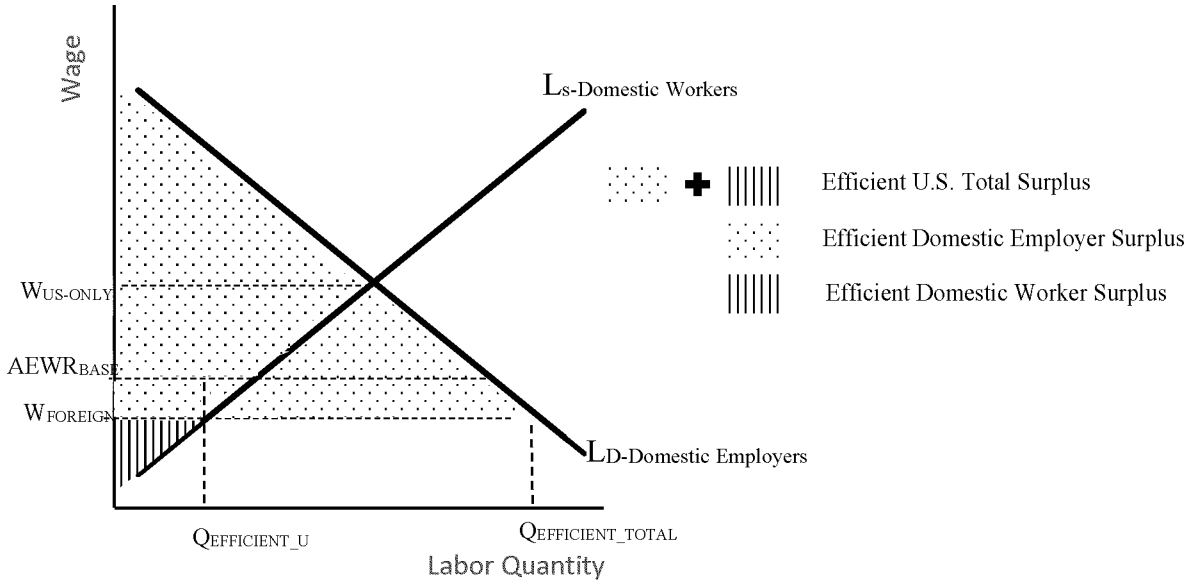

Figure 3: Under the efficient competitive equilibrium with no AEWR, assuming domestic and foreign labor are perfect substitutes and foreign labor is infinitely supplied at wage $W_{FOREIGN}$, U.S. employers will hire Q_{CE_TOTAL} number of workers at the labor market competitive equilibrium wage rate ($W_{FOREIGN}$) below the equilibrium wage rate $W_{US\text{-}ONLY}$ if no foreign workers were allowed. With a large supply of foreign workers willing to work at $W_{FOREIGN}$, U.S. employers will not need to raise the wage rate any further to attract more workers. The number of U.S. workers willing to work at that wage rate is Q_{CE_US}. This results in the Efficient Domestic Worker Surplus, the Efficient Domestic Employer Surplus, and the Efficient U.S. Total Surplus. Because any change in quantity of labor would decrease total surplus, total surplus is maximized and DWL is zero.

Setting an AEWR above the competitive labor market equilibrium wage creates a DWL. Working from the same assumptions as Figure 3, Figure 4 illustrates that setting $AEWR_{BASE}$ above the competitive equilibrium wage $W_{FOREIGN}$ reduces the total number of workers employers are willing to hire from $Q_{EFFICIENT_TOTAL}$ to Q_{AEWR_TOTAL}. Because employers now hire fewer workers at a higher wage rate, domestic employer surplus falls. At the higher wage, the number of domestic workers willing and hired to work increases from $Q_{EFFICIENT_US}$ to Q_{AEWR_US}, increasing domestic worker surplus. Total surplus falls, generating DWL, because the increase in domestic worker surplus is only a fraction of the decrease in domestic employer surplus. Figure 4 depicts U.S. DWL as the amount that the decrease in domestic employer surplus exceeds the increase in domestic worker surplus. Global DWL is smaller than this if we consider the welfare impacts to foreign workers from increasing their wages. Increasing the AEWR under the proposed rule will extend all these impacts; that is, increase DWL, decrease domestic employer surplus, and increase domestic worker surplus.

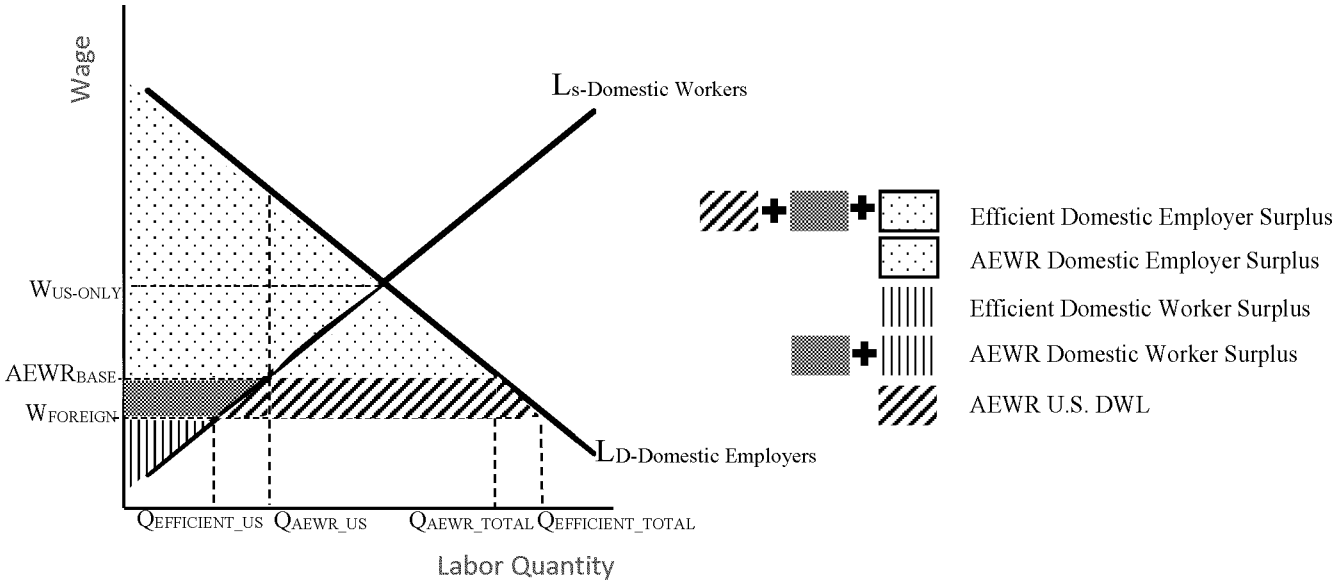

Figure 4: Under the baseline the wage set at $AEWR_{BASE}$ allows for the legal hiring of foreign workers below a U.S.-only labor market equilibrium wage rate ($W_{US\text{-}ONLY}$). With a large supply of foreign workers willing to work at the $AEWR_{BASE}$ wage rate the number of U.S. workers willing to work at that wage rate is Q_{BASE}. This results in the AEWR Domestic Worker Surplus, the AEWR Domestic Employer Surplus, and the AEWR U.S. DWL.

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b. Payroll and Other Transition Costs

The proposed rule will result in new AEWR wage rates for some SOC code and geographic area combinations compared to the baseline. Companies employing H–2A workers will need to update payrolls to account for the new AEWR wage rates. The Department does not quantify this cost and expects it to be *de minimis* because employers already need to update payrolls when AEWR wage rates are released annually. Therefore, they already have the capabilities and processes to quickly, and at *de minimis* cost, update payrolls when AEWR wage rates change.

The proposed rule may also result in other transition costs to some employers for recruitment and training if they hire U.S. workers for the jobs that are performed by H–2A workers. The Department is not able to quantify the transition costs and seeks public input on the potential transition expenses such as recruitment and training.

Transfers

The following section describes the transfers of the proposed rule related to the revisions to the wage structure. The Department considers transfers as payments from one group to another that do not affect total resources available to society. The transfers measured in this analysis are wage transfers from U.S. employers to H–2A workers. H–2A workers are migrant workers who will spend some of their earnings on consumption goods in the U.S. economy but likely send a large fraction of their earnings to their home countries.[86] Therefore, the Department considers the wage transfers in the analysis as transfer payments within the global economic system.

Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1), provides that an H–2A worker is admissible only if the Secretary of Labor determines that ''there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' In 20 CFR 655.120(a), the Department currently meets this statutory requirement, in part, by requiring the employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. As discussed below, the Department's proposed rule maintains this general wage-setting structure but proposes to modify the methodology by which it establishes the AEWRs.

Currently, pursuant to the 2010 Final Rule, the AEWR for each State or region is published annually as a single average hourly gross wage that is set using the field and livestock workers (combined) data from the FLS, which is conducted by the USDA's NASS. This methodology produces a single AEWR for all agricultural workers in a State or region, without regard to occupational classification, and no AEWR in geographic areas not surveyed by NASS (*e.g.,* Alaska). As discussed in depth in the preamble, the Department is concerned that this methodology may have an adverse effect on the wages of

[86] Walmsley, Winters, and Ahmed report the remittances to labor income for migrants from Mexico (the primary source of H–2A workers) at nearly 20%. The ratio ranges from close to 5% for migrants from China to close to 70% for migrants from India. These remittances can provide substantial financial assistance for migrant workers' families in their home countries. Terrie L. Walmsley et al., Global Trade Analysis Project, Measuring the Impact of the Movement of Labor Using a Model of Bilateral Migration Flows (Nov. 2007), *available at https://www.gtap.agecon.purdue.edu/resources/download/4635.pdf. See also* Dilip Ratha, *Remittances: Funds for the Folks Back Home,* International Monetary Fund, *https://www.imf.org/external/pubs/ft/fandd/basics/remitt.htm* (last updated Feb. 24, 2020); Daniel Costa & Philip Martin, Economic Policy Institute, Temporary Labor Migration Programs (Aug. 1, 2018), *available at https://www.epi.org/publication/temporary-labor-migration-programs-governance-migrant-worker-rights-and-recommendations-for-the-u-n-global-compact-for-migration/.*

workers in higher paid agricultural occupations, such as supervisors of farmworkers and construction laborers on farms, whose wages may be inappropriately lowered by an AEWR established from the wages of the FLS field and livestock workers (combined) occupational category, which does not include those workers.

Under this proposed rule the Department would modify the AEWR methodology so that it is based on data more specific to the agricultural occupation of workers in the United States similarly employed. Both the FLS and OEWS survey provide data tailored to U.S. agricultural workers and the States and regions where these workers are employed, making these sources effective in ensuring that the temporary employment of foreign workers in field and livestock job opportunities will not adversely affect the wages of workers in the United States similarly employed. In addition, OEWS data includes employment and gross hourly wage data from employer establishments that support farm production activities. Although they do not represent fixed-site farms and ranches, these establishments employ workers engaged in similar agricultural labor or services as those workers who are directly employed by farms and ranches.

As explained above, these types of employer establishments (*i.e.,* farm labor contractors) participate in the H–2A program and represent an increasing share of the worker positions certified by the Department on H–2A applications both in the predominant field and livestock workers (combined) occupational group and in occupations that are less common in the H–2A program. While the labor demanded from H–2ALCs (*i.e.,* farm labor contractors) using the H–2A program for employment in non-range occupations has significantly increased in recent years, they only represented approximately 16 percent of all certified H–2A applications in FY 2020.[87] Individual employers and agricultural associations filing for one or more individual association members, which generally hire workers directly for employment, constituted approximately 84 percent of all of H–2A applications.[88] Using the FLS, which surveys directly hired agricultural workers, to set AEWRs therefore is more accurate and reasonable because, in addition to being a comprehensive source of farmworker wage date, it also surveys the agricultural employers which make up a significant majority of H–2A applications.

Under this proposed rule the Department would use the AEWR methodology set forth in the 2010 Final Rule, *i.e.,* setting the annual AEWRs using the gross average hourly wage rate for field and livestock workers (combined) in the State or region, as reported by the FLS, when that data is available, for the following SOC codes:

- 45–2041—Graders and Sorters, Agricultural Products
- 45–2091—Agricultural Equipment Operators
- 45–2092—Farmworkers and Laborers, Crop, Nursery and Greenhouse
- 45–2093—Farmworkers, Farm, Ranch, and Aquacultural Animals
- 53–7064—Packers and Packagers, Hand
- 45–2099—Agricultural Workers, All Other

If the annual gross average hourly wage in the State or region is not reported by the FLS, the Department proposes to set the annual AEWR for these occupations (45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099) using the statewide gross average hourly wage rate reported by the OEWS survey. If the annual statewide gross average hourly wage is not reported by the OEWS survey, the Department proposes to set the AEWR for these occupations by using the annual national gross average hourly wage as reported by the OEWS survey. To produce an equivalent AEWR for field and livestock worker job opportunities using the OEWS survey under the proposed rule, BLS will compute an annual weighted average hourly wage using the establishment data reported for these occupations at the State and national level.

For all other SOC codes the Department proposes to annually set the AEWR for agricultural services or labor based on the statewide annual average hourly wage reported by the OEWS survey. If the OEWS survey does not report a statewide annual average hourly wage for the SOC code, the Department proposes to set the AEWR based on the national/annual average hourly wage reported by the OEWS survey.

To estimate wage impacts the Department uses FY 2020 through FY 2021 OFLC certification data. To include the most recent H–2A certification data (*i.e.,* FY 2021) the Department simulated Q4 data based on FY 2016–2020 data, to produce a full year of certification data.[89] For the most common SOC codes (45–2091; 45–2092; and 45–2093), the Department calculated the average certification growth rate form FY 2016 to FY 2020 by SOC and State, and then determined the average annual growth rate. In some cases, due to small numbers of certifications in certain States for a specific SOC in each year, the growth rates were unreasonably high or low (greater than 80% or less than −80% growth). In such cases, the Department applied the national growth rate for the applicable SOC. Next, the Department calculated the number of certifications that had work in the fourth quarter of 2020 by State, and SOC, and applied the applicable growth rate to Q4 to estimate FY 2021 quarter 4 certifications. For all other SOC codes, the Department took the average of the number of certifications for each SOC and State from FY 2016 to FY 2020. The Department also needed to estimate the period of need, number of workers per certification, and number of hours per certifications. For the three most common SOC codes, the Department calculated, by State and SOC code, the number of certifications that had work in one or two calendar years, and the average number of days that occurred in each year. For all other SOC codes, the Department used the national average from FY 2016 to FY 2020 of the percentage of certifications with work in one or two calendar years, and the number of days in each year. For number of workers per certifications and number of hours, the average number of workers for each SOC code and State from FY 2016 to FY 2020 was applied. Total wages were then calculated using the simulated Q4 certifications and these estimated FY 2021 Q4 wage impacts were summed with the FY 2021 Q1 to Q3 wage impacts to create an estimate of total wages for the entirety of FY 2021.

To produce a combined field and livestock AEWR using the OEWS, BLS provided the Department with the weighted average hourly wage for 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099 occupations at the State and national level using the OEWS May 2020 survey. The OEWS May 2020

[87] Based on an analysis of H–2A labor certification data for FY 2020, the Department issued 12,491 temporary labor certifications covering 272,610 worker positions for non-range employment. Of this total, the Department certified 2,052 H–2A applications covering 116,479 worker positions submitted by, or on behalf of, H–2ALCs; 1,669 H–2A applications covering 34,236 worker positions submitted by agricultural associations by, or on behalf of, one of more individual association members; and 8,770 H–2A applications covering 121,895 worker positions submitted by individual employers (*i.e.,* fixed-site agricultural businesses). See ETA, Performance Data, *https://www.dol.gov/agencies/eta/foreign-labor/performance* (last visited Sept. 29, 2021).

[88] *Id.*

[89] FY 2021 certification data only consists of three quarters of data as of the date of analysis for this proposed rule.

wages are applicable to work occurring between July 1, 2021 and June 30, 2022. The FY 2020 and FY 2021 certification data includes work occurring as early as October of 2019. To determine the appropriate weighted average hourly wage for these six occupations between October of 2019 and the start of the OEWS May 2020 period, July 1, 2021, the Department estimated the weighted average hourly wage for OEWS May 2018 and OEWS May 2019 datasets. Using public OEWS survey data, the Department calculated the average annual percent change for wages in these six SOC codes between OEWS May 2018 and OEWS May 2019 and between OEWS May 2019 and OEWS May 2020. To determine the weighted average hourly wage for the six SOC codes in OEWS May 2019, the Department used the percentage growth in the wages to adjust the BLS weighted average hourly wage.[90]

The Department calculated the impact on wages that would occur from the implementation of the revised AEWR methodology. For each H–2A certification in FY 2020 through FY 2021, the Department calculated total wages under the current AEWR baseline, *i.e.,* pursuant to the 2010 Final Rule, and total wages under the proposed AEWR methodology. Then, the Department determined the annual wage impact in calendar year (CY) 2020 and CY 2021 by subtracting the AEWR baseline wage from the NPRM wage. The Department summed the wage impacts in each CY, converted the wage impact to 2020 dollars using the Employment Cost Index (ECI)[91] and took the average impact of CY 2020 and CY 2021.[92] Wage impacts for 2022 to 2031 were estimated by applying the H–2A workers growth rate (5.6 percent) to account for that fact that the number of H–2A workers affected (and the total wage impact) will grow annually at 5.6 percent. Because the proposed rule wage-setting methodology would not retroactively impact workers and OEWS wages in the May 2021 OEWS will not be applicable until July of 2022, the wage impact in 2022 is divided by 2 to account for the fact that only half the year of wages would be impacted.[93]

The Department provides two examples illustrating the above wage calculation methodology for H–2A certifications. Exhibits 5 and 6 illustrate how total wages are calculated for the proposed rule and baseline. The Department multiplied the number of certified workers by the number of hours worked each day, the number of days in a year that the employees worked, and the annual average hourly gross State AEWR wage for SOC codes set by the AEWR. In the example provided in Exhibit 5, for agricultural equipment operators (SOC 45–2092, Farmworkers and Laborers, Crop, Nursery, and Greenhouse) the FLS AEWR wage is not available in Alaska and Puerto Rico, so the AEWR is set by the weighted average OEWS wage. For SOC codes set by the OEWS survey, the annual average hourly gross wage from the state-level OEWS-based wage for the appropriate SOC code and worksite state is used, or the national OEWS-based wage is used if the State-level wage is not available.

EXHIBIT 5—AEWR WAGE UNDER THE PROPOSED RULE

[Example case]

SOC code	NPRM Wage source	Number of certified workers (a)	Basic number of hours (b)	Number of days worked in 2020 (c)	Number of days worked in 2021 (d)	Wage 2020 (e)	Wage 2021 (f)	Total AEWR wages 2020 (a*(b/5)*c*e)	Total AEWR wages 2021 (a*(b/5)*d*f)
45–2092	FLS AEWR (unavailable); weighted average OEWS.	14	40	152	10	$15.15	$16.78	$257,913.60	$18,793.60
13–1074	OEWS	10	35	280	50	25.45	29.84	498,820.00	104,440.00

After the total wages for the proposed rule were determined, the wage calculation under the baseline AEWR was calculated. The number of workers certified is multiplied by the number of hours worked each day, the number of days in a year that the employees worked, and the AEWR baseline for the year(s) in which the work occurred (Exhibit 6 provides an example of the calculation of the AEWR baseline for the same case as in Exhibit 5). In the example provided in Exhibit 6 for SOC code 45–2092, the AEWR baseline wage is not available, so the baseline wage is set by the public OEWS State wage.

EXHIBIT 6—AEWR WAGE UNDER THE BASELINE

[Example case]

SOC code	Baseline wage source	Number of certified workers (a)	Basic number of hours (b)	Number of days worked in 2020 (c)	Number of days worked in 2021 (d)	Wage 2020 (e)	Wage 2021 (f)	Total AEWR wages 2020 (a*(b/5)*c*e)	Total AEWR wages 2021 (a*(b/5)*d*f)
45–2092	FLS AEWR (unavailable); OEWS State.	14	40	152	10	$15.54	$15.72	$264,552.96	$17,606.40
13–1074	FLS AEWR	10	35	280	50	14.58	15.37	285,768.00	53,795.00

[90] The Department divided the BLS calculated weighed average hourly wage rate in OEWS May 2020 by 1+ the average percent change. Similarly, the OEWS May 2018 weighted average hourly wage was determined by dividing the OEWS May 2019 weighted average hourly wage by 1+ the average percent change. The Department completed these calculations at the State and national level.

[91] BLS, *Employment Cost Index Archived News Releases, https://www.bls.gov/bls/news-release/eci.htm* (last modified July 30, 2021).

[92] While there were working days and therefore wage impacts in CY 2019 and CY 2022 in the FY 2020 and FY 2021 certification data, the Department did not include wage impacts in CY 2019 and CY 2022 in the average annual impact calculations because a full CY of work is not captured in the FY 2020 and FY 2021 certification data for CY 2019 and CY 2022.

[93] The Department assumes in the economic analysis of the proposed rule that the final rule will not become effective until the second half of the year 2022.

The changes in wages constitute a transfer from H–2A employers to H–2A employees for SOC codes set by the OEWS survey. For SOC codes set by the FLS AEWR there is no wage impact, unless the worksite location is in Alaska or Puerto Rico where no AEWR currently exists because the FLS does not collect wage data covering these geographic areas.[94] To account for the growth rate in H–2A workers the total transfers in each year are increased annually by the estimated growth rate of H–2A workers (5.6 percent).[95] The results are average annual undiscounted transfers of $29.50 million. The total transfer over the 10-year period is estimated at $295.00 million undiscounted, or $254.20 million and $211.87 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $29.80 million and $30.17 million at discount rates of 3 and 7 percent, respectively.

The estimated transfers are likely on the high end of potential transfers. The Department does not make any adjustment to account for H–2A certifications that are made but do not end up in jobs with realized wages. In FY 2020, according to State Department data, there were 213,394 H–2A visas issued.[96] In FY 2020 there were 275,430 workers associated with H–2A certifications. The Department is unable to verify the specific H–2A certifications that do not end up in materialized jobs and so cannot adjust wage transfers to account for differences in regional, and by-SOC code, job materialization. Overall, the data on H–2A visas compared to workers associated with H–2A certifications indicates that about 80 percent of certified positions have associated H–2A visas. The remaining 20 percent could be jobs that did not materialize or were filled by U.S. workers.

The increase (or decrease) in the wage rates for H–2A workers also represents a wage transfer from employers to corresponding workers performing similar work for the employer, not just the H–2A workers employed under the work contract. The higher (or lower) wages paid to H–2A workers associated with the proposed rule's methodology for determining the AEWRs will also result in wage changes to corresponding workers. However, the Department does not collect or possess sufficient information about the number of corresponding workers affected and their wage payment structures to reasonably measure the transfers to corresponding workers. Employers are not required to provide the Department, on any application or report, the estimated or actual total number of workers in corresponding employment. Although each employer, as a condition of being granted a temporary labor certification, must provide the Department with a report of its initial recruitment efforts for U.S. workers, including the name and contact information of each U.S. worker who applied or was referred to the job, such information typically reflects only a very small portion of the total recruitment period, which runs through 50 percent of the certified work contract period, and does not account for any other workers who may be considered in corresponding employment and already working for the employer. And finally, the Department is also not able to estimate how much of the wage transfer stays in the U.S. economy. It is likely that a substantial portion of the wage transfer is from U.S. employers to the home economy of H–2A workers. Nonimmigrant foreign H–2A workers may spend wages earned in the U.S., spend the money outside of the U.S., send the money outside of the U.S., or some combination. The Department invites comments regarding how these wage transfer impacts can be calculated.

Qualitative Benefits

The proposed rule makes an important update to the AEWR to ensure that it protects U.S. workers in occupations where the existing wage methodology may adversely affect wages in certain occupations where the FLS does not adequately collect or consistently report wage data at a State or regional level (*e.g.*, truck drivers, farm supervisors and managers, construction workers, and many occupations in contract employment). U.S. workers in these occupations would benefit from the protections afforded them by an AEWR determined using a more accurate data source.

The AEWR is the rate that the Department has determined is necessary to ensure the employment of H–2A foreign workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed. A more accurate AEWR for workers in occupations where the FLS is inadequate will guard against the potential for the entry of H–2A foreign workers to adversely affect the wages and working conditions of workers in the United States similarly employed in these occupations. The potential for the employment of foreign workers to adversely affect the wages of U.S. workers is heightened in the H–2A program because the H–2A program is not subject to a statutory cap on the number of foreign workers who may be admitted to work in agricultural jobs. Consequently, concerns about wage depression from the employment of foreign workers are particularly acute because access to an unlimited number of foreign workers in a particular labor market and occupation could cause the prevailing wage of workers in the United States similarly employed to stagnate or decrease.

Addressing the potential adverse effect that the employment of temporary foreign workers may have on the wages of agricultural workers in the United States similarly employed is particularly important because U.S. agricultural workers are, in many cases, especially susceptible to adverse effects caused by the employment of temporary foreign workers. As discussed in prior rulemakings, the Department continues to hold the view that ''U.S. agricultural workers need protection from potential adverse effects of the use of foreign temporary workers, because they generally comprise an especially vulnerable population whose low educational attainment, low skills, low rates of unionization and high rates of unemployment leave them with few alternatives in the non-farm labor market.'' [97] As a result, ''their ability to negotiate wages and working conditions with farm operators or agriculture service employers is quite limited.'' [98] The AEWR provides ''a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment.'' [99]

[94] There is no FLS wage available for Alaska or Puerto Rico. Because of that, wages under the baseline are set by the public OEWS State data. Under the proposed rule, for SOC codes that have worksite locations in Alaska or Puerto Rico, the hourly wage would be set by the weighted average hourly wage rate calculated by BLS. Therefore, those certifications may have a wage impact under the proposed rule.

[95] Total transfers in each year are increased with the following formula to account for an annual increase in the underlying population of H–2A workers: Transfer*(1.056^(Current year − Base year)).

[96] U.S. Department of State, *Nonimmigrant Visas Issued by Classification, Fiscal Years 2016–2020, available at https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport-TableXVB.pdf.*

[97] Proposed Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 74 FR 45905, 45911 (Sep. 4, 2009).

[98] *Id.*

[99] *Id.*

Distributional Impact Analysis

E.O. 13985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, seeks to advance equity in agency actions and programs. The term equity is defined as consistent and systematic fair, just, and impartial treatment of individuals, including individuals who belong to underserved communities, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islands, and other persons of color, as well as members of religious minorities, lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons, persons with disabilities, persons who live in rural areas, and persons otherwise adversely affected by persistent poverty or inequality.

To assess the impact of the proposed rule on equity the Department used Current Population Survey (CPS) data from BLS [100] to determine the ethnic and racial makeup of the most common SOC codes in the H–2A program. CPS only included data for three races, White, Black or African American, and Asian, and one ethnicity, Hispanic or Latino. The results of this analysis for the top ten H–2A SOC codes that experience wage impacts (SOC codes other than 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099) is presented in Exhibit 7. These top 10 SOC codes [101] account for over 90 percent of all the workers in the FY 2021 certification data that experience wage impacts (certifications with wages set by the OEWS).

EXHIBIT 7—RACIAL/ETHNIC DISTRIBUTION OF THE TOP 10 H–2A SOC CODES BY NUMBER OF WORKERS WITH WAGE IMPACTS

SOC code	Description	% of employed people				Number of FY 2021 Q1–Q3 H–2A workers
		White	Black or African American	Asian	Hispanic or Latino	
45–0000	Farming, fishing, and forestry occupations	90	4	2	43	(**)
47–2061	Construction Laborers	87	8	1	46	2,107
53–3032	Heavy and Tractor-Trailer Truck Drivers	77	17	3	23	526
45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	90	5	3	28	328
47–3012	Helpers—Carpenters	Not available	Not available	Not available	Not available	104
45–4022	Logging Equipment Operators	Not available	Not available	Not available	Not available	57
49–3041	Farm Equipment Mechanics and Service Technicians.	94	4	1	19	55
47–2031	Carpenters	88	7	2	36	30
47–3019	Helpers, Construction Trades, All Other	Not available	Not available	Not available	Not available	18
47–2051	Cement Masons and Concrete Finishers	83	8	1	53	16

* Not available indicates that racial/ethnic data for that SOC code was not reported in the CPS data.
** 45–2000 is included as a reference for the racial/ethnic distribution of agricultural workers generally.
Note: Estimates for the above race groups (White, Black or African American, and Asian) do not sum to totals because data are not presented for all races. Persons whose ethnicity is identified as Hispanic or Latino may be of any race.

4. Summary of the Analysis

Exhibit 8 summarizes the estimated total costs and transfers of the proposed rule over the 10-year analysis period. The Department estimates the annualized costs of the proposed rule at $0.19 million and the annualized transfers (from H–2A employers to employees) at $30.17 million, at a discount rate of 7-percent.

EXHIBIT 8—ESTIMATED MONETIZED COSTS AND TRANSFERS OF THE PROPOSED RULE

[2020 $millions]

Year	Costs	Transfers
2022	$0.00	$11.86
2023	0.00	25.05
2024	0.00	26.45
2025	0.00	27.93
2026	0.00	29.50
2027	0.00	31.15
2028	0.00	32.90
2029	0.00	34.74
2030	0.00	36.68
2031	0.00	38.74
Undiscounted 10-Year Total	0.45	295.00
10-Year Total with a Discount Rate of 3%	0.45	254.20
10-Year Total with a Discount Rate of 7%	0.45	211.87
10-Year Average	0.045	29.50
Annualized with a Discount Rate of 3%	0.053	29.80
Annualized with a Discount Rate of 7%	0.064	30.17

[100] BLS, Labor Force Statistics from the Current Population Survey, *Employed persons by occupation, race, Hispanic or Latino ethnicity, and sex, https://www.bls.gov/cps/tables.htm* (last modified May 14, 2021).

[101] Farm Labor Contractors are within the Top 10 impacted H–2A SOC codes, but because Farm Labor Contractor are employers it is excluded from Exhibit 7.

5. Regulatory Alternatives

The Department considered two alternatives to the proposal of using the FLS-based field and livestock worker (combined) average gross hourly wage, where USDA reports such as wage, as the sole source for establishing the AEWR in job opportunities classified under one of the following SOCs:

- 45–2041—Graders and Sorters, Agricultural Products
- 45–2091—Agricultural Equipment Operators
- 45–2092—Farmworkers and Laborers, Crop, Nursery and Greenhouse
- 45–2093—Farmworkers, Farm, Ranch, and Aquacultural Animals
- 53–7064—Packers and Packagers, Hand
- 45–2099—Agricultural Workers, All Other

For each alternative, job opportunities classified under any other SOC will have the AEWR set using the same methodology in the proposed rule: The AEWR for each occupation would be the statewide annual average hourly gross wage for that occupation as reported by the OEWS survey. If the statewide wage is not available, the AEWR would be set by the national annual average hourly wage for that occupation as reported by the OEWS survey.

Under the first regulatory alternative, the Department considered setting the AEWR for job opportunities classified under SOCs 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, and 45–2099, using the *highest* of the annual average hourly gross wage reported by the FLS or the weighted average hourly gross wage provided by the OEWS for these same occupations for the State or region. If a statewide annual average hourly gross wage in the State is not reported in the FLS or the OEWS survey, the AEWR for the occupation shall be determined using the national annual average hourly gross wage as reported by the FLS or the OEWS survey.

The total impact of the first regulatory alternative was calculated using the methodology described to calculate proposed wage impacts using FY 2020 to FY 2021 certification data. The Department estimated average annual undiscounted transfers of $103.30 million. The total transfer over the 10-year period was estimated at $1.03 billion undiscounted, or $890.12 million and $741.88 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was $104.35 million and $105.63 million at discount rates of 3 and 7 percent, respectively.

Under the second regulatory alternative, the Department would set the AEWR using *only* the OEWS average hourly wage for the SOC and State (*i.e.,* use of FLS-based wages in establishing AEWRs under the H–2A program would be discontinued). When OEWS State data is not available, the Department would set the AEWR at the OEWS national average hourly wage for the SOC under this alternative. This alternative reflects the transfers that would occur if, for example, the USDA survey was discontinued or suspended and, as a result, the Department would set the AEWRs for each State using the OEWS data. For SOC codes 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099, the weighted average hourly wage provided by BLS at the State and national level is applied. The Department again used the same method to calculate the total impact of the regulatory alternative and found that unlike the proposed rule and first regulatory alternative, the second regulatory alternative would result in transfers from H–2A employees to employers. The Department estimated average annual undiscounted transfers of $72.30 million. The total transfer over the 10-year period was estimated at $723.03 million undiscounted, or $623.03 million and $519.28 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was $73.04 million and $73.93 million at discount rates of 3 and 7 percent, respectively.

Exhibit 9 summarizes the estimated transfers associated with the three considered revised wage structures over the 10-year analysis period. Transfers under the proposal and the first regulatory alternative are transfers from H–2A employers to H–2A employees and transfers under the second alternative are transfers from H–2A employees to H–2A employers.

EXHIBIT 9—ESTIMATED MONETIZED TRANSFERS AND COSTS OF THE PROPOSED RULE

[2020 $millions]

	Proposed rule (transfers from employers to employees)	Regulatory alternative 1 (transfers from employers to employees)	Regulatory alternative 2 (transfers from employees to employers)
Total 10-Year Transfer	$295	$1,033	$723
Total with 3% Discount	254	890	623
Total with 7% Discount	212	742	519
Annualized Undiscounted Transfer	30	103	72
Annualized Transfer with 3% Discount	30	104	73
Annualized Transfer with 7% Discount	30	106	74

The Department prefers the chosen approach of the proposed rule because it allows specific OEWS wages for workers in higher paid agricultural occupations, such as supervisors of farmworkers and construction laborers on farms while maintaining the use of FLS data for occupations with the majority of H–2A workers. As the Department has stated previously, the FLS, which surveys directly hired agricultural workers, is the best source of wage data to set AEWRs for the vast majority of H–2A occupations. This is in part because the FLS is a more comprehensive source of farmworker wage date than the OEWS survey. The chosen approach also minimizes transfers compared to the two alternatives, and ensures greater stability in the wage obligations of employers by determining AEWRs, including annual adjustments, using the data source that best reflects the wages of workers in the United States similarly employed.

B. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), hereafter jointly referred to as the RFA, initial regulatory flexibility analysis

(IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The Department certifies that the proposed rule does not have a significant economic impact on a substantial number of small entities. The Department presents the basis for this conclusion in the analysis below.

Definition of Small Entity

The RFA defines a ''small entity'' as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by the Small Business Administration (SBA), in effect as of August 19, 2019, to classify entities as small.[102] SBA establishes separate standards for individual 6-digit NAICS industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and noncommercial banks) are classified by total assets (small defined as less than $550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.[103]

Number of Small Entities

The Department collected employment and annual revenue data from the business information provider Data Axle and merged those data into the H–2A disclosure data for FY 2020 and FY 2021. This process allowed the Department to identify the number and type of small entities in the H–2A disclosure data as well as their annual revenues. The Department determined the number of unique employers in the FY 2020 and FY 2021 certification data based on the employer name and city. The Department identified 9,927 unique employers (excluding labor contractors). Of those 9,927 employers, the Department was able to obtain data matches of revenue and employees for 2,615 H–2A employers in the FY 2020 and FY 2021 certification data. Of those 2,615 employers, the Department determined that 2,105 were small (80.5 percent).[104] These unique small entities had an average of 11 employees and average annual revenue of approximately $3.62 million. Of these small unique entities, 2,085 of them had revenue data available from Data Axle. The Department's analysis of the impact of this proposed rule on small entities is based on the number of small unique entities (2,085 with revenue data).

To provide clarity on the agricultural industries impacted by this regulation, Exhibit 10 shows the number of unique H–2A small entities employers with certifications in the FY 2020 and FY 2021 certification data within each NAICS code at the 6-digit level.

EXHIBIT 10—NUMBER OF H–2A SMALL EMPLOYERS BY NAICS CODE

6-Digit NAICS	Description	Number of employers	Percent
111998	All Other Miscellaneous Crop Farming	611	31
444220	Nursery, Garden Center, and Farm Supply Stores	162	8
561730	Landscaping Services	134	7
445230	Fruit and Vegetable Markets	127	6
424480	Fresh Fruit and Vegetable Merchant Wholesalers	84	4
111339	Other Noncitrus Fruit Farming	78	4
112990	All Other Animal Production	57	3
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers	51	3
424910	Farm Supplies Merchant Wholesalers	41	2
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	39	2

Projected Impacts to Affected Small Entities

The Department has estimated the incremental costs for small entities from the baseline (*i.e.,* the 2010 Final Rule: *Temporary Agricultural Employment of H–2A Aliens in the United States;* TEGL 17–06, Change 1; TEGL 33–10, and TEGL 16–06, Change 1) to this proposed rule. We estimated the costs of (a) time to read and review the proposed rule and (b) wage costs. The estimates included in this analysis are consistent with those presented in the E.O. 12866 section.

The Department estimates that small entities not classified as H–2ALCs, 1,946 unique small entities,[105] would incur a one-time cost of $53.08 to familiarize themselves with the rule.[106]

In addition to the cost of rule familiarization above, each small entity will have an increase in the wage costs due to the revisions to the wage structure. To estimate the wage impact for each small entity we followed the methodology presented in the E.O. 12866 section. For each certification of a small entity the Department calculated total wage impacts of the proposed rule in CY 2020 and CY 2021. The Department estimates the total annualized cost at a discount rate of 7 percent is $4,347 on average.

The Department determined the proportion of each small entity's total revenue that would be impacted by the costs of the proposed rule to determine if the proposed rule would have a significant and substantial impact on small entities. The cost impacts included estimated first year costs and the wage impact introduced by the proposed rule. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 15 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities.

[102] SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

[103] *See https://advocacy.sba.gov/resources/the-regulatory-flexibility-act* for details.

[104] SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

[105] The 1,946 unique small entities exclude all labor contractors.

[106] $33.38 + $33.38(0.46) + $33.38(0.17) = $53.08.

A threshold of 3 percent of revenues has been used in prior rulemakings for the definition of significant economic impact.[107] This threshold is also consistent with that sometimes used by other agencies.[108]

Exhibit 11 provides a breakdown of small entities by the proportion of revenue affected by the costs of the proposed rule. Of the 2,085 unique small entities with revenue data in the FY 2020 and FY 2021 certification data, 1.3 percent of employers had more than 3 percent of their total revenue impacted in the first year. Based on the findings presented in Exhibit 11, the proposed rule does not have a significant economic impact on a substantial number of small H–2A employers.

EXHIBIT 11—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

Proportion of revenue impacted	2020, by NAICS code					
	111998	444220	561730	445230	All other	Total
<1%	601 (98.4%)	162 (100.0%)	132 (98.5%)	126 (99.2%)	1,033 (98.3%)	2,054 (98.5%)
1%–2%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	3 (0.3%)	3 (0.1%)
2%–3%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (0.1%)	1 (0.0%)
3%–4%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	2 (0.2%)	2 (0.1%)
4%–5%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (0.1%)	1 (0.0%)
>5%	10 (1.6%)	0 (0.0%)	2 (1.5%)	1 (0.8%)	11 (1.0%)	24 (1.2%)
Total >3%	10 (1.6%)	0 (0.0%)	2 (1.5%)	1 (0.8%)	14 (1.3%)	27 (1.3%)
	2021, by NAICS code					
<1%	606 (99.2%)	162 (100.0%)	131 (97.8%)	125 (98.4%)	1,025 (97.5%)	2,049 (98.3%)
1%–2%	0 (0.0%)	0 (0.0%)	1 (0.7%)	0 (0.0%)	5 (0.5%)	6 (0.3%)
2%–3%	1 (0.2%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	2 (0.2%)	3 (0.1%)
3%–4%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (0.1%)	1 (0.0%)
4%–5%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (0.1%)	1 (0.0%)
>5%	4 (0.7%)	0 (0.0%)	2 (1.5%)	2 (1.6%)	17 (1.6%)	25 (1.2%)
Total >3%	4 (0.7%)	0 (0.0%)	2 (1.5%)	2 (1.6%)	19 (1.8%)	27 (1.3%)

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501, *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This proposed rule does not require a collection of information subject to approval by OMB under the PRA, or affect any existing collections of information.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value equivalent of $100 million in 1995 adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI–U) is approximately $168 million based on the Consumer Price Index for All Urban Consumers.[109]

This proposed rule does not result in unfunded mandates for the public or private sector because private employers'' participation in the program is voluntary, and State governments are reimbursed for performing activities required under the program. The requirements of Title II of the UMRA, therefore, do not apply, and the Department has not prepared a statement under the UMRA.

E. Executive Order 13132 (Federalism)

This proposed rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

[107] *See, e.g.,* NPRM, *Increasing the Minimum Wage for Federal Contractors,* 79 FR 60634 (Oct. 7, 2014) (establishing a minimum wage for contractors); Final Rule, *Discrimination on the Basis of Sex,* 81 FR 39108 (June 15, 2016).

[108] *See, e.g.,* Final Rule, *Medicare and Medicaid Programs; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction; Part II,* 79 FR 27106 (May 12, 2014) (Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant).

[109] *See* BLS, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items, By Month, https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf* (last visited Aug. 19, 2021).

Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2019—Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(255.657–152.383)/152.383] * 100 = (103.274/152.383) *100 = 0.6777 * 100 = 67.77 percent = 68 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.68 = $168 million in 2019 dollars.

G. Regulatory Flexibility Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

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

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons stated in the preamble, the Department of Labor proposes to amend 20 CFR part 655 as follows:

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

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

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), (p), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

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

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

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

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

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

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

■ 2. Amend § 655.103(b) by revising the definition of *Adverse effect wage rate* to read as follows:

§ 655.103 Overview of this subpart and definition of terms.

* * * * *

(b) * * *

Adverse effect wage rate (AEWR). The wage rate published by the OFLC Administrator in the **Federal Register** for non-range occupations as set forth in § 655.120(b) and range occupations as set forth in § 655.211(c).

* * * * *

■ 3. Amend § 655.120 by revising paragraphs (b)(1)(i) through (iii) and (b)(5) to read as follows:

§ 655.120 Offered wage rate.

* * * * *

(b)(1) * * *

(i) For occupations included in the Department of Agriculture's (USDA) Farm Labor Survey (FLS) field and livestock workers (combined) category:

(A) If an annual average hourly gross wage in the State or region is reported by the FLS, that wage shall be the AEWR for the State; or

(B) If an annual average hourly gross wage in the State or region is not reported by the FLS, the AEWR for the occupations shall be the statewide annual average hourly gross wage in the State as reported by the Occupational Employment and Wage Statistics (OEWS) survey; or

(C) If a statewide annual average hourly gross wage in the State is not reported by the OEWS survey, the AEWR for the occupations shall be the national annual average hourly gross wage as reported by the OEWS survey.

(ii) For all other occupations:

(A) The AEWR for each occupation shall be the statewide annual average hourly gross wage for that occupation in the State as reported by the OEWS survey; or

(B) If a statewide annual average hourly gross wage in the State is not reported by the OEWS survey, the AEWR for each occupation shall be the national annual average hourly gross wage for that occupation as reported by the OEWS survey.

(iii) The AEWR methodologies described in paragraphs (b)(1)(i) and (ii) of this section shall apply to all job orders submitted, as set forth in § 655.121, on or after January 31, 2022, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the NPC for emergency situations under § 655.134. For purposes of paragraphs (b)(1)(i) and (ii) of this section, the term *State* and *statewide* include the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

* * * * *

(5) If the job duties on the *Application for Temporary Employment Certification* do not fall within a single occupational classification, the applicable AEWR shall be the highest AEWR for all applicable occupations.

* * * * *

Angela Hanks,

Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2021–25803 Filed 11–30–21; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 559

RIN 3141–AA76

Facility License Notifications

AGENCY: National Indian Gaming Commission.

ACTION: Proposed rule.

SUMMARY: The National Indian Gaming Commission proposes to amend our facility license notifications. The proposed rule would modify the requirement that facility license notice submissions include a name and address of the proposed gaming facility. Specifically, the National Indian Gaming Commission would require the submission of the name and address of the property only if known when the facility license notification is submitted to the NIGC Chair. The Commission proposes this action to assist tribal governments, and tribal gaming regulatory authorities that face challenges in meeting the regulatory requirement in instances where a facility has not been issued a name or address.

DATES: The agency must receive comments on or before January 3, 2022.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: information@nigc.gov.*
- *Mail:* National Indian Gaming Commission, 1849 C Street NW, MS 1621, Washington, DC 20240.
- *Fax comments to:* National Indian Gaming Commission at 202–632–0045.
- *Hand Delivery:* National Indian Gaming Commission, 90 K Street NE, Suite 200, Washington, DC 20002, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Rea Cisneros, National Indian Gaming Commission; Telephone: (202) 632–7003.

SUPPLEMENTARY INFORMATION:

I. 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.

II. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (NIGC or Commission) and sets out a comprehensive framework for the regulation of gaming on Indian lands. On February 1, 2008, the NIGC published a final rule in the **Federal Register** called *Facility License Notifications and Submissions,* 73 FR 6019. The rule amended the then-current facility license regulations to provide for an expedited review to confirm a tribe's submittal of facility license information; to require notice to the NIGC when a tribe issues, renews, or terminates a facility license; to streamline the submittal of certain information relating to the construction, maintenance, and operation of a gaming facility; and to provide that a tribe need not submit a notification of seasonal or temporary closures of less than 180 days.

III. Development of the Proposed Rule

On, June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the Facility License notifications and submission requirements. Prior to consultation, the Commission released proposed discussion drafts of the regulations for review. The proposed amendments to the regulations were intended to implement flexibilities for a tribe to submit the notification of a new facility if the facility does not have an existing physical address at the time of submission.

The Commission held two virtual consultation sessions in July 2021 to receive tribal input on the possible changes. The Commission reviewed all comments and now proposes these changes which it believes will allow Tribes greater flexibility in submitting facility license notifications and afford the Agency greater efficiency in processing the applications.

III. Regulatory Matters

Regulatory Flexibility Act

The proposed rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rulemaking does not have an effect on the economy of $100 million or more. The rulemaking will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions. Nor will the proposed rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the proposed rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

The information collection requirements contained in this proposed rule were previously approved by the Office of Management and Budget as required by 44 U.S.C. 3501, *et seq.,* and assigned OMB Control Number 3141–0012.

Tribal Consultation

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (E.O.) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy published July 15, 2013. The NIGC's consultation policy specifies that it will consult with tribes on Commission Action with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to the ability of an Indian tribe to regulate its Indian gaming; an Indian tribe's formal relationship with the Commission; or the consideration of the Commission's trust responsibilities to Indian tribes.

Pursuant to this policy, on June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the management contract process.

List of Subjects in 25 CFR Part 559

Gambling, Indian—lands, Indian—tribal government, Reporting and recordkeeping requirements.

Therefore, for reasons stated in the preamble, 25 CFR part 559 is amended as follows:

PART 559—FACILITY LICENSE NOTIFICATIONS

■ 1. The authority citation for part 559 continues to read as follows:

Authority: 25 U.S.C. 2701, 2702(3), 2703(4), 2705, 2706(b)(10), 2710, 2719.

■ 2. Revise § 559.2(b) to read as follows:

§ 559.2 When must a tribe notify the Chair that it is considering issuing a new facility license?

* * * * *

(b) The notice shall contain the following:

(1) A legal description of the property;

(2) The tract number for the property as assigned by the Bureau of Indian Affairs, Land Title and Records Offices, if any;

(3) If not maintained by the Bureau of Indian Affairs, Department of the Interior, a copy of the trust or other deed(s) to the property or an explanation as to why such documentation does not exist; and

(4) If not maintained by the Bureau of Indian Affairs, Department of the Interior, documentation of property ownership.

* * * * *

Dated: November 18, 2021, Washington, DC.

E. Sequoyah Simermeyer,

Chairman.

[FR Doc. 2021–25845 Filed 11–30–21; 8:45 am]

BILLING CODE 7565–01–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3065

[Docket Nos. RM2020–4; Order No. 6047]

RIN 3211–AA26

Market Dominant Products

AGENCY: Postal Regulatory Commission.

ACTION: Proposed rulemaking.

SUMMARY: The Commission is proposing to add rules which describe instances when letters may be carried out of the mail, or when the letter monopoly does not apply to a mailpiece. The Commission invites public comment on the proposed rule.

DATES: *Comments are due:* January 3, 2022.

ADDRESSES: For additional information, Order No. 6047 can be accessed electronically through the Commission's website at *https://www.prc.gov.* 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:

Table of Contents

I. Relevant Statutory Requirements
II. Background
III. Basis and Purpose of Proposed Rules
IV. Proposed Rules

I. Relevant Statutory Requirements

Section 601 of title 39 describes instances when letters may be carried out of the mail, or when the letter monopoly does not apply to a mailpiece. Section 601(a) sets forth the conditions under which a letter may be carried out of the mail, which include requiring that the letter be enclosed in an envelope, that the proper amount of postage is affixed to the envelope, and that the postage is canceled. 39 U.S.C. 601(a). Section 601(b) provides the price and weight limitations such that the letter monopoly does not apply to letters charged more than six times the current rate for the first ounce of a Single-Piece First-Class Letter or to letters weighing more than 12.5 ounces. 39 U.S.C. 601(b)(1) and (2). Section 601(b)(3) references exceptions from the Postal Service regulations that purported to permit private carriage as in effect on July 1, 2005. 39 U.S.C. 601(b)(3); *see also* 39 CFR 310.1; 39 CFR 320.2 through 320.8. Section 601(c) directs the Commission to promulgate any regulations necessary to carry out this section. 39 U.S.C. 601(c).

II. Background

The Postal Service has exclusive rights in the carriage and delivery of letters under certain circumstances.[1] This letter monopoly is codified in the Private Express Statutes (PES), a group of civil and criminal statutes that make it unlawful for any entity other than the Postal Service to send or carry letters. *See* 18 U.S.C. 1693–1699; 39 U.S.C. 601–606.[2]

Under the Postal Accountability and Enhancement Act (PAEA) of 2006,[3] Congress added Section 601(b)(3) to authorize the continuation of private activities that the Postal Service had purportedly permitted by regulations to be carried out of the mail.[4] Congress gave the Commission the authority to promulgate any regulations necessary to carry out the section. 39 U.S.C. 601(c).

On February 7, 2020, the Commission issued Order No. 5422, seeking input from the public about what regulations promulgated by the Commission may be necessary to carry out the requirements of 39 U.S.C. 601. In particular, the Commission sought comments on 14 issues, such as whether the statutory requirements of Section 601 are clear and concise, whether any terms in the statute required further definition, and whether consumers and competitors can easily determine when a mailpiece is subject to monopoly protections. Order No. 5422 at 7–8.

The Commission received a wide range of comments in response to Order No. 5422, but found it necessary to gather more information before promulgating regulations under Section 601. Thus, the Commission held this docket in abeyance and initiated a public inquiry seeking further input from the public.[5] In particular, the Commission sought comments on two issues: (1) Whether Postal Service regulations administering current Sections 601(a), 601(b)(1), and 601(b)(2) should be adopted by the Commission; and (2) what private carrier services are within the scope of Section 601(b)(3). For both issues, the goal of the Commission was to determine whether it is necessary to clarify the statutory exemptions regarding the letter monopoly. The Commission sought information as to how best to resolve any ambiguities in the application of the exceptions. The Commission also inquired whether consolidating regulations and definitions under one section, rescinding redundant and/or conflicting sections, or standardizing the terminology used in the regulations would be helpful.

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[1] This exclusive right is known as the ''letter monopoly.'' The Commission has previously discussed the background and history of the letter monopoly. *See* Advance Notice of Proposed Rulemaking to Consider Regulations to Carry Out the Statutory Requirements of 39 U.S.C. 601, February 7, 2020 (Order No. 5422); 85 FR 8789 (Feb. 18, 2020).

[2] Although these provisions of the U.S. Code are customarily referred to collectively as the ''PES,'' they do not all relate to private expresses or prohibit carriage of letters out of the mails.

[3] *See* Postal Accountability and Enhancement Act, Public Law 109–435, 120 Stat. 3198 (2006).

[4] The House Report on the PAEA explains that the clause protects mailers and private carriers who had relied upon the regulations adopted as of the date of the bill. *See* H.R. Rep. No. 109–66, 109th Cong., 1st Sess., pt. 1, at 58 (2005) (H.R. Rep. No. 109–66), at 58.

[5] *See* Order Holding Rulemaking in Abeyance, July 2, 2021 (Order No. 5929); Docket No. PI2021–2, Notice and Order Providing an Opportunity to Comment on Regulations Pertaining to 39 U.S.C. 601, July 2, 2021 (Order No. 5930); 86 FR 36246 (Jul. 9, 2021).

Having received adequate input from the public in order to propose regulations in this docket, the Commission issued an order, filed concurrently with this order, closing the public inquiry docket.[6]

III. Basis and Purpose of Proposed Rule

The Commission finds it necessary to provide some clarity on the statute, and its relationship with the Postal Service's regulations. The Commission also finds it necessary to provide the public a process to seek clarification of the statute or the letter monopoly should the need arise in the future. Thus, the Commission proposes the following rules.

First, the Commission proposes a provision stating that certain Postal Service regulations in parts 310 and 320 of this title are within the scope of these new rules and subject to Commission interpretation. The Postal Service asserts that only certain provisions in parts 310 and 320 of this title are subject to Commission authority, namely § 310.1(a)(7) of this title, § 310.2(b)(1) and (2) of this title, and §§ 320.2 through 320.8 of this title. However, the Commission notes that Section 601(b)(3) specifically references § 310.1 of this title in its entirety and thus, the entirety of that provision is under Commission authority. Additionally, the definitions referenced in § 310.1 of this title are referenced in § 320.1 of this title and therefore, the Commission also includes § 320.1 of this title. The Commission also proposes a provision that if there is a conflict between the Postal Service regulations and Section 601, Section 601 takes precedence.

Next, the Commission proposes a provision explicitly stating that the Postal Service no longer has authority to issue regulations interpreting, suspending or otherwise defining the scope of the letter monopoly. These provisions also include a prohibition on issuing guidance or entering into agreements purporting to do the same. The Commission also proposes a provision stating that it has the sole authority to promulgate regulations necessary to carry out Section 601.

Finally, the Commission proposes a provision allowing interested parties to seek interpretation of Postal Service regulations or statutory language by filing a rulemaking petition with the Commission, or requesting an advisory opinion from the Commission's General Counsel. The Commission may also initiate its own proceeding. These procedures allow for interpretation of statutory and regulatory requirements that is accessible and transparent to the public.

IV. Proposed Rule

The Commission proposes to place the new regulations clarifying Section 601 in new 39 CFR part 3065.

Proposed § 3050.1 states that the rules in this part implement 39 U.S.C. 601. It lists the Postal Service regulations that are subject to the proposed rules and clarifies that the Commission has authority to interpret them. It also provides that in the event of a conflict between Section 601 and the Postal Service regulations, Section 601 would supersede any applicable requirements.

Proposed § 3065.2 provides that the Commission has the sole authority to promulgate new regulations necessary to carry out Section 601. It also prohibits the Postal Service from promulgating any new regulations, issuing any guidance, or entering into agreements purporting to suspend or otherwise define the letter monopoly. It further states that the Postal Service may not promulgate new regulations or issue any guidance purporting to interpret Section 601.

Proposed § 3065.3 provides two procedures for parties seeking clarification or interpretation of the statute or regulations concerning Section 601. It also states that the Commission may initiate its own proceeding for clarification or interpretation.

List of Subjects in 39 CFR Part 3065

Administrative practice and procedure, Postal Service.

For the reasons stated in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of Federal Regulations as follows:

PART 3065—RULES FOR LETTERS CARRIED OUT OF THE MAIL

■ 1. Add part 3065 to read as follows:

PART 3065—RULES FOR LETTERS CARRIED OUT OF THE MAIL

Sec.
3065.1 Applicability and scope.
3065.2 Prohibition on new regulations.
3065.3 Procedure for seeking clarification or interpretation.

Authority: 39 U.S.C. 503, 601.

§ 3065.1 Applicability and scope.

(a) The rules in this part implement 39 U.S.C. 601, which generally describes when letters may be carried out of the mail.

(b) Notwithstanding placement in Postal Service chapter I of this title, the following provisions in parts 310 and 320 of this title are within the scope of this part and the Commission has the authority to interpret them:

(1) § 310.1 of this title;

(2) § 310.2(b)(1) and (2) of this title; and

(3) §§ 320.1 through 320.8 of this title.

(c) In the event of a conflict between 39 U.S.C. 601 and applicable regulations under parts 310 and 320 of this title, 39 U.S.C. 601 shall supersede any other generally applicable requirements.

§ 3065.2 Prohibition on new regulations.

(a) The Postal Service may not promulgate any new regulations, issue guidance, or enter into agreements purporting to suspend or otherwise define the scope of the letter monopoly.

(b) The Postal Service may not promulgate any new regulations or issue guidance purporting to interpret 39 U.S.C. 601.

(c) The Commission has the sole authority to promulgate new regulations necessary to carry out 39 U.S.C. 601.

§ 3065.3 Procedure for seeking clarification or interpretation.

(a) The Commission may, on its own motion, initiate a proceeding under this subpart pursuant to § 3010.201(a) of this chapter.

(b) The Commission may provide interpretation of these regulations or 39 U.S.C. 601 upon:

(1) A party's request to initiate a rulemaking proceeding with the Commission pursuant to the requirements of § 3010.201(b) of this chapter; or

(2) a party's request for an advisory opinion from the General Counsel.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2021–26035 Filed 11–30–21; 8:45 am]

BILLING CODE 7710–FW–P

[6] *See* Docket No. PI2021–2, Order Closing Docket, November 24, 2021 (Order No. 6046).

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 73

[AU Docket No. 21–449; DA 21–1444; FR ID 59514]

Auction of Construction Permits for Full Power Television Stations; Comment Sought on Competitive Bidding Procedures for Auction 112

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; proposed auction procedures.

SUMMARY: The Office of Economics and Analytics and the Media Bureau seek

comment on the procedures to be used for Auction 112, an auction of construction permits for full power television (FPTV) stations. OEA and MB expect the bidding for Auction 112 to commence in June 2022.

DATES: Comments are due on or before December 13, 2021, and reply comments are due on or before December 23, 2021. Bidding in this auction is expected to commence in June 2022.

ADDRESSES: Interested parties may file comments or reply comments in AU Docket No. 21–449. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) All filings in response to the Public Notice must refer to AU Docket No. 21–449.

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS at *https://www.fcc.gov/ecfs/*.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- Filings in response to the Public Notice can be sent by commercial courier or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial deliveries (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Dr., Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, or Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19.
- *Email:* Commenters are asked to also submit a copy of their comments and reply comments electronically to the following address: *auction112@fcc.gov*.
- *People with Disabilities:* To request materials in accessible formats (braille, large print, electronic files, audio format) for people with disabilities, send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

FOR FURTHER INFORMATION CONTACT:

Auction legal questions: Mary Lovejoy, (202) 418–0660, *Mary.Lovejoy@fcc.gov,* Andrew McArdell, (202) 418–0660, *Andrew.McArdell@fcc.gov*.

General auction questions: Auction Hotline at (717) 338–2868.

Full power television station service questions: Shaun Maher (legal), (202) 418–2324, *Shaun.Maher@fcc.gov,* or Kevin Harding (technical questions), (202) 418–7077, *Kevin.Harding@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Public Notice (*Auction 112 Comment Public Notice*), AU Docket No. 21–449, DA 21–1444, released on November 19, 2021. The *Auction 112 Comment Public Notice* includes the following attachments: Attachment A, Construction Permits in Auction 112. The complete text of the *Auction 112 Comment Public Notice,* including its attachment, is available on the Commission's website at *http://www.fcc.gov/auction/112* or by using the search function for AU Docket No. 21–449 on the Commission's ECFS web page at *www.fcc.gov/ecfs*. Alternative formats are available to persons with disabilities by sending an email to *FCC504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

I. Introduction

1. By the *Auction 112 Comment Public Notice,* the Office of Economics and Analytics (OEA) and the Media Bureau (MB) of the Federal Communications Commission (Commission) seek comment on the procedures to be used for Auction 112, an auction of construction permits for full power television (FPTV) stations. OEA and MB expect the bidding for Auction 112 to commence in June 2022.

II. Construction Permits To Be Offered in Auction 112

2. Auction 112 will offer 27 construction permits for FPTV stations. The permits that will be available in Auction 112 are listed in Attachment A to the *Auction 112 Comment Public Notice*.

3. The permits that will be available in Auction 112 are for channel allotments contained in the Table of Television Allotments (TV Table) and assigned at the indicated communities for which there currently is not a licensee. Each permit awarded will be for one of the allotted-but-unlicensed channels currently contained in the TV Table.

III. Implementation of Part 1 and Part 73 Competitive Bidding Rules and Requirements

4. Consistent with the provisions of section 309(j)(3)(E)(i) of the Communications Act of 1934 (the Act), and to ensure that potential bidders have adequate time to familiarize themselves with the specific rules that will govern the day-to-day conduct of an auction, OEA and MB seek comment on a variety of auction-specific procedures relating to the conduct of Auction 112.

5. The Commission's part 1 and part 73 competitive bidding rules require each applicant seeking to bid to acquire a construction permit in a broadcast auction to provide certain information in a short-form application (FCC Form 175), including ownership details and numerous certifications. The competitive bidding rules in part 1, subpart Q, and part 73 also contain a framework for the implementation of a competitive bidding design, application and certification procedures, reporting requirements, and the prohibition of certain communications.

A. Certification of Notice of Auction 112 Requirements and Procedures

6. OEA and MB propose to require any party seeking to participate in Auction 112 to certify in its short-form application, under penalty of perjury, that it has read the public notice adopting procedures for the auction and that it has familiarized itself both with the auction procedures and with the requirements for obtaining a construction permit for an FPTV station. OEA and MB believe that this requirement, which was also recently implemented in Auction 110, would help ensure that the applicant has reviewed the procedures for participation in the auction process and has investigated and evaluated those technical and marketplace factors that may have a bearing on its potential use of any permits won at auction. Consequently, OEA and MB believe this requirement would promote an applicant's successful participation and minimize its risk of defaulting on its auction obligations. As with other certifications required under 47 CFR 1.2105, an auction applicant's failure to make the required certification in its short-form application by the applicable filing deadline would render its application unacceptable for filing, and its application would be dismissed with prejudice. OEA and MB seek comment on this proposal. Are there alternative procedures that could be implemented that would better ensure that an applicant has thoroughly reviewed the auction's procedures and considered all relevant factors that may affect its participation in the auction and use of any permits for which it is the winning bidder?

B. Information Procedures During the Auction Process

7. OEA and MB propose to limit information available in Auction 112 to

discourage unproductive and anti-competitive strategic behavior. Accordingly, if this proposal is adopted, OEA and MB will not identify bidders placing particular bids until after the bidding has closed. While OEA and MB generally make available to the public information provided in each applicant's FCC Form 175 following an initial review by Commission staff, OEA and MB propose to not make public until after bidding has closed: (1) The permits that an applicant selects for bidding in its short-form application, (2) the amount of any upfront payment made by or on behalf of an applicant, (3) any applicant's bidding eligibility, and (4) any other bidding-related information that might reveal the identity of the bidder placing a bid. Similarly, this nonpublic information may not be communicated from one applicant to another. 47 CFR 1.2105(c)(1) provides that, subject to specified exceptions, all applicants are prohibited from cooperating or collaborating with respect to, or communicating with or disclosing to each other in any manner, the substance of their own, or each other's, or any other applicant's bids or bidding strategies (including post-auction market structure), or discussing or negotiating settlement agreements, until after the deadline for winning bidders to submit down payments. ''Applicant'' is defined as including all officers and directors of the entity submitting a short form application to participate in the auction, all controlling interests of that entity, as well as all holders of partnership and other ownership interests and any stock interest amounting to 10% or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application. A party that submits an application becomes an ''applicant'' under the rule at the application filing deadline and that status does not change based on later developments.

8. Under this proposal, OEA and MB would not make public any real-time information on bidding activity until the close of the auction. However, bidders would have access to additional information related to their own bidding and bid eligibility before and during the auction via the FCC auction bidding system.

9. Under this proposal, after the close of bidding, bidders' permit selections, upfront payment amounts, bidding eligibility, bids, and other bidding-related information would be made publicly available.

10. OEA and MB seek comment on the above details of the proposal for implementing limited information procedures, or anonymous bidding, in Auction 112. Commenters opposing the use of limited information procedures in Auction 112 should explain their reasoning and propose alternative information rules.

C. Upfront Payments and Bidding Eligibility

11. In keeping with the usual practice in spectrum auctions, OEA and MB propose that applicants be required to submit upfront payments as a prerequisite to becoming qualified to bid. An upfront payment is a refundable deposit made by an applicant to establish its eligibility to bid on construction permits. Upfront payments that are related to the specific construction permits being auctioned protect against frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of bidding.

12. OEA and MB seek comment on an appropriate upfront payment for each construction permit being auctioned, taking into account such factors as the efficiency of the auction process and the potential value of similar construction permits. With these considerations in mind, OEA and MB propose the upfront payments set forth in Attachment A to the *Auction 112 Comment Public Notice* and seek comment on those proposed upfront payment amounts.

13. OEA and MB further propose that the amount of the upfront payment submitted by an applicant will determine its initial bidding eligibility in bidding units, which are a measure of bidder eligibility and bidding activity. OEA and MB propose to assign each construction permit a specific number of bidding units, equal to one bidding unit per one thousand dollars of the upfront payment listed in Attachment A to the *Auction 112 Comment Public Notice.* The number of bidding units for a given construction permit is fixed and does not change during the auction as prices change. If an applicant is found to be qualified to bid on more than one permit being offered in Auction 112, such bidder may place bids on multiple construction permits, provided that the total number of bidding units associated with those construction permits does not exceed that bidder's current eligibility. A bidder cannot increase its eligibility during the auction; it can only maintain or decrease its eligibility. In calculating its upfront payment amount and hence its initial bidding eligibility, an applicant must determine the maximum number of bidding units on which it may wish to bid (or hold provisionally winning bids) in any single round and submit an upfront payment amount covering that total number of bidding units. OEA and MB seek comment on these proposals.

D. Minimum Opening Bids or Reserve Prices

14. As part of the pre-bidding process for each auction, OEA and MB seek comment on the use of a minimum opening bid amount and/or reserve price, as mandated by section 309(j) of the Act. OEA and MB propose to establish minimum opening bid amounts for Auction 112. Based on their experience in past broadcast auctions, OEA and MB have found that setting a minimum opening bid amount judiciously is an effective bidding tool for accelerating the competitive bidding process. In the most recent television broadcast auctions—for low power television (LPTV) construction permits (Auctions 104 and 111)—OEA and MB have similarly proposed establishing minimum opening bids but not reserve prices; in those auctions, no comments opposed the proposal, and OEA and MB adopted it both times. Based on these facts, OEA and MB propose establishing minimum opening bids for Auction 112. OEA and MB do not propose to establish separate reserve prices for any of the construction permits to be offered in Auction 112, nor do OEA and MB see any reason to propose an aggregate reserve price for this auction.

15. For auctions of broadcast permits, OEA and MB generally propose minimum opening bid amounts that have been determined by taking into account the type of service and class of facility offered, market size, population covered by the proposed broadcast facility, and recent broadcast transaction data, to the extent such information is available. OEA and MB seek comment on the proposed minimum opening bid amounts for Auction 112, which are specified in Attachment A to this *Auction 112 Comment Public Notice.*

16. If commenters believe that these minimum opening bid amounts will result in unsold construction permits or are not reasonable amounts at which to start bidding, they should explain why this is so and comment on the desirability of an alternative approach. Commenters should support their claims with valuation analyses and suggested amounts or formulas. In establishing the minimum opening bid amounts, OEA and MB particularly seek comment on factors that could reasonably have an impact on bidders' valuation of the broadcast spectrum, including the type of service and class

of facility offered, market size, population covered by the proposed broadcast facility and any other relevant factors. Commenters also may wish to address the general role of minimum opening bids in managing the pace of the auction. For example, commenters could compare using minimum opening bids—*e.g.,* by setting higher minimum opening bids to reduce the number of rounds it takes for construction permits to reach their final prices—to other means of controlling auction pace, such as changes to bidding schedules, percentage increments, or activity requirements.

E. Auction Delay, Suspension, or Cancellation

17. For Auction 112, OEA and MB propose that at any time before or during the bidding process OEA, in conjunction with MB, may delay, suspend, or cancel bidding in the auction in the event of a natural disaster, technical obstacle, network interruption, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding. In such a case, OEA would notify participants of any such delay, suspension, or cancellation by public notice or through the FCC auction bidding system's messages function. OEA and MB propose that, if bidding is delayed or suspended, OEA may, in its sole discretion, elect to resume the auction starting from the beginning of the current round or from some previous round, or cancel the auction in its entirety. OEA and MB propose to exercise this authority solely at their discretion, and not as a substitute for situations in which bidders may wish to apply activity rule waivers. OEA and MB seek comment on these proposals.

F. Interim Withdrawal Payment Percentage

18. As discussed below, OEA and MB propose not to allow bid withdrawals in Auction 112. In the event bid withdrawals are permitted in Auction 112, however, OEA and MB propose the interim bid withdrawal payment be 20% of the withdrawn bid. A bidder that withdraws a provisionally winning bid during an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or a subsequent auction. However, if a construction permit for which a bid has been withdrawn does not receive a subsequent higher bid or winning bid in the same auction, the Commission cannot calculate the final withdrawal payment until that construction permit receives a higher bid or winning bid in a subsequent auction. In such cases, when that final withdrawal payment cannot yet be calculated, the Commission imposes on the bidder responsible for the withdrawn bid an interim bid withdrawal payment, which will be applied toward any final bid withdrawal payment that is ultimately assessed.

19. The percentage amount of the interim bid withdrawal payment is established in advance of bidding in each auction and may range from 3% to 20% of the withdrawn bid amount. The Commission has determined that the level of interim withdrawal payment in a particular auction will be based on the nature of the service and the inventory of the licenses being offered. The Commission noted specifically that a higher interim withdrawal payment percentage is warranted to deter the anti-competitive use of withdrawals when, for example, bidders will not need to aggregate the licenses being offered in the auction or when there are few synergies to be captured by combining licenses. In light of these considerations with respect to the construction permits being offered in this auction, OEA and MB propose to use the maximum interim bid withdrawal payment percentage permitted by 47 CFR 1.2104(g)(1) in the event bid withdrawals are allowed in this auction. OEA and MB request comment on using 20% for calculating an interim bid withdrawal payment amount in Auction 112 in the event that bidders would be permitted to withdraw bids. Commenters advocating the use of bid withdrawals should also address the percentage of the interim bid withdrawal payment.

G. Deficiency Payments and Additional Default Payment Percentage

20. Any winning bidder that defaults or is disqualified after the close of an auction (*i.e.,* fails to remit the required down payment by the specified deadline, fails to make full and timely final payment, fails to submit a timely long-form application, or whose long-form application is not granted for any reason, or is otherwise disqualified) is liable for a default payment under 47 CFR 1.2104(g)(2). This payment consists of a deficiency payment, equal to the difference between the amount of the Auction 112 bidder's winning bid and the amount of the winning bid the next time a construction permit covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less.

21. The Commission's rules provide that, in advance of each auction, it will establish a percentage between 3% and 20% of the applicable winning bid to be assessed as an additional default payment. As the Commission has indicated, the level of this additional payment in each auction will be based on the nature of the service and the construction permits being offered.

22. For Auction 112, OEA and MB propose to establish an additional default payment of 20%, which is consistent with the percentage in prior auctions of broadcast construction permits. As the Commission has noted, defaults weaken the integrity of the auction process and may impede the deployment of service to the public, and an additional 20% default payment will be more effective in deterring defaults than the 3% used in some earlier auctions. In light of these considerations, OEA and MB propose for Auction 112 an additional default payment of 20% of the relevant bid. OEA and MB seek comment on this proposal.

IV. Proposed Bidding Procedures

A. Simultaneous Multiple-Round Auction Design

23. OEA and MB propose to use the Commission's simultaneous multiple-round auction format for Auction 112. As described further below, this type of auction offers every construction permit for bid at the same time and consists of successive bidding rounds in which qualified bidders may place bids on individual construction permits. Typically, bidding remains open on all construction permits until bidding stops on every construction permit. OEA and MB seek comment on this proposal.

B. Bidding Rounds

24. The Commission will conduct Auction 112 over the internet using the FCC auction bidding system. A bidder will also have the option of placing bids by telephone through a dedicated auction bidder line.

25. Under this proposal, Auction 112 would consist of sequential bidding rounds, each followed by the release of round results. The initial bidding schedule will be announced in a public notice to be released at least one week before the start of bidding. Details on viewing round results, including the location and format of downloadable round results files, will be included in the same public notice.

26. OEA and MB propose that the initial bidding schedule may be

adjusted in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. Under this proposal, such changes may include the amount of time for the bidding rounds, the amount of time between rounds, or the number of rounds per day, depending upon bidding activity and other factors. OEA and MB seek comment on this proposal. Parties commenting on this issue should address the role of the bidding schedule in managing the pace of the auction, specifically discussing the tradeoffs in managing auction pace by bidding schedule changes, by changing the activity requirement(s) or bid amount parameters, or by using other means.

C. Stopping Rule

27. OEA and MB have discretion to establish stopping rules before or during multiple-round auctions in order to complete the auction within a reasonable time. For Auction 112, OEA and MB propose to employ a simultaneous stopping rule approach, which means all construction permits remain available for bidding until bidding stops on every construction permit. Specifically, bidding will close on all construction permits after the first round in which no bidder submits any new bid, applies a proactive activity rule waiver, or withdraws any provisionally winning bid (if bid withdrawals are permitted in this auction). Thus, under the proposed simultaneous stopping rule, bidding would remain open on all construction permits until bidding stops on every construction permit. Consequently, under this approach, it is not possible to determine in advance how long the bidding in this auction will last.

28. Further, OEA and MB propose to retain the discretion to exercise any of the following stopping options during Auction 112:

Option 1. The auction would close for all construction permits after the first round in which no bidder applies a waiver, no bidder withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or no bidder places any new bid on a construction permit for which it is not the provisionally winning bidder. Absent any other bidding activity, a bidder placing a new bid on a construction permit for which it is the provisionally winning bidder would not keep the auction open under this modified stopping rule.

Option 2. The auction would close for all construction permits after the first round in which no bidder applies a waiver, no bidder withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or no bidder places any new bid on a construction permit that already has a provisionally winning bid. Absent any other bidding activity, a bidder placing a new bid on an FCC-held construction permit (a construction permit that does not already have a provisionally winning bid) would not keep the auction open under this modified stopping rule.

Option 3. The auction would close using a modified version of the simultaneous stopping rule that combines Option 1 and Option 2 above.

Option 4. The auction would close after a specified number of additional rounds (special stopping rule) to be announced in advance in the FCC auction bidding system. If OEA and MB invoke this special stopping rule, they will accept bids in the specified final round(s), after which the auction will close.

Option 5. The auction would remain open even if no bidder places any new bid, applies a waiver, or withdraws any provisionally winning bid (if withdrawals are permitted in this auction). In this event, the effect will be the same as if a bidder had applied a waiver. The activity rule will apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use a waiver.

29. OEA and MB propose to exercise these options only in certain circumstances, for example, where the auction is proceeding unusually slowly or quickly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period or will close prematurely. Before exercising these options, OEA and MB are likely to attempt to change the pace of the auction. For example, OEA and MB may adjust the pace of bidding by changing the number of bidding rounds per day or the minimum acceptable bids. Under the proposal, OEA would retain the discretion to exercise any of these options with or without prior announcement during the auction. OEA and MB seek comment on these proposals. Commenters should provide specific reasons for supporting or objecting to these proposals.

D. Availability of Bidding Information

30. OEA and MB propose to make available, after each round closes, for each permit its current provisionally winning bid amount, the minimum acceptable bid amount for the following round, and the amounts of all bids placed on the permit during the round. These reports would be publicly accessible. Moreover, after the auction closes, OEA and MB propose to make available complete reports of all bids placed during each round of the auction, including bidder identities.

31. OEA and MB also propose to provide bidders with secure access to certain non-public bidding information while bidding is ongoing. Specifically, after each round ends, and before the next round begins, OEA and MB propose to make the following information available to individual bidders:

- The bidder's activity, based on all bids in the previous round; and
- Summary statistics of the bidder's bidding and other bidding-related actions in each round, including the permits on which it bid and the price it bid for each of those permits, the result of each of its bids, whether it has any provisionally winning bids, and remaining activity rule waivers.

32. OEA and MB believe that limiting the availability of bidding information during the auction balances the Commission's interest in providing bidders with sufficient information about the status of their own bids and the general level of bidding on all permits to allow them to bid confidently and effectively, while restricting the availability of information that may facilitate identification of bidders placing particular bids, which could potentially lead to undesirable strategic bidding. OEA and MB seek comment on this view.

E. Activity Rule

33. To ensure that the auction closes within a reasonable period, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. For purposes of the activity rule, the FCC auction bidding system calculates a bidder's activity in a round as the sum of the bidding units associated with any construction permits upon which it places bids during the current round and the bidding units associated with any construction permits for which it holds provisionally winning bids. Bidders are required to be active on a specific percentage of their current bidding eligibility during each round of the auction. OEA and MB propose a single-stage auction with a 100% activity requirement. That is, in each bidding round, a bidder desiring to maintain its current bidding eligibility will be required to be active on 100% of its bidding eligibility. Under this proposal, the activity requirement would be satisfied when a bidder has bidding activity on construction permits with bidding units that total 100% of its current eligibility in the round. If the activity rule is met, then the bidder's eligibility does not change in the next round. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any remain, or a reduction in the bidder's eligibility for the next round of bidding, possibly curtailing or eliminating the bidder's

ability to place additional bids in the auction. A reduction in the bidder's eligibility would be to the amount that would bring the bidder into compliance with the activity requirement. With a 100% activity requirement, a bidder's eligibility would be reduced to equal its activity. OEA and MB seek comment on these activity requirements. OEA and MB encourage commenters that oppose a 100% activity requirement to explain their reasons with specificity and to propose alternative approaches.

F. Activity Rule Waivers and Reducing Eligibility

34. For the proposed simultaneous multiple-round auction format, OEA and MB propose that when a bidder's activity in the current round is below the required minimum level, it may preserve its current level of eligibility through an activity rule waiver, if the bidder has any available. Consistent with prior Commission auctions of broadcast construction permits, OEA and MB propose that each bidder in Auction 112 be provided with three activity rule waivers that may be used as set forth below at the bidder's discretion during the course of the auction.

35. An activity rule waiver applies to an entire round of bidding, not to a particular construction permit. Activity rule waivers can be either proactive or automatic. Activity rule waivers are primarily a mechanism for a bidder to avoid the loss of bidding eligibility in case exigent circumstances prevent it from bidding in a particular round.

36. The FCC auction bidding system will assume that a bidder that does not meet the activity requirement would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver at the end of any bidding round in which a bidder's activity level is below the minimum required unless: (1) The bidder has no activity rule waiver remaining; or (2) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the activity requirement. If a bidder has no waivers remaining and does not satisfy the required activity level, the bidder's current eligibility will be permanently reduced, possibly curtailing or eliminating the ability to place additional bids in the auction.

37. A bidder with insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding round by using the reduce eligibility function in the FCC auction bidding system. In this case, the bidder's eligibility would be permanently reduced to bring it into compliance with the activity rule described above. Reducing eligibility is an irreversible action; once eligibility has been reduced, a bidder cannot regain its lost bidding eligibility.

38. Under the proposed simultaneous stopping rule, a bidder would be permitted to apply an activity rule waiver proactively as a means to keep the auction open without placing a bid. If a bidder proactively applies an activity rule waiver (using the proactive waiver function in the FCC auction bidding system) during a bidding round in which no bid is placed or withdrawn (if bid withdrawals are permitted in this auction), the auction will remain open and the bidder's eligibility will be preserved. An automatic waiver applied by the FCC auction bidding system in a round in which there is no new bid, no bid withdrawal (if bid withdrawals are permitted in this auction), or no proactive waiver would not keep the auction open. OEA and MB seek comment on these proposals.

G. Bid Amounts

39. OEA and MB propose that, in each round, a qualified bidder will be able to place a bid on a given construction permit in any of up to nine different amounts: The minimum acceptable bid amount or one of eight additional bid amounts. Bidders must have sufficient eligibility to place a bid on the particular construction permit.

40. *Minimum Acceptable Bid Amounts.* The first of the acceptable bid amounts is called the minimum acceptable bid amount. The minimum acceptable bid amount for a construction permit will be equal to its minimum opening bid amount until there is a provisionally winning bid for the construction permit. Once there is a provisionally winning bid for a construction permit, the minimum acceptable bid amount for that construction permit will be equal to the amount of the provisionally winning bid plus a specified percentage of that bid amount. The percentage used for this calculation, the minimum acceptable bid increment percentage, is multiplied by the provisionally winning bid amount, and the resulting amount is added to the provisionally winning bid amount. If, for example, the minimum acceptable bid increment percentage is 10%, then the provisionally winning bid amount is multiplied by 10%. The result of that calculation is added to the provisionally winning bid amount, and that sum is rounded using the Commission's standard rounding procedure for auctions. The result of the calculation is subject to a minimum of $100 and results above $10,000 are rounded to the nearest $1,000; results below $10,000 but above $1,000 are rounded to the nearest $100; and results below $1,000 are rounded to the nearest $10. If bid withdrawals are permitted in this auction, in the case of a construction permit for which the provisionally winning bid has been withdrawn, the minimum acceptable bid amount will equal the second highest bid received for the construction permit.

41. *Additional Bid Amounts.* Under this proposal, the Commission will calculate the eight additional bid amounts using the minimum acceptable bid amount and an additional bid increment percentage. The minimum acceptable bid amount is multiplied by the additional bid increment percentage, and that result (rounded) is the additional increment amount. The first additional acceptable bid amount equals the minimum acceptable bid amount plus the additional increment amount. The second additional acceptable bid amount equals the minimum acceptable bid amount plus two times the additional increment amount; the third additional acceptable bid amount is the minimum acceptable bid amount plus three times the additional increment amount; etc. If, for example, the additional bid increment percentage is 5%, then the calculation of the additional increment amount would be (minimum acceptable bid amount) * (0.05), rounded. The first additional acceptable bid amount equals (minimum acceptable bid amount) + (additional increment amount); the second additional acceptable bid amount equals (minimum acceptable bid amount) + (2* (additional increment amount)); the third additional acceptable bid amount equals (minimum acceptable bid amount) + (3* (additional increment amount)); etc.

42. For Auction 112, OEA and MB propose to use a minimum acceptable bid increment percentage of 10%. This means that the minimum acceptable bid amount for a construction permit will be approximately 10% greater than the provisionally winning bid amount for the construction permit. To calculate the additional acceptable bid amounts, OEA and MB propose to use a bid increment percentage of 5%. OEA and MB seek comment on these proposals.

43. *Bid Amount Changes.* OEA and MB propose to retain the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid percentage, the additional bid increment

percentage, and the number of acceptable bid amounts during the auction if it determines, consistent with past practice, that circumstances so dictate. OEA and MB propose to retain the discretion to do so on a construction permit-by-construction permit basis. OEA and MB also propose to retain the discretion to limit (a) the amount by which a minimum acceptable bid for a construction permit may increase compared with the corresponding provisionally winning bid, and (b) the amount by which an additional bid amount may increase compared with the immediately preceding acceptable bid amount. For example a $1,000 limit could be set on increases in minimum acceptable bid amounts over provisionally winning bids. In this example, if calculating a minimum acceptable bid using the minimum acceptable bid increment percentage results in a minimum acceptable bid amount that is $1,200 higher than the provisionally winning bid on a construction permit, the minimum acceptable bid amount would instead be capped at $1,000 above the provisionally winning bid. OEA and MB seek comment on the circumstances under which such a limit should be employed, factors that should be considered when determining the dollar amount of the limit, and the tradeoffs in setting such a limit or changing other parameters, such as changing the minimum acceptable bid percentage, the bid increment percentage, or the number of acceptable bid amounts. If OEA and MB exercise this discretion, it will alert bidders by announcement in the FCC auction bidding system during the auction.

44. OEA and MB seek comment on these proposals. If commenters disagree with the proposal to begin the auction with nine acceptable bid amounts per construction permit, they should suggest an alternative number of acceptable bid amounts to use. Commenters may wish to address the role of the minimum acceptable bids and the number of acceptable bid amounts in managing the pace of the auction and the tradeoffs in managing auction pace by changing the bidding schedule, activity requirement, bid amounts, or by using other means.

H. Provisionally Winning Bids

45. Under the proposed simultaneous multiple-round auction format, the FCC auction bidding system would determine provisionally winning bids consistent with practice in past auctions. At the end of a bidding round, the bidding system would determine a provisionally winning bid for each construction permit based on the highest bid amount received for that permit. The FCC auction bidding system would advise bidders of the status of their bids when round results are released. A provisionally winning bid would remain the provisionally winning bid until there is a higher bid on the same construction permit at the close of a subsequent round, unless the provisionally winning bid is withdrawn (if bid withdrawals are permitted in this auction). Provisionally winning bids at the end of the auction would become the winning bids. As a reminder, provisionally winning bids count toward activity for purposes of the activity rule.

46. The FCC auction bidding system assigns a pseudo-random number generated by an algorithm to each bid when the bid is entered. If identical high bid amounts are submitted on a construction permit in any given round (*i.e.,* tied bids), the FCC auction bidding system will use these pseudo-random generated numbers to select a single provisionally winning bid from among the tied bids. The tied bid with the highest pseudo-random number wins the tiebreaker and becomes the provisionally winning bid. The remaining bidders, as well as the provisionally winning bidder, can submit higher bids in subsequent rounds. However, if the auction were to end with no other bids being placed, the winning bidder would be the one that placed the provisionally winning bid. If the construction permit receives any bids in a subsequent round, the provisionally winning bid again will be determined by the highest bid amount received for the construction permit.

I. Bid Removal and Bid Withdrawal

47. *Bid Removal.* The FCC auction bidding system allows each bidder to remove any of the bids it placed in a round before the close of that round. By removing a bid placed within a round, a bidder effectively ''unsubmits'' the bid. In contrast to the bid withdrawal provisions described below, a bidder removing a bid placed in the same round is not subject to a withdrawal payment. Once a round closes, a bidder may no longer remove a bid. Consistent with the design of the bidding system, OEA and MB propose that bidders in Auction 112 would be permitted to remove bids placed in a round before the close of that round.

48. *Bid Withdrawal.* OEA and MB propose not to permit bidders in Auction 112 to withdraw bids. When permitted in an auction, bid withdrawals provide a bidder with the option of withdrawing bids placed in prior rounds that have become provisionally winning bids. A bidder would be able to withdraw its provisionally winning bids using the withdraw function in the FCC auction bidding system. A bidder that withdraws its provisionally winning bid(s), if permitted, is subject to the bid withdrawal payment provisions of the Commission's rules.

49. The Commission has recognized that bid withdrawals may be a helpful tool in certain circumstances for bidders seeking to efficiently aggregate products or implement backup strategies. The Commission has also acknowledged that allowing bid withdrawals may encourage insincere bidding or increased opportunities for undesirable strategic bidding in certain circumstances. The Commission stated that this discretion should be exercised assertively, consider limiting the number of rounds in which bidders may withdraw bids, and prevent bidders from bidding on a particular market if they find a bidder is abusing the Commission's bid withdrawal procedures. In managing the auction, therefore, OEA and MB have discretion to limit the number of withdrawals to prevent bidding abuses.

50. Based on this guidance and on experience with past auctions of broadcast construction permits, OEA and MB propose to prohibit bidders from withdrawing any bid after the close of the round in which that bid was placed. OEA and MB make this proposal in light of the site-specific nature and wide geographic dispersion of the permits available in this auction, which suggest that potential applicants for this auction may have fewer incentives to aggregate permits through the auction process (as compared with bidders in many auctions of wireless licenses). Thus, OEA and MB believe that it is unlikely that bidders will have a need to withdraw bids in this auction. Further, OEA and MB are mindful that bid withdrawals, particularly if they were made late in this auction, could result in delays in licensing new broadcast stations and attendant delays in the offering of new broadcast service to the public. OEA and MB seek comment on the proposal to prohibit bid withdrawals in Auction 112. Commenters advocating alternative approaches should support their arguments by taking into account the construction permits offered, the impact of auction dynamics and the pricing mechanism, and the effects on the bidding strategies of other bidders.

V. Tutorial and Additional Information for Applicants

51. The Commission intends to provide additional information on the bidding system and to offer demonstrations and other educational opportunities for applicants in Auction 112 to familiarize themselves with the FCC auction application system and the auction bidding system. For example, OEA and MB intend to release an online tutorial that will help applicants understand the procedures to be followed in the filing of their auction short-form applications (FCC Form 175) and on the bidding procedures for Auction 112.

VI. Procedural Matters

A. Paperwork Reduction Act

52. The *Auction 112 Comment Public Notice* contains proposed new or modified information collection requirements. As part of the Commission's continuing effort to reduce paperwork burdens, OEA and MB invite the general public and the Office of Management and Budget to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995 (PRA). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, OEA and MB seek specific comment on how they might further reduce the information collection burden for small business concerns with fewer than 25 employees.

B. Supplemental Initial Regulatory Flexibility Analysis

53. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 603, the Commission prepared Initial Regulatory Flexibility Analyses (IRFAs) in connection with the *Broadcast Competitive Bidding Notice of Proposed Rulemaking* (NPRM), 62 FR 65392, December 12, 1997, and other Commission NPRMs (collectively, *Competitive Bidding NPRMs*) pursuant to which Auction 112 will be conducted. Final Regulatory Flexibility Analyses (FRFAs) likewise were prepared in the *Broadcast Competitive Bidding Order,* 63 FR 48615, September 11, 1998, and other Commission rulemaking orders (collectively, *Competitive Bidding Orders*) pursuant to which Auction 112 will be conducted. OEA and MB have prepared this Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in the *Auction 112 Comment Public Notice,* to supplement the Commission's Initial and Final Regulatory Flexibility Analyses completed in the *Competitive Bidding NPRMs* and the *Competitive Bidding Orders* pursuant to which Auction 112 will be conducted. Written public comments are requested on this Supplemental IRFA. Comments must be identified as responses to the Supplemental IRFA and must be filed by the same filing deadlines for comments specified on the first page of the *Auction 112 Comment Public Notice.* The Commission will send a copy of the *Auction 112 Comment Public Notice,* including this Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

1. Need for, and Objectives of, the Public Notice

54. The proposed procedures for the conduct of Auction 112, as described in the *Auction 112 Comment Public Notice,* would constitute the more specific implementation of the competitive bidding rules contemplated by parts 1 and 73 of the Commission's rules, adopted by the Commission in multiple notice-and-comment rulemaking proceedings, including the Commission's establishment in the underlying rulemaking orders of additional procedures to be used on delegated authority. More specifically, the *Auction 112 Comment Public Notice* seeks comment on proposed procedures, terms, and conditions governing Auction 112, as well as the minimum opening bid amounts for the specified construction permits, and it is fully consistent with the underlying rulemaking orders, including the *Broadcast Competitive Bidding Order* and other relevant competitive bidding orders.

55. The *Auction 112 Comment Public Notice* provides notice of proposed auction procedures and adequate time for Auction 112 applicants to comment on those proposed procedures. To promote the efficient and fair administration of the competitive bidding process for all Auction 112 participants, including small businesses, the *Auction 112 Comment Public Notice* seeks comment on the following proposed procedures:

- A requirement that any applicant seeking to participate in Auction 112 certify in its short-form application, under penalty of perjury, that it has read the public notice adopting procedures for Auction 112 that will be released in advance of the short-form deadline, and that it has familiarized itself with those procedures and the requirements for obtaining a construction permit for an FPTV station;
- establishment of an interim bid withdrawal percentage of 20% of the withdrawn bid in the event that OEA and MB allow bid withdrawals in Auction 112;
- establishment of an additional default payment of 20% under 47 CFR 1.2104(g)(2) in the event that a winning bidder defaults or is disqualified after the auction;
- use of a simultaneous multiple-round auction format, consisting of sequential bidding rounds with a simultaneous stopping rule (with discretion to exercise alternative stopping rules under certain circumstances);
- retention by OEA, in conjunction with MB, of its discretion to delay, suspend, or cancel bidding in Auction 112 for any reason that affects the fair and efficient conduct of the competitive bidding process;
- retention by OEA of its discretion to adjust the bidding schedule in order to manage the pace of Auction 112;
- a specific minimum opening bid amount for each construction permit available in Auction 112;
- a specific number of bidding units for each construction permit;
- a specific upfront payment amount for each construction permit;
- establishment of a bidder's initial bidding eligibility in bidding units based on that bidder's upfront payment through assignment of a specific number of bidding units for each construction permit;
- use of an activity requirement so that bidders must bid actively during the auction rather than waiting until late in the auction before participating;
- a single stage auction in which a bidder is required to be active on 100% of its bidding eligibility in each round of the auction;
- provision of three activity waivers for each qualified bidder to allow it to preserve eligibility during the course of the auction;
- use of minimum acceptable bid amounts and additional bid increments, along with a proposed methodology for calculating such amounts, while retaining discretion to change their methodology if circumstances dictate;
- bid removal procedures; and
- proposal to allow for bid removals (before the close of a bidding round) but not allow bid withdrawals (after the close of a bidding round).

2. Legal Basis

56. The Commission's statutory obligations to small businesses participating in a spectrum auction

under the Act are found in sections 309(j)(3)(B) and 309(j)(4)(D). The statutory basis for the Commission's competitive bidding rules is found in various provisions of the Act, including 47 U.S.C. 154(i), 301, 303(e), 303(f), 303(r), 304, 307, and 309(j). The Commission has established a framework of competitive bidding rules pursuant to which it has conducted auctions since the inception of the auction program in 1994 and would conduct Auction 112. The Commission has directed that OEA and MB, under delegated authority, seek comment on a variety of auction-specific procedures prior to the start of bidding in each auction.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Procedures Will Apply

57. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed procedures, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small government jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated, (2) is not dominant in its field of operation, and (3) satisfies any additional criteria established by the SBA.

58. The specific procedures and minimum opening bid amounts on which comment is sought in the *Auction 112 Comment Public Notice* will directly affect all applicants participating in Auction 112. OEA and MB expect that the pool of applicants who seek to bid in Auction 112 will include firms of all sizes.

59. *Television Broadcasting.* This Economic Census category comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: Those having $41.5 million or less in annual receipts. The 2012 Economic Census reports that 751 firms operated that entire year. Of that number, 656 had annual receipts of $25,000,000 or less, and 25 had annual receipts between $25,000,000 and $49,999,999. Based on this data OEA and MB therefore estimates that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

60. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,374. Of this total, 1,269 stations (or about 92.5%) had revenues of $41.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) in April 20, 2021, and therefore these stations qualify as small entities under the SBA definition.

61. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 384. These stations are non-profit, and therefore considered to be small entities.

62. There are also 2,371 low power television stations, including Class A stations, and 3,306 TV translators. Given the nature of these services, OEA and MB presume that all of these entities qualify as small entities under the SBA small business size standard.

63. OEA and MB note, however, that the SBA size standard data do not allow for a meaningful estimate of the number of small entities that may participate in Auction 112.

64. In assessing whether a business entity qualifies as small under the SBA definition, business control affiliations must be included. The estimates above therefore likely overstate the number of small entities that might be affected by this auction because the revenue figures on which this estimate is based does not include or aggregate revenues from affiliated companies. Moreover, the definition of small business also requires that an entity not be dominant in its field of operation and that the entity be independently owned and operated. The estimate of small businesses to which Auction 112 competitive bidding rules may apply does not exclude any television station from the definition of a small business on these bases and is therefore over-inclusive to that extent. Furthermore, OEA and MB are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation.

65. OEA and MB also note that they are unable to accurately develop an estimate of how many of the potential Auction 112 applicants might prove to be small businesses based on the number of small entities that applied to participate in prior broadcast auctions because that information is not collected from applicants for broadcast auctions in which bidding credits are not based on an applicant's size (as is the case in some auctions of licenses for wireless services). OEA and MB conclude, however, that the majority of Auction 112 eligible bidders will likely meet the SBA's definition of a small business concern.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

66. The Commission designed the auction application process itself to minimize reporting and compliance requirements for all applicants, including small business applicants. To participate in this auction, parties will file streamlined, short-form applications in which they certify under penalty of perjury as to their qualifications. Eligibility to participate in bidding is based on an applicant's short-form application and certifications, as well as its upfront payment. In the second phase of the process, there are additional compliance requirements for winning bidders. Thus, a small business that fails to become a winning bidder does not need to satisfy additional requirements of a winning bidder.

67. OEA and MB do not expect the processes and procedures proposed in the *Auction 112 Comment Public Notice* will require small entities to hire attorneys, engineers, consultants, or other professionals to participate in Auction 112 and comply with the procedures ultimately adopted because of the information, resources, and guidance OEA and MB make available to potential and actual participants. For example, OEA and MB intend to release an online tutorial that will help applicants understand the procedures for filing the auction short-form application (FCC Form 175). OEA and MB also intend to make information on the bidding system available and to offer demonstrations and other educational opportunities for applicants in Auction 112 to familiarize themselves with the FCC auction application system and the auction bidding system. By providing these resources as well as the resources discussed below, OEA and MB expect small business entities who use the available resources to experience lower participation and compliance costs. Nevertheless, while OEA and MB cannot quantify the cost of compliance with the proposed procedures, OEA and MB do not believe that the costs of

compliance will unduly burden small entities that choose to participate in the auction because the proposals for Auction 112 are similar in many respects to the procedures in recent auctions conducted by the Commission.

5. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

68. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

69. OEA and MB have taken steps to minimize any economic impact of the auction procedures on small businesses through, among other things, the many resources provided to potential auction participants. Small entities and other auction participants may seek clarification of or guidance on complying with competitive bidding rules and procedures, reporting requirements, and the FCC's auction bidding system. An FCC Auctions Hotline provides access to Commission staff for information about the auction process and procedures. The FCC Auctions Technical Support Hotline is another resource which provides technical assistance to applicants, including small entities, on issues such as access to or navigation within the electronic FCC Form 175 and use of the FCC's auction bidding system. Small entities may also use the web-based, interactive online tutorial produced by Commission staff to familiarize themselves with auction procedures, filing requirements, bidding procedures, and other matters related to an auction.

70. The Commission also makes various databases and other sources of information, including the Auctions program websites and copies of Commission decisions, available to the public without charge, providing a low-cost mechanism for small entities to conduct research prior to and throughout the auction. Prior to and at the close of Auction 112, OEA and MB will post public notices on the Auctions website, which articulate the procedures and deadlines for the auction. OEA and MB make this information easily accessible and without charge to benefit all Auction 112 applicants, including small entities, thereby lowering their administrative costs to comply with the Commission's competitive bidding rules.

71. Prior to the start of bidding, eligible bidders will be given an opportunity to become familiar with auction procedures and the bidding system by participating in a mock auction. Further, OEA and MB intend to conduct Auction 112 electronically over the internet using a web-based auction system that eliminates the need for bidders to be physically present in a specific location. Qualified bidders also have the option to place bids by telephone. These mechanisms are made available to facilitate participation in Auction 112 by all eligible bidders and may result in significant cost savings for small business entities that use these alternatives. Moreover, the adoption of bidding procedures in advance of the auction, consistent with statutory directive, is designed to ensure that the auction will be administered predictably and fairly for all participants, including small entities.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

72. None.

C. Deadlines and Filing Procedures

73. Interested parties may file comments or reply comments on or before the dates indicated on the first page of this document in AU Docket No. 21–449. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).

74. *Ex Parte Requirements.* This proceeding has been designated as a ''permit-but-disclose'' proceeding in accordance with the Commission's ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to the Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with 47 CFR 1.1206(b). In proceedings governed by 47 CFR 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the Electronic Comment Filing System available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

Federal Communications Commission.

William W. Huber,

Associate Chief, Auctions Division, Office of Economics and Analytics.

[FR Doc. 2021–26001 Filed 11–30–21; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 86, No. 228

Wednesday, December 1, 2021

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

DEPARTMENT OF AGRICULTURE

Forest Service

Sanders Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Sanders 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 to make recommendations on recreation fee proposals for sites on Lolo and Kootenai National Forests within Sanders County, consistent with the Federal Lands Recreation Enhancement Act. RAC information can be found at the following website: *https://www.fs.usda.gov/detail/lolo/workingtogether/advisorycommittees/?cid=fsm9_021467.*

DATES: The meeting will be held on December 14, 2021, 5:00 p.m.–7:00 p.m. Mountain 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 telephone and/or video conference.

Members of the public may participate in the meeting by using the following Microsoft Teams meeting link: *MS Teams Meeting Link* or call in (audio only) +1 202–650–0123, Phone Conference ID: 817 903 769#.

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: David Wrobleski, Designated Federal Official and Plains/Thompson Falls District Ranger, by phone at 406–203–8947 or email at *david.wrobleski@usda.gov* or Robin Jermyn, RAC Coordinator, by phone at 406–360–5936 or via email at *robin.jermyn@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. Approve minutes from previous meeting;
2. Review, rank and recommend proposals for Title II funding; and
3. Open forum for public discussion.

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 request in writing by November 29, 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 staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Robin Jermyn, RAC Coordinator, P.O. Box 429, Plains, Montana 59859, by email to *robin.jermyn@usda.gov,* or via facsimile to 406–826–4358.

Meeting Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodation. 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: November 24, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–26093 Filed 11–30–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 211124–0245]

RIN 0694–XC087

Impact of the Implementation of the Chemical Weapons Convention (CWC) on Legitimate Commercial Chemical, Biotechnology, and Pharmaceutical Activities Involving "Schedule 1" Chemicals (Including "Schedule 1" Chemicals Produced as Intermediates) During Calendar Year 2021

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Notice of inquiry.

SUMMARY: The Bureau of Industry and Security is seeking public comments on the impact that implementation of the Chemical Weapons Convention, through the Chemical Weapons Convention Implementation Act of 1998 and the Chemical Weapons Convention Regulations, has had on commercial activities involving ''Schedule 1'' chemicals during calendar year 2021. The purpose of this notice of inquiry is to collect information to assist BIS in its preparation of the annual certification to the Congress on whether the legitimate

commercial activities and interests of chemical, biotechnology, and pharmaceutical firms are harmed by such implementation. This certification is required under Condition 9 of Senate Resolution 75 (April 24, 1997), in which the Senate gave its advice and consent to the ratification of the Chemical Weapons Convention.

DATES: Comments must be received by January 3, 2022.

ADDRESSES: You may submit comments, identified by *regulations.gov* docket number BIS–2021–0043 or by RIN 0694–XC087, using any of the following methods:

- *Federal rulemaking portal (http://www.regulations.gov).* You can find this notice by searching under its *regulations.gov* docket number, which is BIS–2021–0043;
- *Email: PublicComments@bis.doc.gov*. Include RIN 0694–XC087 in the subject line of the message.

All filers using the portal or email should use the name of the person or entity submitting the comments as the name of their files, in accordance with the instructions below. Parties 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 (including rebuttal 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.'' The ''BC'' or ''P'' (as appropriate) in the file name should be followed by the name of the person or entity submitting the comments. Any submissions with file names that do not begin with a ''P'' or ''BC'' will be assumed to be public and will be made publicly available through *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: For questions on the Chemical Weapons Convention requirements for ''Schedule 1'' chemicals, contact Douglas Brown, Treaty Compliance Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, U.S. Department of Commerce, (202) 482–5808, Email: *Douglas.Brown@bis.doc.gov*. For questions on the submission of comments, contact Willard Fisher, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce, (202) 482–6057, Email: *RPD2@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

Background

In providing its advice and consent to the ratification of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and Their Destruction, commonly called the Chemical Weapons Convention (CWC or ''the Convention''), the Senate included, in Senate Resolution 75 (S. Res. 75, April 24, 1997), several conditions to its ratification. Condition 9, titled ''Protection of Advanced Biotechnology,'' calls for the President to certify to Congress on an annual basis that ''the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are not being significantly harmed by the limitations of the Convention on access to, and production of, those chemicals and toxins listed in Schedule 1.'' On July 8, 2004, President George W. Bush, by Executive Order 13346, delegated his authority to make the annual certification to the Secretary of Commerce.

The CWC is an international arms control treaty that contains certain verification provisions. In order to implement these verification provisions, the CWC established the Organization for the Prohibition of Chemical Weapons (OPCW). In order to achieve the object and purpose of the Convention and the implementation of its provisions, the CWC imposes certain obligations on countries that have ratified the Convention (*i.e.,* States Parties), among which are the enactment of legislation to prohibit the production, storage, and use of chemical weapons and the establishment of a National Authority to serve as the national focal point for effective liaison with the OPCW and other States Parties. The CWC also requires each State Party to implement a comprehensive data declaration and inspection regime to provide transparency and to verify that both the public and private sectors of the State Party are not engaged in activities prohibited under the CWC. In the United States, the Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. 6701 *et seq.,* implements the provisions of the CWC.

''Schedule 1'' chemicals consist of those toxic chemicals and precursors set forth in the CWC ''Annex on Chemicals'' and in ''Supplement No. 1 to part 712—SCHEDULE 1 CHEMICALS'' of the Chemical Weapons Convention Regulations (CWCR) (15 CFR parts 710–722). The CWC identified these toxic chemicals and precursors as posing a high risk to the object and purpose of the Convention.

The CWC (Part VI of the ''Verification Annex'') restricts the production of ''Schedule 1'' chemicals for protective purposes to two facilities per State Party: A single small-scale facility and a facility for production in quantities not exceeding 10 kg per year. The CWC Article-by-Article Analysis submitted to the Senate in Treaty Doc. 103–21 defined the term ''protective purposes'' to mean ''used for determining the adequacy of defense equipment and measures.'' Consistent with this definition and as authorized by Presidential Decision Directive (PDD) 70 (December 17, 1999), which specifies agency and departmental responsibilities as part of the U.S. implementation of the CWC, the Department of Defense (DOD) was assigned the responsibility to operate these two facilities. DOD maintains strict controls on ''Schedule 1'' chemicals produced at its facilities in order to ensure accountability for such chemicals, as well as their proper use, consistent with the object and purpose of the Convention. Although this assignment of responsibility to DOD under PDD–70 effectively precluded commercial production of ''Schedule 1'' chemicals for ''protective purposes'' in the United States, it did not establish any limitations on ''Schedule 1'' chemical activities that are not prohibited by the CWC.

The provisions of the CWC that affect commercial activities involving ''Schedule 1'' chemicals are implemented in the CWCR (*see* 15 CFR part 712) and in the Export Administration Regulations (EAR) (*see* 15 CFR 742.18 and 15 CFR part 745), both of which are administered by the Bureau of Industry and Security (BIS). Pursuant to CWC requirements, the CWCR restrict commercial production of ''Schedule 1'' chemicals to research, medical, or pharmaceutical purposes. The CWCR prohibit commercial production of ''Schedule 1'' chemicals for ''protective purposes'' because such production is effectively precluded per PDD–70, as described above. *See* 15 CFR 712.2(a).

The CWCR also contain other requirements and prohibitions that apply to ''Schedule 1'' chemicals and/or

''Schedule 1'' facilities. Specifically, the CWCR:

(1) Prohibit the import of ''Schedule 1'' chemicals from States not Party to the Convention (15 CFR 712.2(b));

(2) Require annual declarations by certain facilities engaged in the production of ''Schedule 1'' chemicals in excess of 100 grams aggregate per calendar year (*i.e.,* declared ''Schedule 1'' facilities) for purposes not prohibited by the Convention (15 CFR 712.5(a)(1) and (a)(2));

(3) Provide for government approval of ''declared Schedule 1'' facilities (15 CFR 712.5(f));

(4) Require 200 days advance notification of the establishment of new ''Schedule 1'' production facilities producing greater than 100 grams aggregate of ''Schedule 1'' chemicals per calendar year (15 CFR 712.4);

(5) Provide that ''declared Schedule 1'' facilities are subject to initial and routine inspection by the OPCW (15 CFR 712.5(e) and 716.1(b)(1));

(6) Require advance notification and annual reporting of all imports and exports of ''Schedule 1'' chemicals to, or from, other States Parties to the Convention (15 CFR 712.6, 742.18(a)(1) and 745.1); and

(7) Prohibit the export of ''Schedule 1'' chemicals to States not Party to the Convention (15 CFR 742.18(a)(1) and (b)(1)(ii)).

For purposes of the CWCR (*see* the definition of ''production'' in 15 CFR 710.1), the phrase ''production of a Schedule 1 chemical'' means the formation of ''Schedule 1'' chemicals through chemical synthesis, as well as processing to extract and isolate ''Schedule 1'' chemicals. The phrase also encompasses the formation of a chemical through chemical reaction, including by a biochemical or biologically mediated reaction. ''Production of a Schedule 1 chemical'' is understood, for CWCR declaration purposes, to include intermediates, by-products, or waste products that are produced and consumed within a defined chemical manufacturing sequence, where such intermediates, by-products, or waste products are chemically stable and therefore exist for a sufficient time to make isolation from the manufacturing stream possible, but where, under normal or design operating conditions, isolation does not occur.

Request for Comments

In order to assist in determining whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are significantly harmed by the limitations of the Convention on access to, and production of, ''Schedule 1'' chemicals as described in this notice, BIS is seeking public comments on any effects that implementation of the CWC, through the Chemical Weapons Convention Implementation Act of 1998 and the CWCR, has had on commercial activities involving ''Schedule 1'' chemicals during calendar year 2021. To allow BIS to properly evaluate the significance of any harm to commercial activities involving ''Schedule 1'' chemicals, public comments submitted in response to this notice of inquiry should include both a quantitative and qualitative assessment of the impact of the CWC on such activities.

Submission of Comments

All comments must be submitted to one of the addresses indicated in this notice and in accordance with the instructions provided herein. BIS will consider all comments received on or before January 3, 2022.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2021–26101 Filed 11–30–21; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, Office of AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–4735.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspended investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with 19 CFR 351.213, that the Department of Commerce (Commerce) conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

All deadlines for the submission of comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting date.

Respondent Selection

In the event Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review. We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 35 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. Commerce invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the review.

In the event Commerce decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, Commerce finds that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of a review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, new shipper review or changed circumstances review). For any company subject to a review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent

selection. Parties are requested to: (a) Identify which companies subject to review previously were collapsed; and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete a Quantity and Value Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of a proceeding where Commerce considered collapsing that entity, complete quantity and value data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that requests a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that Commerce may extend this time if it is reasonable to do so. Determinations by Commerce to extend the 90-day deadline will be made on a case-by-case basis.

Deadline for Particular Market Situation Allegation

Section 504 of the Trade Preferences Extension Act of 2015 amended the Act by adding the concept of particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.[1] Section 773(e) of the Act states that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act nor 19 CFR 351.301(c)(2)(v) set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of initial Section D responses.

Opportunity to request a review: Not later than the last day of December 2021,[2] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in December for the following periods:

Antidumping Duty Proceedings	
Brazil: Carbon Steel Butt-Weld Pipe Fittings, A–351–602	12/1/20–11/30/21
Chile: Certain Preserved Mushrooms, A–337–804	12/1/20–11/30/21
Germany: Non-Oriented Electrical Steel, A–428–843	12/1/20–11/30/21
India:	
Carbazole Violet Pigment 23, A–533–838	12/1/20–11/30/21
Certain Hot-Rolled Carbon Steel Flat Products, A–533–820	12/1/20–11/30/21
Commodity Matchbooks, A–533–848	12/1/20–11/30/21
Forged Steel Fittings, A–533–891	5/28/20–11/30/21
Stainless Steel Wire Rod, A–533–808	12/1/20–11/30/21
Indonesia: Certain Hot-Rolled Carbon Steel Flat Products, A–560–812	12/1/20–11/30/21
Japan:	
Prestressed Concrete Steel Wire Strand, A–588–068	12/1/20–11/30/21
Non-Oriented Electrical Steel, A–588–872	12/1/20–11/30/21
Welded Large Diameter Line Pipe, A–588–857	12/1/20–11/30/21
Oman: Circular Welded Carbon-Quality Steel Pipe, A–523–812	12/1/20–11/30/21
Pakistan: Circular Welded Carbon-Quality Steel Pipe, A–535–903	12/1/20–11/30/21
Republic of Korea:	
Forged Steel Fittings, A–580–904	5/28/20–11/30/21
Non-Oriented Electrical Steel, A–580–872	12/1/20–11/30/21
Welded Astm A–312 Stainless Steel Pipe, A–580–810	12/1/20–11/30/21
Welded Line Pipe, A–580–876	12/1/20–11/30/21
Russia: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products, A–821–809	12/1/20–11/30/21
Singapore: Acetone, A–559–808	12/1/20–11/30/21
Socialist Republic of Vietnam: Uncovered Innerspring Units, A–552–803	12/1/20–11/30/21
South Africa: Uncovered Innerspring Units, A–791–821	12/1/20–11/30/21
Spain: Acetone, A–469–819	12/1/20–11/30/21
Sweden: Non-Oriented Electrical Steel, A–401–809	12/1/20–11/30/21
Taiwan:	
Carbon Steel Butt-Weld Pipe Fittings, A–583–605	12/1/20–11/30/21
Non-Oriented Electrical Steel, A–583–851	12/1/20–11/30/21
Steel Wire Garment Hangers, A–583–849	12/1/20–11/30/21
Welded Astm A–312 Stainless Steel Pipe, A–583–815	12/1/20–11/30/21
Thailand: Carbon and Alloy Steel Threaded Rod, A–549–840	12/1/20–11/30/21
The People's Republic of China:	
Aluminum Wire and Cable, A–570–095	12/1/20–11/30/21
Carbazole Violet Pigment 23, A–570–892	12/1/20–11/30/21
Certain Cased Pencils, A–570–827	12/1/20–11/30/21
Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, A–570–979	12/1/20–11/30/21
Hand Trucks and Certain Parts Thereof, A–570–891	12/1/20–11/30/21

[1] *See* Trade Preferences Extension Act of 2015, Public Law No. 114–27, 129 Stat. 362 (2015).

[2] Or the next business day, if the deadline falls on a weekend, federal holiday or any other day when Commerce is closed.

Honey, A–570–863	12/1/20–11/30/21
Malleable Cast Iron Pipe Fittings, A–570–881	12/1/20–11/30/21
Mattresses, A–570–092	12/1/20–11/30/21
Melamine, A–570–020	12/1/20–11/30/21
Multilayered Wood Flooring, A–570–970	12/1/20–11/30/21
Non-Oriented Electrical Steel, A–570–996	12/1/20–11/30/21
Porcelain-On-Steel Cooking Ware,[3] A–570–506	12/1/20–8/10/21
Refillable Stainless Steel Kegs, A–570–093	12/1/20–11/30/21
Silicomanganese, A–570–828	12/1/20–11/30/21
Vertical Metal File Cabinets, A–570–110	12/1/20–11/30/21
Turkey: Welded Line Pipe, A–489–822	12/1/20–11/30/21
United Arab Emirates: Circular Welded Carbon-Quality Steel Pipe, A–520–807	12/1/20–11/30/21
Countervailing Duty Proceedings	
India:	
Carbazole Violet Pigment 23, C–533–839	1/1/20–12/31/20
Certain Hot-Rolled Carbon Steel Flat Products, C–533–821	1/1/20–12/31/20
Commodity Matchbooks, C–533–849	1/1/20–12/31/20
Forged Steel Fittings, C–533–892	3/30/20–12/31/20
Indonesia: Certain Hot-Rolled Carbon Steel Flat Products, C–560–813	1/1/20–12/31/20
Taiwan: Non-Oriented Electrical Steel, C–583–852	1/1/20–12/31/20
Thailand: Certain Hot-Rolled Carbon Steel Flat Products, C–549–818	1/1/20–12/31/20
The People's Republic of China:	
Aluminum Wire and Cable, C–570–096	1/1/20–12/31/20
Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, C–570–980	1/1/20–12/31/20
Melamine, C–570–021	1/1/20–12/31/20
Non-Oriented Electrical Steel, C–570–997	1/1/20–12/31/20
Multilayered Wood Flooring, C–570–971	1/1/20–12/31/20
Refillable Stainless Steel Kegs, C–570–094	1/1/20–12/31/20
Vertical Metal File Cabinets, C–570–111	1/1/20–12/31/20
Turkey: Welded Line Pipe, C–489–823	1/1/20–12/31/20
Suspension Agreements	
Mexico:	
Sugar, A–201–845	12/1/20–11/30/21
Sugar, C–201–846	1/1/21–12/31/21

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which was produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Note that, for any party Commerce was unable to locate in prior segments, Commerce will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 FR 23954 (May 6, 2003), and Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties, 76 FR 65694 (October 24, 2011), Commerce clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders.[4]

Commerce no longer considers the non-market economy (NME) entity as an exporter conditionally subject to an antidumping duty administrative reviews.[5] Accordingly, the NME entity will not be under review unless Commerce specifically receives a request for, or self-initiates, a review of the NME entity.[6] In administrative reviews of antidumping duty orders on merchandise from NME countries where a review of the NME entity has not been initiated, but where an individual exporter for which a review was initiated does not qualify for a separate rate, Commerce will issue a final decision indicating that the company in question is part of the NME entity. However, in that situation, because no review of the NME entity was

[3] This order was revoked, effective August 11, 2021. *See Porcelain-on-Steel Cooking Ware from the People's Republic of China: Final Results of Fifth Sunset Review and Revocation of Order,* 86 FR 56887 (October 13, 2021). Accordingly, this period of review only covers the period prior to revocation of the order in which entries could remain unliquidated.

[4] See the Enforcement and Compliance web site at *https://www.trade.gov/us-antidumping-and-countervailing-duties.*

[5] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[6] In accordance with 19 CFR 351.213(b)(1), parties should specify that they are requesting a review of entries from exporters comprising the entity, and to the extent possible, include the names of such exporters in their request.

conducted, the NME entity's entries were not subject to the review and the rate for the NME entity is not subject to change as a result of that review (although the rate for the individual exporter may change as a function of the finding that the exporter is part of the NME entity). Following initiation of an antidumping administrative review when there is no review requested of the NME entity, Commerce will instruct CBP to liquidate entries for all exporters not named in the initiation notice, including those that were suspended at the NME entity rate.

All requests must be filed electronically in Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) on Enforcement and Compliance's ACCESS website at *https://access.trade.gov*.[7] Further, in accordance with 19 CFR 351.303(f)(l)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[8]

Commerce will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of December 2021. If Commerce does not receive, by the last day of December 2021, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, Commerce will instruct CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional measures ''gap'' period of the order, if such a gap period is applicable to the period of review.

This notice is not required by statute but is published as a service to the international trading community.

Dated: November 16, 2021.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2021–26135 Filed 11–30–21; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

Background

Every five years, pursuant to the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) and the International Trade Commission automatically initiate and conduct reviews to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for January 2022

Pursuant to section 751(c) of the Act, the following Sunset Reviews are scheduled for initiation in January 2022 and will appear in that month's *Notice of Initiation of Five-Year Sunset Reviews* (Sunset Review).

	Department contact
Antidumping Duty Proceedings	
Large Residential Washers from China, A–570–033 (1st Review)	Jacky Arrowsmith, (202) 482–5255.
Glycine from China, A–570–836 (5th Review)	Mary Kolberg, (202) 482–1785.
Wooden Bedroom Furniture from China, A–570–890 (3rd Review)	Mary Kolberg, (202) 482–1785.
Polyester Staple Fiber from South Korea, A–580–839 (4th Review)	Thomas Martin, (202) 482–3936.
Polyester Staple Fiber from Taiwan, A–583–833 (4th Review)	Thomas Martin, (202) 482–3936.

Countervailing Duty Proceedings

No Sunset Review of countervailing duty orders is scheduled for initiation in January 2022.

Suspended Investigations

No Sunset Review of suspended investigations is scheduled for initiation in January 2022.

Commerce's procedures for the conduct of Sunset Review are set forth in 19 CFR 351.218. The *Notice of Initiation of Five-Year (Sunset) Review* provides further information regarding what is required of all parties to participate in Sunset Review.

Pursuant to 19 CFR 351.103(c), Commerce will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact Commerce in writing within 10 days of the publication of the Notice of Initiation.

Please note that if Commerce receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue.

Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation. Note that Commerce has modified certain of its requirements for serving documents containing business proprietary information, until further notice.[1]

This notice is not required by statute but is published as a service to the international trading community.

[7] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263 (July 6, 2011).

[8] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19*, 85 FR 41363 (July 10, 2020).

[1] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period*, 85 FR 41363 (July 10, 2020).

Dated: November 19, 2021.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2021–26128 Filed 11–30–21; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–971]

Multilayered Wood Flooring From the People's Republic of China: Notice of Amended Final Results of Countervailing Duty Administrative Review; 2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is amending its notice of final results of the 2018 administrative review of the countervailing duty (CVD) order on multilayered wood flooring (wood flooring) from the People's Republic of China (China).

DATES: Applicable December 1, 2021.

FOR FURTHER INFORMATION CONTACT: Dennis McClure, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5973.

SUPPLEMENTARY INFORMATION:

Background

On October 20, 2021, Commerce issued the final results of the 2018 administrative review of the CVD order on wood flooring from China, which was subsequently published in the **Federal Register**.[1] On October 25, 2021, Dalian Shengyu Science and Technology Development Co., Ltd. (Dalian Shengyu) requested that Commerce correct a typographical error, stating that Commerce did not include the complete spelling of its name in the *Final Results,* which is necessary to ensure proper administration by U.S. Customs and Border Protection (CBP).[2] On October 25, 2021, mandatory respondent Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. (Jiangsu Senmao) submitted a ministerial error allegation alleging that Commerce did not include the EU market price for pine plywood in its benchmark price for plywood as it did in the preliminary results.[3] On October 27, 2021, the petitioner American Manufacturers of Multilayered Wood Flooring submitted ministerial allegations alleging that Commerce incorrectly calculated the fiberboard benchmark price for Jiangsu Senmao and should not have included domestic benchmark prices in the plywood benchmark calculation for both Jiangsu Senmao and the other mandatory respondent, Riverside Plywood Corporation and its cross-owned affiliate Baroque Timber Industries.[4] The petitioner also alleged that Commerce should recalculate the non-selected respondent subsidy rate based on any corrected calculations. On November 1, 2021, Jiangsu Senmao replied to the petitioner's ministerial error allegations regarding the inclusion of domestic pricing data in the plywood benchmark calculation.[5]

Scope of the Order

The product covered by the *Order*[6] is multilayered wood flooring from China. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum in the *Final Results.*[7]

Ministerial Errors

Section 351.224(e) of Commerce's regulations provides that Commerce will analyze any comments received and, if appropriate, correct any ministerial error by amending the final results of the review. Section 751(h) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.224(f) define a ''ministerial error'' as an error ''in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.''

In light of the ministerial error comments, we reviewed the relevant record information and determined, in accordance with section 751(h) of the Act and 19 CFR 351.224(e) and (f), that we made the following ministerial errors in the *Final Results:*[8]

(1) We incorrectly removed the EU market price for pine plywood from the plywood benchmark price calculation used in Jiangsu Senmao's benefit calculation for the plywood for less than adequate remuneration (LTAR) program. Therefore, we have corrected Jiangsu Senmao's plywood benefit calculation in these amended final results, and we will incorporate the Jiangsu Senmao's corrected total subsidy rate in the amended cash deposit instructions and liquidation instructions.

(2) We incorrectly calculated the total fiberboard benchmark price (inclusive of freight) used in Jiangsu Senmao's benefit calculation for fiberboard for LTAR program by adding benchmark prices denominated in Chinese renminbi and freight costs denominated in U.S. dollars without making the necessary currency conversions. Therefore, we have corrected Jiangsu Senmao's fiberboard benefit calculation in these amended final results, and we will incorporate Jiangsu Senmao's corrected total subsidy rate in the amended cash deposit instructions and liquidation instructions.

(3) Finally, we inadvertently misspelled Dalian Shengyu's name in the *Final Results* and draft cash deposit and liquidation instructions. Therefore, we have corrected the spelling of Dalian Shengyu's name in these amended final results and in the CBP cash deposit and liquidation instructions.

With regard to the petitioner's allegation that we erred in including domestic prices in the plywood benchmark price, we find no ministerial error because we made a methodological decision to include such prices in the plywood benchmark calculation.

Amended Final Results of Review

As a result of correcting the alleged ministerial errors noted above, we determine that the following countervailable subsidy rates exist for the POR.

Producer/exporter	Subsidy rate (percent)
Jiangsu Senmao Bamboo and Wood Industry Co., Ltd	6.13

[1] *See Multilayered Wood Flooring From the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review;* 2018, 86 FR 59362 (October 27, 2021) (*Final Results*), and accompanying Issues and Decision Memorandum (*Final Results* IDM).

[2] *See* Dalian Shengyu's Letter, ''Comments for the Final Results and Draft Liquidation Instructions,'' dated October 25, 2021.

[3] *See* Jiangsu Senmao's Letter, ''Ministerial Error Comments,'' dated October 25, 2021.

[4] *See* Petitioner's Letter, ''Ministerial Error Allegations,'' dated October 27, 2021.

[5] *See* Jiangsu Senmao's Letter, ''Reply to Ministerial Error Allegations of American Manufacturers of Multilayered Wood Flooring,'' dated November 1, 2021.

[6] *See Multilayered Wood Flooring from the People's Republic of China: Countervailing Duty Order,* 76 FR 76693 (December 8, 2011) (*Order*); *see also Multilayered Wood Flooring from the People's Republic of China: Amended Antidumping and Countervailing Duty Orders,* 77 FR 5484 (February 3, 2012) (*Amended Order*); and *Multilayered Wood Flooring from the People's Republic of China: Final Clarification of the Scope of the Antidumping and Countervailing Duty Orders,* 82 FR 27799 (June 19, 2017).

[7] *Final Results* IDM at 4–5.

[8] *See* Memorandum, ''Countervailing Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China: Allegations of Ministerial Errors in the Final Results,'' dated concurrently with, and hereby adopted by, this notice.

Producer/exporter	Subsidy rate (percent)
Non-Selected Companies Under Review [9]	8.27

Assessment Rates

Pursuant to 19 CFR 351.212(b)(2), Commerce will determine, and CBP shall assess, countervailing duties on all appropriate entries of subject merchandise in accordance with the amended final results of this review, for the above-listed companies at the applicable *ad valorem* assessment rates listed. We intend to issue assessment instructions to CBP 35 days after the date of publication of these amended final results of review. 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 Instructions

In accordance with section 751(a)(2)(C) of the Act, Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the respective companies listed above on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. These cash deposit requirements, effective upon publication of these amended final results, shall remain in effect until further notice.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing these amended final results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

[9] *See* the appendix to this notice.

Dated: November 23, 2021.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix

Non-Selected Companies Under Review

1. Anhui Boya Bamboo & Wood Products Co., Ltd.
2. Anhui Longhua Bamboo Product Co., Ltd.
3. Anhui Yaolong Bamboo & Wood Products Co., Ltd.
4. Armstrong Wood Products (Kunshan) Co., Ltd.
5. Benxi Flooring Factory (General Partnership)
6. Benxi Wood Company
7. Changzhou Hawd Flooring Co., Ltd.
8. Dalian Huilong Wooden Products Co., Ltd.
9. Dalian Jaenmaken Wood Industry Co., Ltd.
10. Dalian Jiahong Wood Industry Co., Ltd.
11. Dalian Kemian Wood Industry Co., Ltd.
12. Dalian Penghong Floor Products Co., Ltd.
13. Dalian Qianqiu Wooden Product Co., Ltd.
14. Dalian Shengyu Science and Technology Development Co., Ltd.
15. Dalian Shumaike Floor Manufacturing Co., Ltd.
16. Dalian T-Boom Wood Products Co., Ltd.
17. Dongtai Fuan Universal Dynamics, LLC
18. Dun Hua Sen Tai Wood Co., Ltd.
19. Dunhua City Dexin Wood Industry Co., Ltd.
20. Dunhua City Hongyuan Wood Industry Co., Ltd.
21. Dunhua City Jisen Wood Industry Co., Ltd.
22. Dunhua Shengda Wood Industry Co., Ltd.
23. Fine Furniture (Shanghai) Limited
24. Fusong Jinlong Wooden Group Co., Ltd.
25. Fusong Jinqiu Wooden Product Co., Ltd.
26. Fusong Qianqiu Wooden Product Co., Ltd.
27. Guangzhou Homebon Timber Manufacturing Co., Ltd.
28. HaiLin LinJing Wooden Products Co., Ltd.
29. Hangzhou Hanje Tec Company Limited
30. Hangzhou Zhengtian Industrial Co., Ltd.
31. Hunchun Forest Wolf Wooden Industry Co., Ltd.
32. Hunchun Xingjia Wooden Flooring Inc.
33. Huzhou Chenghang Wood Co., Ltd.
34. Huzhou Fulinmen Imp. & Exp. Co., Ltd.
35. Huzhou Jesonwood Co., Ltd.
36. Huzhou Sunergy World Trade Co., Ltd.
37. Jiangsu Guyu International Trading Co., Ltd.
38. Jiangsu Keri Wood Co., Ltd.
39. Jiangsu Mingle Flooring Co., Ltd.
40. Jiangsu Simba Flooring Co., Ltd.
41. Jiashan HuiJiaLe Decoration Material Co., Ltd.
42. Jiaxing Hengtong Wood Co., Ltd.
43. Jilin Xinyuan Wooden Industry Co., Ltd.
44. Karly Wood Product Limited
45. Kember Flooring, Inc. (aka Kember Hardwood Flooring, Inc.)
46. Kemian Wood Industry (Kunshan) Co., Ltd.
47. Kingman Floors Co., Ltd.
48. Linyi Anying Wood Co., Ltd.
49. Linyi Youyou Wood Co., Ltd. (successor-in-interest to Shanghai Lizhong Wood Products Co., Ltd.) (aka, The Lizhong Wood Industry Limited Company of Shanghai)
50. Pinge Timber Manufacturing (Zhejiang) Co., Ltd.
51. Power Dekor Group Co. Ltd.
52. Scholar Home (Shanghai) New Material Co. Ltd.
53. Shanghaifloor Timber (Shanghai) Co., Ltd.
54. Sino-Maple (Jiangsu) Co., Ltd.
55. Suzhou Dongda Wood Co., Ltd.
56. Tongxiang Jisheng Import and Export Co., Ltd.
57. Xiamen Yung De Ornament Co., Ltd.
58. Xuzhou Shenghe Wood Co., Ltd.
59. Yekalon Industry, Inc.
60. Yihua Lifestyle Technology Co., Ltd.
61. Yingyi-Nature (Kunshan) Wood Industry Co., Ltd.
62. Zhejiang Dadongwu Greenhome Wood Co., Ltd.
63. Zhejiang Fuerjia Wooden Co., Ltd.
64. Zhejiang Jiechen Wood Industry Co., Ltd.
65. Zhejiang Longsen Lumbering Co., Ltd.
66. Zhejiang Shiyou Timber Co., Ltd.
67. Zhejiang Shuimojiangnan New Material Technology Co., Ltd.
68. Zhejiang Simite Wooden Co., Ltd.

[FR Doc. 2021–26024 Filed 11–30–21; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (Sunset) Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: In accordance with the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) is automatically initiating the five-year reviews (Sunset Reviews) of the antidumping and countervailing duty (AD/CVD) order(s) and suspended investigation(s) listed below. The International Trade Commission (the ITC) is publishing concurrently with this notice its notice of *Institution of Five-Year Reviews* which covers the same order(s) and suspended investigation(s).

DATES: Applicable December 1, 2021.

FOR FURTHER INFORMATION CONTACT: Commerce official identified in the *Initiation of Review* section below at AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230. For information from the ITC, contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

Commerce's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (Sunset) Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to Commerce's conduct of Sunset Reviews is set forth in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

Initiation of Review

In accordance with section 751(c) of the Act and 19 CFR 351.218(c), we are initiating the Sunset Reviews of the following antidumping and countervailing duty order(s) and suspended investigation(s):

DOC case No.	ITC case No.	Country	Product	Commerce contact
A–433–812	731–TA–1317	Austria	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–423–812	731–TA–1318	Belgium	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–351–847	731–TA–1319	Brazil	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–570–047	731–TA–1320	China	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–427–828	731–TA–1321	France	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–428–844	731–TA–1322	Germany	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–475–834	731–TA–1323	Italy	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–588–875	731–TA–1324	Japan	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–580–887	731–TA–1325	Korea	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–791–822	731–TA–1326	South Africa	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–583–858	731–TA–1327	Taiwan	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–489–828	731–TA–1328	Turkey	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Mary Kolberg (202) 482–1785.
A–570–958	731–TA–1169	China	Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (2nd Review).	Mary Kolberg (202) 482–1785.
A–560–823	731–TA–1170	Indonesia	Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (2nd Review).	Mary Kolberg (202) 482–1785.
A–570–803	731–TA–457–A–B–C–D	China	Heavy Forged Hand Tools, With or Without Handles (5th Review).	Thomas Martin (202) 482–3936.
A–351–503	731–TA–262	Brazil	Iron Construction Castings (5th Review)	Mary Kolberg (202) 482–1785.
A–122–503	731–TA–263	Canada	Iron Construction Castings (5th Review)	Mary Kolberg (202) 482–1785.
A–570–502	731–TA–265	China	Iron Construction Castings (5th Review)	Mary Kolberg (202) 482–1785.
A–423–808	731–TA–788	Belgium	Stainless Steel Plate in Coils (4th Review)	Jacky Arrowsmith (202) 482–5255.
A–791–805	731–TA–792	South Africa	Stainless Steel Plate in Coils (4th Review)	Jacky Arrowsmith (202) 482–5255.
A–583–830	731–TA–793	Taiwan	Stainless Steel Plate in Coils (4th Review)	Jacky Arrowsmith (202) 482–5255.
C–570–048	701–TA–560	China	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Thomas Martin (202) 482–3936.
C–580–888	701–TA–561	Korea	Carbon and Alloy Steel Cut-to-Length Plate (1st Review).	Jacky Arrowsmith (202) 482–5255.
C–570–959	701–TA–470	China	Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (2nd Review).	Mary Kolberg (202) 482–1785.
C–560–824	701–TA–471	Indonesia	Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (2nd Review).	Jacky Arrowsmith (202) 482–5255.
C–351–504	701–TA–249	Brazil	Iron Construction Castings (5th Review)	Mary Kolberg (202) 482–1785.
C–791–806	701–TA–379	South Africa	Stainless Steel Plate in Coils (4th Review)	Mary Kolberg (202) 482–1785.

Filing Information

As a courtesy, we are making information related to sunset proceedings, including copies of the pertinent statute and Commerce's regulations, Commerce's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on Commerce's website at the following address: *https://enforcement.trade.gov/sunset/.* All submissions in these Sunset Reviews must be filed in accordance with Commerce's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), can be found at 19 CFR 351.303.

In accordance with section 782(b) of the Act, any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information. Parties must use the certification formats provided in 19 CFR 351.303(g). Commerce intends to reject factual submissions if the submitting party does not comply with applicable revised certification requirements.

Letters of Appearance and Administrative Protective Orders

Pursuant to 19 CFR 351.103(d), Commerce will maintain and make available a public service list for these proceedings. Parties wishing to participate in any of these five-year reviews must file letters of appearance as discussed at 19 CFR 351.103(d). To facilitate the timely preparation of the public service list, it is requested that those seeking recognition as interested parties to a proceeding submit an entry of appearance within 10 days of the publication of the Notice of Initiation. Because deadlines in Sunset Reviews can be very short, we urge interested

parties who want access to proprietary information under administrative protective order (APO) to file an APO application immediately following publication in the **Federal Register** of this notice of initiation. Commerce's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[1]

Information Required From Interested Parties

Domestic interested parties, as defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b), wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with Commerce's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, Commerce will automatically revoke the order without further review.[2]

If we receive an order-specific notice of intent to participate from a domestic interested party, Commerce's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that Commerce's information requirements are distinct from the ITC 's information requirements. Consult Commerce's regulations for information regarding Commerce's conduct of Sunset Reviews. Consult Commerce's regulations at 19 CFR part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at Commerce.

[1] *See Temporary Rule Modifying AD/CVD Service Requirements Due to* COVID–19, 85 FR 41363 (July 10, 2020).

[2] *See* 19 CFR 351.218(d)(1)(iii).

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

Dated: November 19, 2021.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2021–26154 Filed 11–30–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Federal Consistency Appeal by Norwalk Cove Marina, Inc.

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice; closure of administrative appeal decision record.

SUMMARY: This announcement provides notice that the decision record has closed for an administrative appeal filed by Norwalk Cove Marina, Inc. (Appellant) under the Coastal Zone Management Act of 1972 (CZMA). Appellant has requested that the National Oceanic and Atmospheric Administration (NOAA) Administrator, pursuant to authority delegated by the Secretary of Commerce to decide CZMA federal consistency appeals, override an objection by the New York State Department of State to a consistency certification for a proposed project to dispose of dredged material at the Central Long Island Sound Disposal Site.

DATES: The decision record for Appellant's federal consistency appeal of the New York State Department of State's objection closed on December 1, 2021.

ADDRESSES: NOAA has provided access to publicly available materials and related documents comprising the appeal record on the following website: *www.regulations.gov,* under docket number NOAA–HQ–2021–0059.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, contact Bethany Henneman, NOAA Office of the General Counsel, Oceans and Coasts Section, 1305 East-West Highway, Room 6111, Silver Spring, MD 20910, (301) 300–0027, *bethany.henneman@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background Information

On May 19, 2021, the NOAA Administrator, pursuant to authority delegated by the Secretary of Commerce to decide Coastal Zone Management Act (CZMA) federal consistency appeals, received a ''Notice of Appeal'' filed by Norwalk Cove Marina, Inc., pursuant to the CZMA, 16 U.S.C. 1451 et seq, and implementing regulations found at 15 CFR part 930, subpart H. The ''Notice of Appeal'' is taken from an objection by the New York State Department of State to a consistency certification for a pending permit application to the U.S. Army Corps of Engineers to dispose of approximately 24,500 cubic yards of dredged material in the Central Long Island Sound Disposal Site. Under the CZMA, the NOAA Administrator may override the New York State Department of State's objection on grounds that the project is consistent with the objectives or purposes of the CZMA, or otherwise necessary in the interest of national security. To make the determination that the proposed activity is ''consistent with the objectives or purposes of the CZMA,'' the NOAA Administrator must find that: (1) The proposed activity furthers the national interest as articulated in sections 302 or 303 of the CZMA, in a significant or substantial manner; (2) the national interest furthered by the proposed activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively; and (3) no reasonable alternative is available that would permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the applicable coastal management program. 15 CFR 930.121. To make the determination that the proposed activity is ''necessary in the interest of national security,'' the NOAA Administrator must find that a national defense or other national security interest would be significantly impaired if the proposed activity is not permitted to go forward as proposed. 15 CFR 930.122.

The NOAA Administrator must close the decision record in a federal consistency appeal 160 days after the Notice of Appeal is published in the **Federal Register**. 15 CFR 930.130(a)(1). However, the CZMA authorizes the NOAA Administrator to stay the closing of the decision record for up to 60 days when the NOAA Administrator determines it is necessary to receive, on an expedited basis, any supplemental information specifically requested by the NOAA Administrator to complete a consistency review or any clarifying information submitted by a party to the proceeding related to information in the consolidated record compiled by the lead federal permitting agency. 15 CFR 930.130(a)(2), (3).

After reviewing the decision record developed to date, the NOAA Administrator has determined that it is not necessary to stay the closure of the decision record in this appeal. Consistent with the schedule contained in the CZMA and its implementing regulations, the decision record for Appellant's federal consistency appeal of the New York Department of State's objection closed on December 1, 2021. No further information or briefs will be considered in deciding this appeal.

Public Availability of Appeal Documents

NOAA has provided access to publicly available materials and related documents comprising the appeal record on the following website: *www.regulations.gov,* under docket number NOAA–HQ–2021–0059.

(Authority Citation: 15 CFR 930.130(a)(1))

Adam Dilts,

Chief, Oceans and Coasts Section, National Oceanic and Atmospheric Administration Office of the General Counsel.

[FR Doc. 2021–26010 Filed 11–30–21; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB571]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the NOAA Port Facility Project in Ketchikan, Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from the National Oceanic and Atmospheric Administration (NOAA) for authorization to take marine mammals incidental to the NOAA Port Facility Project in Ketchikan, Alaska. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this document. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notification of our decision.

DATES: Comments and information must be received no later than January 3, 2022.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be sent to *ITP.Meadows@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Dwayne Meadows, Ph.D., Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

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 IHA 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.

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.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notification prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On October 26, 2021, NMFS received an application from NOAA's Office of Marine and Aviation Operations requesting an IHA to take small numbers of 9 species (Dall's porpoise (*Phocoenoides dalli*), Steller sea lions (*Eumetopias jubatus*), Pacific white-

sided dolphin (*Lagenorhynchus obliquidens*), killer whale (*Orcinus orca*), gray whale (*Eschrichtius robustus*), minke whale (*Balaenoptera acutorostrata*), harbor seal (*Phoca vitulina*), harbor porpoise (*Phocoena phocoena*) and humpback whale (*Megaptera novaeangliae*)) of marine mammals incidental to vibratory and impact pile driving and down-the-hole (DTH) system use associated with the project. The application was deemed adequate and complete on November 16, 2021. NOAA's request is for take of a small number of these species by Level A or Level B harassment. Neither NOAA nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Proposed Activity

Overview

The purpose of the project is to remove an obsolete dock facility and construct a new facility including a 240 feet (ft) x 50 ft floating pier connected to land by a transfer bridge. A small boat dock would be connected to the large ship pier and a small boat launch ramp will be constructed adjacent to the other structures.

The pile driving/removal and DTH can result in take of marine mammals from sound in the water which results in behavioral harassment or auditory injury.

Dates and Duration

This construction work will occur from 1 February 2022 through 31 January 2023 and will take no more than 47 days of in-water pile and DTH work.

Specific Geographic Region

The project is located in the city of Ketchikan on Revillagigedo Island and the east shore of the Tongass Narrows waterway (Figure 1). The natural topography of the local area largely consists of moderately steep slopes trending toward the Tongass Narrows waterway. In this region, the Tongass Narrows is part of Southeast Alaska's Inside Passage where it splits into two channels by Pennock Island. The project area is in an industrial waterfront. The shoreline and underwater portions of the area are highly modified by existing dock structures and past dredging. Offshore marine sediments are reported to be minimal, with sediment cover depths progressively increasing away from the shoreline. Marine sediment depths overlying bedrock reportedly range from four to five feet and consist of coarse sand, rock fragments, and shells. Ongoing vessel activities throughout Tongass Narrows waterway, land-based industrial and commercial activities, and regular aircraft operations result in elevated in-air and underwater sound conditions in the area. Sound levels likely vary seasonally, with elevated levels during summer when the tourism and fishing industries are at their peaks. The shoreline and underwater portions of the area are highly modified by existing dock structures and past dredging.

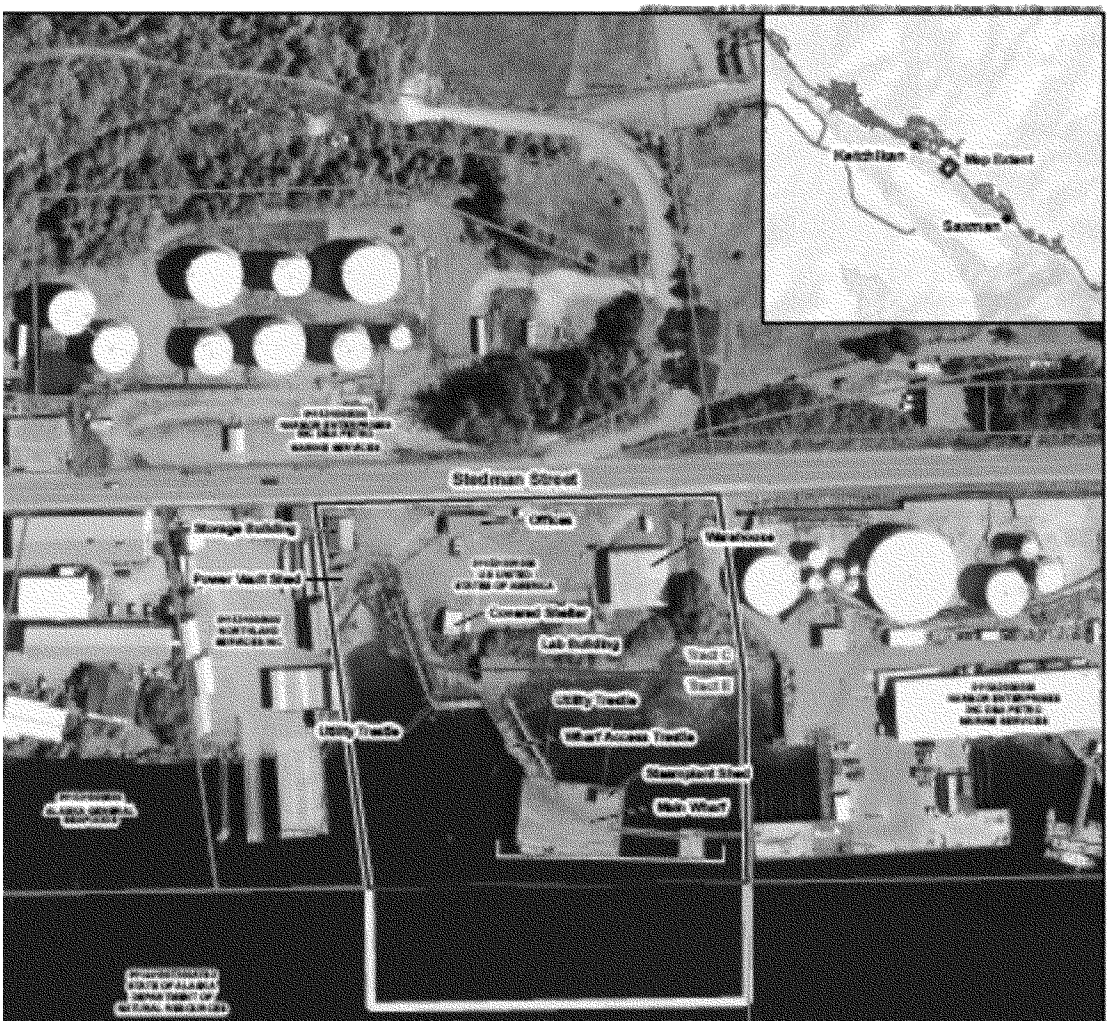
Detailed Description of Specific Activity

The project consists of an almost complete recapitalization of the existing facility. This includes the removal and appropriate disposal of unused or obsolete structures and infrastructure, in both a 77,000-square-feet (ft^2) upland area and within 102,000 ft^2 of the in-water area. Descriptions of additional upland activities may be found in the application but such actions will not affect marine mammals and are not described in detail here.

All existing in-water structures, including pier, access trestle, and mooring dolphins present above and below the water surface, are inadequate and would be removed except for a concrete/steel mooring platform and breasting dolphin with fender. The in-water structures would be replaced by adequately sized and structurally sound elements necessary for berthing, preparing, and maintaining vessel operations.

An estimated 134 remnant timber piles would be removed by direct pull or by vibratory methods. If piles incur breakage or splintering during the removal process, the pile would be cut at or about 2 feet (0.67 meters (m)) from the bottom. In addition, 66 remnant steel piles must be removed. This will occur by use of a pile clipper or hydraulic saw.

Figure 1-- Map of Proposed Project Area.



An approximately 240-ft long and 50-ft wide (73 by 15 m) floating pier would replace the existing pier and its supporting piles. The floating pier would be secured and stabilized by 10 24-inch diameter steel pipe piles, and accessed via a single, 144-ft long and 17-ft wide (44 by 5 m) steel, truss-framed transfer bridge. The transfer bridge would be supported by a bridge support float adjacent to the pier and hinged to the shoreline cast in place concrete abutment. The 24-ft by 22-ft (7.3 by 6.7 m) bridge support float would be secured by four additional 24-inch diameter steel piles. A small boat dock, approximately 90 ft long by 14 ft wide (27 by 4 m), would be installed and connected to the floating pier by an aluminum gangway and would require an additional four 24-inch steel piles. Thus the new structures would require a total of 18 24-inch steel piles. Installation of the new steel piles is anticipated to be undertaken using a barge mounted DTH system to create holes in the rock (sockets) in which the piles would be placed. Piles would be embedded into socket holes created by the DTH in bedrock to a minimum depth of 20 ft. The last foot of each pile would be ''proofed'' using an impact pile driver that is anticipated will require approximately 5 to 10 blows per pile.

Replacement mooring dolphins and fenders for mooring would be installed. Ship utilities would be extended dockside attached to the transfer bridge. A small boat launch ramp would be built on the northern portion of the site and would be supported on a raised, rip-rap protected mound with a footprint of approximately 200 ft by 70 ft wide (61 by 21 m).

Table 1 provides a summary of the pile driving activities. Because the steel piles being removed could be removed using either a pile clipper or hydraulic saw, we use the loudest, most precautionary source level for those piles which are pile clippers. In-water work would be performed using equipment based on a floating barge or from the shore, as needed. Pile work would normally only occur during civil daylight hours unless work needs to continue on a pile until it is safe to leave overnight. In summary, the project period includes 47 days of pile or DTH activities for which this IHA is requested.

TABLE 1—SUMMARY OF PILE DRIVING ACTIVITIES AND USER SPREADSHEET INPUTS

Method	Pile type	Number of piles	Minutes/strikes per pile	Piles per day
DTH Impact	24-inch Steel	18	25,000	1.5
			48	1.5
Vibratory	14-inch Timber	130	2	10
Small Pile Clipper	14-inch Steel	28	10	10
Large Pile Clipper	20- or 24-inch Steel	42	10	10
Totals		218		

All User spreadsheet calculations use Transmission Loss = 15 and standard weighting factor adjustments.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. 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 2 lists all species with expected potential for occurrence in the project area 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 (2021). 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). While no mortality is anticipated or authorized here, 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. Alaska or Pacific SARs including the 2021 draft SARs.

TABLE 2—SPECIES THAT SPATIALLY CO-OCCUR WITH THE ACTIVITY TO THE DEGREE THAT TAKE IS REASONABLY LIKELY TO OCCUR

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae*	Central North Pacific	-,-; Y	10,103 (0.3, 7,890, 2006)	83	26
Minke Whale	*Balaenoptera acutorostrata*	Alaska	-,-; N	N/A (see SAR, N/A, see SAR).	uND	0
Family Eschrichtiidae (gray whale):						
Gray Whale	*Eschrichtius robustus*	Eastern North Pacific	-,-; N	26,960 (0.05, 25,849, 2016).	801	131
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Pacific white-sided dolphin	*Lagenorhynchus obliquidens*	North Pacific	-,-; N	26,880 (N/A, N/A, 1990)	uND	0
Killer Whale	*Orcinus orca*	Northern Resident	-,-; N	302 (N/A, 302, 2018)	2.2	0.2
		Alaska Resident	-,-; N	2,347 (N/A, 2347, 2012)	24	1
		West Coast Transient	-,-; N	349 (N/A, 349, 2018)	3.5	0.4
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	Southeast Alaska	-,-; N	see SAR (see SAR, see SAR, 2012).	See SAR	34
Dall's porpoise	*Phocoenoides dalli*	Entire Alaska Stock	-,-; N	83,400 (0.097, N/A, 1991)	uND	38
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (sea lions and fur seals):						
Steller sea lion	*Eumetopias jubatus*	Eastern Stock	-,-; N	43,201 a (see SAR, 43,201, 2017).	2592	112

TABLE 2—SPECIES THAT SPATIALLY CO-OCCUR WITH THE ACTIVITY TO THE DEGREE THAT TAKE IS REASONABLY LIKELY TO OCCUR—Continued

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	Clarence Strait	-; N	27,659 (see SAR, 24,854, 2015).	746	40

[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. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports*. CV is coefficient of variation; Nmin is the minimum estimate of stock abundance.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual Mortality/ Serious Injury (M/SI) often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

Humpback whales, minke whales, gray whales, Pacific white-sided dolphin, killer whale, harbor porpoise, Dall's porpoise, harbor seal, and Steller sea lions spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing take of these species. Fin whale could potentially occur in the area, however there are no known sightings nearby so the species is very rare, is readily observed, and the applicant would shut down pile driving if they enter the project area. Thus take is not expected to occur, and they are not discussed further.

Humpback Whale

The humpback whale is found worldwide in all oceans. Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.*, 2015), NMFS established 14 DPSs with different listing statuses (81 FR 62259; September 8, 2016) pursuant to the ESA. Humpback whales found in the project area are predominantly members of the Hawaii DPS, which is not listed under the ESA. However, based on a comprehensive photo-identification study, members of the Mexico DPS, which is listed as threatened, are known to occur in Southeast Alaska. Members of different DPSs are known to intermix on feeding grounds; therefore, all waters off the coast of Alaska should be considered to have ESA-listed humpback whales. Approximately 2 percent of all humpback whales in Southeast Alaska and northern British Columbia are members of the Mexico DPS, while all others are members of the Hawaii DPS (Wade *et al.*, 2021).

The DPSs of humpback whales that were identified through the ESA listing process do not equate to the existing MMPA stocks. The stock delineations of humpback whales under the MMPA are currently under review. Until this review is complete, NMFS considers humpback whales in Southeast Alaska to be part of the Central North Pacific stock, with a status of endangered under the ESA and designations of strategic and depleted under the MMPA (Muto *et al.*, 2021).

Humpback whales experienced large population declines due to commercial whaling operations in the early 20th century. Barlow (2003) estimated the population of humpback whales at approximately 1,200 animals in 1966. The population in the North Pacific grew to between 6,000 and 8,000 by the mid-1990s. Current threats to humpback whales include vessel strikes, spills, climate change, and commercial fishing operations (Muto *et al.*, 2021).

Humpback whales are found throughout Southeast Alaska in a variety of marine environments, including open-ocean, near-shore waters, and areas with strong tidal currents (Dahlheim *et al.*, 2009). Most humpback whales are migratory and spend winters in the breeding grounds off either Hawaii or Mexico. Humpback whales generally arrive in Southeast Alaska in March and return to their wintering grounds in November. Some humpback whales depart late or arrive early to feeding grounds, and therefore the species occurs in Southeast Alaska year-round (Straley, 1990, Straley *et al.*, 2018). Across the region, there have been no recent estimates of humpback whale density.

No systematic studies have documented humpback whale abundance near Ketchikan. Anecdotal information suggests that this species is present in low numbers year-round in Tongass Narrows, with the highest abundance during summer and fall. Anecdotal reports suggest that humpback whales are seen only once or twice per month, while more recently it has been suggested that the occurrence is more regular, such as once per week on average, and more seasonal. Humpbacks observed in Tongass Narrows are generally alone or in groups of one to three individuals. In August 2017, a group of 6 individuals was observed passing through Tongass Narrows several times per day, for several days in a row.

The City of Ketchikan (COK) Rock Pinnacle project, which was located approximately 4 kilometers (km) southeast of the proposed project site, reported one humpback whale sighting of one individual during the project (December 2019 through January 2020). During the Ward Cove Cruise Ship Dock Construction, located approximately 5 km northwest of the proposed project site, 28 sightings of humpbacks were made on eighteen days of in water work that occurred between February and September 2020, with at least one humpback being recorded every month. A total of 42 individuals were recorded and group sizes ranged from 1 to 6 (Power Systems & Supplies of Alaska, 2020). Humpback whales were sighted on 17 days out of 88 days of monitoring in Tongass Narrows in 2020 and 2021 (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). There were no sightings in January or February, but humpback whales were observed each month from October to December 2020 and May to June 2021. During November 2020, a single known individual (by fluke pattern) was observed repeatedly, accounting for 14 of the 26 sighting events that month (DOT&PF, 2020). During monitoring, humpback whales were observed on average once a week.

Southeast Alaska is considered an important area for feeding humpback whales between March and May (Ellison *et al.*, 2012), though not currently designated as critical habitat (86 FR 21082; April 21, 2021). In Alaska, humpback whales filter feed on tiny crustaceans, plankton, and small fish

such as walleye pollock, Pacific sand lance, herring, eulachon (*Thaleichthys pacificus*), and capelin (Witteveen *et al.*, 2012).

Minke Whale

Minke whales are found throughout the northern hemisphere in polar, temperate, and tropical waters. The population status of minke whales is considered stable throughout most of their range. Historically, commercial whaling reduced the population size of this species, but given their small size, they were never a primary target of whaling and did not experience the severe population declines as did larger cetaceans.

Minke whales are found in all Alaska waters. Minke whales in Southeast Alaska are part of the Alaska stock (Muto *et al.*, 2021). Research in Southeast Alaska have consistently identified individuals throughout inland waters in low numbers (Dahlheim *et al.*, 2009). All sightings were of single minke whales, except for a single sighting of multiple minke whales. Surveys took place in spring, summer, and fall, and minke whales were present in low numbers in all seasons and years. No information appears to be available on the winter occurrence of minke whales in Southeast Alaska.

There are no known occurrences of minke whales within the project area. Since their ranges extend into the project area and they have been observed in southeast Alaska, including in Clarence Strait (Dahlheim *et al.*, 2009), it is possible the species could occur near the project area. No minke whales were reported during the COK Rock Pinnacle Blasting Project (Sitkiewicz, 2020). During marine mammal monitoring of Tongass Narrows in 2020 and 2021, there were no minke whales observed on 88 days of observations across 7 months (October 2020—February 2021; May—June 2021) (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d).

In Alaska, the minke whale diet consists primarily of euphausiids and walleye pollock. Minke whales are generally found in shallow, coastal waters within 200 m of shore (Zerbini *et al.*, 2006) and are almost always solitary or in small groups of 2 to 3. In Alaska, seasonal movements are associated with feeding areas that are generally located at the edge of the pack ice (NMFS, 2014).

Gray Whale

Gray whales are distributed throughout the North Pacific Ocean and are found primarily in shallow coastal waters (Muto *et al.*, 2021). Gray whales in the Eastern North Pacific stock range from the southern Gulf of California, Mexico to the arctic waters of the Bering and Chukchi Seas. Gray whales are generally solitary creatures and travel together alone or in small groups.

Gray whales are rare in the action area and unlikely to occur in Tongass Narrows. They were not observed during the Dahlheim *et al.* (2009) surveys of Alaska's inland waters with surveys conducted in the spring, summer and fall months. No gray whales were reported during the COK Rock Pinnacle Blasting Project (Sitkiewicz, 2020) or Ward Cove (Power Systems & Supplies of Alaska, 2020). However a gray whale could migrate through or near the project during November especially.

There is an ongoing Unusual Mortality Event (UME) involving gray whales on the Pacific Coast (*https://www.fisheries.noaa.gov/national/marine-life-distress/2019-2021-gray-whale-unusual-mortality-event-along-west-coast-and*). Almost half of the strandings in the United States have been in Alaska. A definitive cause has not been found for the UME but many of the animals show signs of emaciation.

Killer Whale

Killer whales have been observed in all the world's oceans, but the highest densities occur in colder and more productive waters found at high latitudes (NMFS, 2016b). Killer whales occur along the entire Alaska coast, in British Columbia and Washington inland waterways, and along the outer coasts of Washington, Oregon, and California (NMFS, 2016b).

Based on data regarding association patterns, acoustics, movements, and genetic differences, eight killer whale stocks are now recognized within the Pacific U.S. Exclusive Economic Zone. This proposed IHA considers only the Eastern North Pacific Alaska Resident stock (Alaska Resident stock), Eastern North Pacific Northern Resident stock (Northern Resident stock), and West Coast Transient stock, because all other stocks occur outside the geographic area under consideration (Muto *et al.*, 2021).

There are three distinct ecotypes, or forms, of killer whales recognized: Resident, Transient, and Offshore. The three ecotypes differ morphologically, ecologically, behaviorally, and genetically. Surveys between 1991 and 2007 encountered resident killer whales during all seasons throughout Southeast Alaska. Both residents and transients were common in a variety of habitats and all major waterways, including protected bays and inlets. There does not appear to be strong seasonal variation in abundance or distribution of killer whales, but there was substantial variability between years (Dahlheim *et al.*, 2009). Spatial distribution has been shown to vary among the different ecotypes, with resident and, to a lesser extent, transient killer whales more commonly observed along the continental shelf, and offshore killer whales more commonly observed in pelagic waters (Rice *et al.*, 2021).

No systematic studies of killer whales have been conducted in or around Tongass Narrows. Killer whales have been observed in Tongass Narrows year-round and are most common during the summer Chinook salmon run (May-July). During the Chinook salmon run, Ketchikan residents have reported pods of up to 20–30 whales (84 FR 36891; July 30, 2019). Typical pod sizes observed within the project vicinity range from 1 to 10 animals and the frequency of killer whales passing through the action area is estimated to be once per month (Frietag, 2017). Anecdotal reports suggest that large pods of killer whales (as many as 80 individuals, but generally between 25 and 40 individuals) are not uncommon in May, June, and July when the king salmon are running. During the rest of the year, killer whales occur irregularly in pods of 6 to 12 or more individuals.

Transient killer whales are often found in long-term stable social units (pods) of 1 to 16 whales. Average pod sizes in Southeast Alaska were 6.0 in spring, 5.0 in summer, and 3.9 in fall. Pod sizes of transient whales are generally smaller than those of resident social groups. Resident killer whales occur in larger pods, ranging from 7 to 70 whales that are seen in association with one another more than 50 percent of the time (Dahlheim *et al.*, 2009; NMFS, 2016a). In Southeast Alaska, resident killer whale mean pod size was approximately 21.5 in spring, 32.3 in summer, and 19.3 in fall (Dahlheim *et al.*, 2009).

Although killer whales may occur in large numbers, they generally form large pods and would incur fewer work stoppages than their numbers suggest since stoppages would correlate more with the number of pods than the number of individuals. Killer whales tend to transit through Tongass Narrows, and do not linger in the project area.

Marine mammal observations in Tongass Narrows during 2020 and 2021 support an estimate of approximately one group of killer whales a month in the Project area. During 7 months of monitoring (October 2020 February 2021; May June 2021), there were five

killer whale sightings in 4 months (November, February, May, June) totaling 22 animals and sightings occurred on 5 out of 88 days of monitoring (DOT&PF, 2020, 2021a, 2021b, 2021c, 2021d). Pod sizes ranged from two to eight animals. During the COK's monitoring for the Rock Pinnacle Removal project in December 2019 and January 2020, no killer whales were observed. Over eight months of monitoring at the Ward Cove Cruise Ship Dock in 2020, killer whales were only observed on two days in March (Power Systems and Supplies of Alaska, 2020). These observations included a sighting of one pod of two killer whales and a second pod of five individuals travelling through the project area.

Pacific White-Sided Dolphin

Pacific white-sided dolphins are a pelagic species inhabiting temperate waters of the North Pacific Ocean and along the coasts of California, Oregon, Washington, and Alaska (Muto *et al.*, 2021). Despite their distribution mostly in deep, offshore waters, they may also be found over the continental shelf and near shore waters, including inland waters of Southeast Alaska (Ferrero and Walker, 1996). They are managed as two distinct stocks: The California/Oregon/Washington stock, and the North Pacific stock (north of 45 N, including Alaska). Only the North Pacific stock is found within the project area. The Pacific white-sided dolphin is distributed throughout the temperate North Pacific Ocean, north of Baja California to Alaska's southern coastline and Aleutian Islands. The North Pacific Stock ranges from Canada into Alaska (Muto *et al.*, 2021).

Pacific white-sided dolphins prey on squid and small schooling fish such as capelin, sardines, and herring (Morton, 2006). They are known to work in groups to herd schools of fish and can dive underwater for up to 6 minutes to feed (Morton, 2006). Group sizes have been reported to range from 40 to over 1,000 animals, but groups of between 10 and 100 individuals (Stacey and Baird, 1991; NMFS no date) occur most commonly. Seasonal movements of Pacific white-sided dolphins are not well understood, but there is evidence of both north-south seasonal movement (Leatherwood *et al.*, 1984) and inshore-offshore seasonal movement (Stacey and Baird, 1991).

Scientific studies and data are lacking relative to the presence or abundance of Pacific white-sided dolphins in or near Tongass Narrows. Although they generally prefer deeper and more-offshore waters, anecdotal reports suggest that Pacific white-sided dolphins have previously been observed in Tongass Narrows, although they have not been observed entering Tongass Narrows or nearby inter-island waterways in 15–20 years.

Pacific white-sided dolphins are rare in the inside passageways of Southeast Alaska. Most observations occur off the outer coast or in inland waterways near entrances to the open ocean. According to Muto *et al.* (2018), aerial surveys in 1997 sighted one group of 164 Pacific white-sided dolphins in Dixon entrance to the south of Tongass Narrows. Surveys in April and May from 1991 to 1993 identified Pacific white-sided dolphins in Revillagigedo Channel, Behm Canal, and Clarence Strait (Dahlheim and Towell 1994). These areas are contiguous with the open ocean waters of Dixon Entrance. This observational data, combined with anecdotal information, indicates there is a rare, however, slight potential for Pacific white-sided dolphins to occur in the project area.

During marine mammal monitoring of Tongass Narrows in 2020 and 2021, no Pacific white-sided dolphins were observed on 88 days of observations across 7 months (October 2020–February 2021; May–June 2021), which supports the anecdotal evidence that sightings of this species are rare (DOT&PF, 2020, 2021a, 2021b, 2021c, 2021d). There were also no sightings of Pacific white-sided dolphins during the COK Rock Pinnacle Blasting Project during monitoring surveys conducted in December 2019 and January 2020 (Sitkiewicz, 2020) or during monitoring surveys conducted between February and September 2020 as part of the Ward Cove Cruise Ship Dock (Power Systems and Supplies of Alaska, 2020).

Harbor Porpoise

In the eastern North Pacific Ocean, the harbor porpoise ranges from Point Barrow, along the Alaska coast, and down the west coast of North America to Point Conception, California. The Southeast Alaska stock ranges from Cape Suckling to the Canadian border (Muto *et al.*, 2021). Harbor porpoises frequent primarily coastal waters in Southeast Alaska (Dahlheim *et al.*, 2009) and occur most frequently in waters less than 100 m (328 ft) deep (Dahlheim *et al.*, 2015). They are not attracted to areas with elevated levels of vessel activity and noise such as Tongass Narrows.

Studies of harbor porpoises reported no evidence of seasonal changes in distribution for the inland waters of Southeast Alaska (Dahlheim *et al.,* 2009). Their small overall size, lack of a visible blow, low dorsal fins and overall low profile, and short surfacing time make them difficult to spot (Dahlheim *et al.,* 2015). Ketchikan area densities are expected to be low. This is supported by anecdotal estimates. Anecdotal reports (see IHA Application) specific to Tongass Narrows indicate that harbor porpoises are rarely observed in the action area. Harbor porpoises are expected to be present in the action area only a few times per year.

Dall's Porpoise

Dall's porpoises are found throughout the North Pacific, from southern Japan to southern California north to the Bering Sea. All Dall's porpoises in Alaska are members of the Alaska stock. This species can be found in offshore, inshore, and nearshore habitat.

Jefferson *et al.* (2019) presents historical survey data showing few sightings in the Ketchikan area. The mean group size in Southeast Alaska is estimated at approximately three individuals (Dahlheim *et al.*, 2009, Jefferson *et al.*, 2019), although Freitag (2017, as cited in 83 FR 37473) suggested group sizes near Ketchikan range from 10 to 15 individuals. Anecdotal reports suggest that Dall's porpoises are found northwest of Ketchikan near the Guard Islands, where waters are deeper, as well as in deeper waters to the southeast of Tongass Narrows. This species has a tendency to bow-ride with vessels and may occur in the action area incidentally a few times per year.

Harbor Seal

Harbor seals inhabit coastal and estuarine waters off Alaska. They haul out on rocks, reefs, beaches, and drifting glacial ice. They are opportunistic feeders and often adjust their distribution to take advantage of locally and seasonally abundant prey (Womble *et al.*, 2009, Allen and Angliss, 2015).

Harbor seals occurring in the project area belong to the Clarence Strait stock. Distribution of the Clarence Strait stock ranges from the east coast of Prince of Wales Island from Cape Chacon north through Clarence Strait to Point Baker and along the east coast of Mitkof and Kupreanof Islands north to Bay Point, including Ernest Sound, Behm Canal, and Pearse Canal (Muto *et al.,* 2021). In the project area, they tend to be more abundant during spring, summer and fall months when salmon are present in Ward Creek. Anecdotal evidence indicates that harbor seals typically occur in groups of 1–3 animals in Ward Cove with a few sightings per day (Spokely, 2019). They were not observed in Tongass Narrows during a combined 63.5 hours of marine mammal

monitoring that took place in 2001 and 2016 (OSSA, 2001, Turnagain, 2016). There are no known harbor seal haulouts within the project area. According to the list of harbor seal haulout locations, the closest listed haulouts are located off the tip of Gravina Island, approximately eight km (five miles (mi)) northwest of Ward Cove (AFSC, 2018), but not in the ensonified area from this project.

Steller Sea Lion

Steller sea lions were listed as threatened range-wide under the ESA on November 26, 1990 (55 FR 49204). Steller sea lions were subsequently partitioned into the western and eastern Distinct Population Segments (DPSs; western and eastern stocks) in 1997 (62 FR 24345; May 5, 1997). The eastern DPS remained classified as threatened until it was delisted in November 2013. The current minimum abundance estimate for the eastern DPS of Steller sea lions is 43,201 individuals (Muto *et al.,* 2021). The western DPS (those individuals west of 144° W longitude or Cape Suckling, Alaska) was upgraded to endangered status following separation of the DPSs, and it remains endangered today. There is regular movement of both DPSs across this 144° W longitude boundary (Jemison *et al.,* 2013), however, due to the distance from this DPS boundary, it is likely that only eastern DPS Steller sea lions are present in the project area. Therefore, animals potentially affected by the project are assumed to be part of the eastern DPS. Sea lions from the western DPS, which is listed as endangered under the Endangered Species Act (ESA), are not likely to be affected by the proposed activity and are not discussed further.

There are several mapped and regularly monitored long-term Steller sea lion haulouts surrounding Ketchikan, such as West Rocks (36 mi/58 km) or Nose Point (37 mi/60 km), but none are known to occur within Tongass Narrows (Fritz *et al.,* 2015). The nearest known Steller sea lion haulout is located approximately 20 mi (58 km) west/northwest of Ketchikan on Grindall Island. None of these haul-outs would be affected by the proposed activity. Summer counts of adult and juvenile sea lions at this haulout since 2000 have averaged approximately 191 individuals, with a range from 6 in 2009 to 378 in 2008. Only two winter surveys of this haulout have occurred. In March 1993, a total of 239 individuals were recorded, and in December 1994, a total of 211 individuals were recorded. No sea lion pups have been observed at this haulout during surveys. Although this is a limited sample, it suggests that abundance may be consistent year-round at the Grindall Island haulout.

No systematic studies of sea lion abundance or distribution have occurred in Tongass Narrows. Anecdotal reports suggest that Steller sea lions may be found in Tongass Narrows year-round, with an increase in abundance from March to early May during the herring spawning season, and another increase in late summer associated with salmon runs. Overall sea lion presence in Tongass Narrows tends to be lower in summer than in winter (FHWA, 2017). During summer, Steller sea lions may aggregate outside the project area, at rookery and haulout sites. Monitoring during construction of the Ketchikan Ferry Terminal in summer (July 16 through August 17, 2016) did not record any Steller sea lions (ADOT&PF 2015); however, monitoring during construction of the Ward Cove Dock, located approximately 6 km northwest of the Project site, recorded 181 individual sea lions between February and September 2020 (Power Systems & Supplies of Alaska, 2020). Most sightings occurred in February (45 sightings of 88 sea lions) and March (34 sightings of 45 sea lions); the fewest number of sightings were observed in May (1 sighting of 1 sea lion) (Power Systems & Supplies of Alaska, 2020).

Sea lions are known to transit through Tongass Narrows while pursuing prey. Steller sea lions are known to follow fishing vessels, and may congregate in small numbers at seafood processing facilities and hatcheries or at the mouths of rivers and creeks containing hatcheries, where large numbers of salmon congregate in late summer. Three seafood processing facilities are located east of the proposed berth location on Revillagigedo Island, and two salmon hatcheries operated by the Alaska Department of Fish & Game (ADF&G) are located east of the project area. Steller sea lions may aggregate near the mouth of Ketchikan Creek, where a hatchery upstream supports a summer salmon run. The Creek mouth is more than 4 km (2.5 mi) from both ferry berth sites, and is positioned behind the cruise ship terminal and within the small boat harbor. In addition to these locations, anecdotal information from a local kayaking company suggests that there are Steller sea lions present at Gravina Point, near the southwest entrance to Tongass Narrows.

A total of 181 Steller sea lions were sighted on forty-four separate days during all months of Ward Cove Cruise Ship Dock construction (February through September, 2020) (Power Systems and Supplies of Alaska, 2020). Most sightings occurred in February and March and the fewest sightings were in May. Sightings were of single individuals, pairs, and herds of up to 10 individuals. They were identified as travelling, foraging, swimming, chuffing, milling, looking, sinking, spyhopping, and playing.

Marine mammal monitoring occurred near the proposed project site during 2020 and 2021 for previous construction components of the Tongass Narrows Project. Monitoring occurred from October 2020 to February 2021 and resumed in May 2021, and is still underway. Steller sea lions were observed in the Tongass Narrows Project area on 49 of 88 days between October 2020 and June 2021 (DOT&PF, 2020, 2021a, 2021b, 2021c, 2021d). They were observed in every month that observations took place (DOT&PF, 2020, 2021a, 2021b, 2021c, 2021d). Sightings of Steller sea lions were most frequent in January and February and least common in May and June (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Sightings were primarily of single animals, but animals were also present in pairs and groups up to five sea lions (DOT&PF, 2020, 2021a, 2021b, 2021c, 2021d). This is consistent with Freitag (2017 as cited in 83 FR 22009), though groups of up to 80 individuals have been observed (HDR, Inc., 2003). On average over the course of a year, Steller sea lions occur in Tongass Narrows approximately three or four times per week (DOT&PF, 2020, 2021a, 2021b, 2021c, 2021d).

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018)

described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Humpback, minke and gray whales are in the low-frequency hearing group, killer whales and Pacific white-sided dolphins are in the mid-frequency hearing group, harbor and Dall's porpoises are in the high frequency hearing group, harbor seals are in the phocid group and Steller sea lions are otariids.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. 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 Determination section considers the content of this section, the Estimated Take section, and the Proposed 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.

Acoustic effects on marine mammals during the specified activity can occur from impact pile driving and vibratory driving and removal and DTH. The effects of underwater noise from NOAA's proposed activities have the potential to result in Level A or Level B harassment of marine mammals in the action area.

Description of Sound Sources

The marine soundscape is comprised of both ambient and anthropogenic sounds. Ambient sound is defined as the all-encompassing sound in a given place and is usually a composite of sound from many sources both near and far (ANSI 1995). The sound level of an area is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, wind, precipitation, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the project would include impact and vibratory pile driving and removal and DTH. The sounds produced by these activities fall into one of two general sound types: Impulsive and non-impulsive. Impulsive sounds (*e.g.,* explosions, sonic booms, impact pile driving) are typically transient, brief (less than 1 second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay (ANSI, 1986; NIOSH, 1998; NMFS, 2018). Non-impulsive sounds (*e.g.,* machinery operations such as drilling or dredging, vibratory pile driving, underwater chainsaws, and active sonar systems) can be broadband, narrowband or tonal, brief or prolonged (continuous or intermittent), and typically do not have the high peak sound pressure with raid rise/decay time that impulsive sounds do (ANSI 1995; NIOSH 1998; NMFS 2018). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward 1997 in Southall *et al.,* 2007).

Three types of hammers would be used on this project: Impact, vibratory, and DTH. Impact hammers operate by repeatedly dropping and/or pushing a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper, 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer

to push them into the sediment. Vibratory hammers produce significantly less sound than impact hammers. Peak Sound pressure Levels (SPLs) may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.,* 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards, 2002; Carlson *et al.,* 2005).

A DTH hammer is essentially a drill bit that drills through the bedrock using a rotating function like a normal drill, in concert with a hammering mechanism operated by a pneumatic (or sometimes hydraulic) component integrated into to the DTH hammer to increase speed of progress through the substrate (*i.e.,* it is similar to a ''hammer drill'' hand tool). Rock socketing involves using DTH equipment to create a hole in the bedrock inside of which the pile is placed to give it lateral and longitudinal strength. The sounds produced by the DTH method contain both a continuous non-impulsive component from the drilling action and an impulsive component from the hammering effect. Therefore, we treat DTH systems as both impulsive and non-impulsive sound source types simultaneously.

The likely or possible impacts of NOAA's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment, vessels, and personnel; however, any impacts to marine mammals are expected to primarily be acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile installation and removal.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving equipment is the primary means by which marine mammals may be harassed from the NOAA's specified activity. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.,* 2007). Generally, exposure to DTH or pile driving and removal and other construction noise has the potential to result in auditory threshold shifts and behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses such an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions such as communication and predator and prey detection. The effects of pile driving and demolition noise on marine mammals are dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mom with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.,* 2004; Southall *et al.,* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS (2018), there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing and vocalization frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.,* 2014), and the overlap between the animal and the source (*e.g.,* spatial, temporal, and spectral).

Permanent Threshold Shift (PTS)—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (see Ward *et al.,* 1958, 1959; Ward, 1960; Kryter *et al.,* 1966; Miller, 1974; Ahroon *et al.,* 1996; Henderson *et al.,* 2008). PTS levels for marine mammals are estimates, with the exception of a single study unintentionally inducing PTS in a harbor seal (Kastak *et al.,* 2008), there are no empirical data measuring PTS in marine mammals, largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS, 2018).

Temporary Threshold Shift (TTS)—A temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Based on data from cetacean TTS measurements (see Southall *et al.,* 2007), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.,* 2000; Finneran *et al.,* 2000, 2002). As described in Finneran (2016), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level (SEL_{cum}) in an accelerating fashion: At low exposures with lower SEL_{cum}, the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SEL_{cum}, the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and five species of pinnipeds exposed to a limited number

of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.,* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). The potential for TTS from impact pile driving exists. After exposure to playbacks of impact pile driving sounds (rate 2,760 strikes/hour) in captivity, mean TTS increased from 0 dB after 15 minute exposure to 5 dB after 360 minute exposure; recovery occurred within 60 minutes (Kastelein *et al.,* 2016). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. No data are available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and Table 5 in NMFS (2018).

Installing piles for this project requires impact pile driving and DTH. There would likely be pauses in activities producing the sound during each day. Given these pauses and that many marine mammals are likely moving through the action area and not remaining for extended periods of time, the potential for TS declines.

Behavioral Harassment—Exposure to noise from DTH and pile driving and removal also has the potential to behaviorally disturb marine mammals. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.*, Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005).

Disturbance may result in changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located. Pinnipeds may increase their haul-out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006). Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.*, species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.*, Richardson *et al.*, 1995; Wartzok *et al.*, 2004; Southall *et al.*, 2007; Weilgart, 2007; Archer *et al.*, 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.*, 2012), and can vary depending on characteristics associated with the sound source (*e.g.*, whether it is moving or stationary, number of sources, distance from the source). In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater sound than do cetaceans, and generally seem to be less responsive to exposure to industrial sound than most cetaceans. Please see Appendices B and C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.*, bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.*, Croll *et al.*, 2001; Nowacek *et al.*, 2004; Madsen *et al.*, 2006; Yazvenko *et al.*, 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

In 2016, the Alaska Department of Transportation and Public Facilities (ADOT&PF) documented observations of marine mammals during construction activities (*i.e.*, pile driving) at the Kodiak Ferry Dock (see 80 FR 60636, October 7, 2015). In the marine mammal monitoring report for that project (ABR, 2016), 1,281 Steller sea lions were observed within the Level B disturbance zone during pile driving or drilling (*i.e.*, documented as Level B harassment take). Of these, 19 individuals demonstrated an alert behavior, 7 were fleeing, and 19 swam away from the project site. All other animals (98 percent) were engaged in activities such as milling, foraging, or fighting and did not change their behavior. In addition, two sea lions approached within 20 m of active vibratory pile driving activities. Three harbor seals were observed within the disturbance zone during pile driving activities; none of them displayed disturbance behaviors. Fifteen killer whales and three harbor porpoise were also observed within the Level B harassment zone during pile driving. The killer whales were travelling or milling while all harbor porpoises were travelling. No signs of disturbance were noted for either of these species. Given the similarities in species, activities and habitat, we expect similar behavioral responses of marine mammals to the NOAA's specified activity. That is, disturbance, if any, is likely to be temporary and localized (*e.g.*, small area movements).

Stress responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.*, Seyle, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.*, Moberg 1987; Blecha 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.*, 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.*, Holberton *et al.*, 1996; Hood *et al.*, 1998; Jessop *et al.*, 2003; Krausman *et al.*, 2004; Lankford *et al.*, 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker 2000; Romano *et al.*, 2002b) and, more rarely, studied in wild populations (*e.g.*, Romano *et al.*, 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003), however distress is an unlikely result of this project based on observations of marine mammals during previous, similar projects in the area.

Masking—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.*, those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.*, 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.*, snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.*, pile driving, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.*, signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.*, sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions. Masking of natural sounds can result when human activities produce high levels of background sound at frequencies important to marine mammals. Conversely, if the background level of underwater sound is high (*e.g.*, on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked. The Ketchikan area contains active commercial shipping, ferry operations, commercial fishing as well as numerous recreational and other commercial vessel and background sound levels in the area are already elevated.

Airborne Acoustic Effects—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with DTH and pile driving and removal that have the potential to cause behavioral harassment, depending on their distance from pile driving activities. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

Airborne noise would primarily be an issue for pinnipeds that are swimming or hauled out near the project site within the range of noise levels elevated above the acoustic criteria. We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with their heads above water. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon the area and move further from the source. However, these animals would likely previously have been ''taken'' because of exposure to underwater sound above the behavioral harassment thresholds, which are generally larger than those associated with airborne sound. There are no haulouts near the project site. Thus, the behavioral harassment of these animals is already accounted for in these estimates of potential take. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further here.

Marine Mammal Habitat Effects

NOAA's construction activities could have localized, temporary impacts on marine mammal habitat and their prey by increasing in-water sound pressure levels and slightly decreasing water quality. Increased noise levels may affect acoustic habitat (see masking discussion above) and adversely affect marine mammal prey in the vicinity of the project area (see discussion below). During DTH, impact and vibratory pile driving or removal, elevated levels of underwater noise would ensonify the project area where both fishes and mammals occur and could affect foraging success. Additionally, marine mammals may avoid the area during construction, however, displacement due to noise is expected to be temporary and is not expected to result in long-term effects to the individuals or populations. Construction activities are of short duration and would likely have temporary impacts on marine mammal habitat through increases in underwater and airborne sound.

A temporary and localized increase in turbidity near the seafloor would occur in the immediate area surrounding the area where piles are installed or removed. In general, turbidity associated with pile installation is localized to about a 25-ft (7.6-m) radius around the pile (Everitt *et al.*, 1980). The sediments of the project site will settle out rapidly when disturbed. Cetaceans are not expected to be close enough to the pile driving areas to experience effects of turbidity, and any pinnipeds could avoid localized areas of turbidity. Local strong currents are anticipated to disburse any additional suspended sediments produced by project activities at moderate to rapid rates depending on tidal stage. Therefore, we expect the impact from increased turbidity levels to be discountable to marine mammals and do not discuss it further.

In-Water Construction Effects on Potential Foraging Habitat

The area likely impacted by the project is relatively small compared to the available habitat in Southeast Alaska and does not include any Biologically Important Areas or other habitat of known importance. The area is highly influenced by anthropogenic activities. The total seafloor area affected by pile installation and removal is a small area compared to the vast foraging area

available to marine mammals in the area. At best, the impact area provides marginal foraging habitat for marine mammals and fishes. Furthermore, pile driving and removal at the project site would not obstruct movements or migration of marine mammals.

Avoidance by potential prey (*i.e.,* fish) of the immediate area due to the temporary loss of this foraging habitat is also possible. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity.

In-water Construction Effects on Potential Prey—Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, zooplankton). Marine mammal prey varies by species, season, and location. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick and Mann, 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds which are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish; several are based on studies in support of large, multiyear bridge construction projects (*e.g.,* Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Pena *et al.,* 2013; Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009; Popper *et al.,* 2015).

SPLs of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012b; Casper *et al.,* 2013).

The most likely impact to fishes from DTH and pile driving and removal and construction activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated.

Construction activities, in the form of increased turbidity, have the potential to adversely affect forage fish in the project area. Forage fish form a significant prey base for many marine mammal species that occur in the project area. Increased turbidity is expected to occur in the immediate vicinity (on the order of 10 ft (3 m) or less) of construction activities. However, suspended sediments and particulates are expected to dissipate quickly within a single tidal cycle. Given the limited area affected and high tidal dilution rates any effects on forage fish are expected to be minor or negligible. Finally, exposure to turbid waters from construction activities is not expected to be different from the current exposure; fish and marine mammals in Tongass Narrows are routinely exposed to substantial levels of suspended sediment from natural and anthropogenic sources.

In summary, given the short daily duration of sound associated with individual pile driving events and the relatively small areas being affected, pile driving activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. Thus, we conclude that impacts of the specified activity are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Further, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to contribute to adverse impacts on their populations.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. 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).

Authorized takes would primarily be by Level B harassment, as use of the acoustic sources (*i.e.,* vibratory or impact pile driving and DTH) have the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result for porpoises and harbor seals because predicted auditory injury zones are larger. The proposed mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described previously, no mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds

above which 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). Due to the lack of marine mammal density, NMFS relied on local occurrence data and group size to estimate take for some species. Below, we describe the factors considered here in more detail and present the proposed 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).

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 dB re 1 microPascal (μPa) (root mean square (rms)) for continuous (*e.g.,* vibratory pile-driving) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* impact pile driving) or intermittent (*e.g.,* scientific sonar) sources.

NOAA's proposed activity includes the use of continuous (vibratory hammer and DTH) and impulsive (DTH and impact pile-driving) sources, and therefore the 120 and 160 dB re 1 μPa (rms) thresholds are applicable.

Level A harassment for non-explosive sources—NMFS'' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). NOAA's activity includes the use of impulsive (impact pile-driving and DTH) and non-impulsive (vibratory hammer and DTH) sources.

These thresholds are provided in Table 4. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript ''flat'' is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the proposed project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact and vibratory pile driving, and DTH).

In order to calculate distances to the Level A harassment and Level B harassment sound thresholds for the methods and piles being used in this project, NMFS used acoustic monitoring data from other locations to develop source levels for the various pile types, sizes and methods (Table 5). Because the steel piles being removed could be removed using either a pile clipper or hydraulic saw, we use the loudest, most precautionary source level for those piles.

TABLE 5—PROJECT SOUND SOURCE LEVELS

Method	Estimated noise levels (dB)	Source
24-inch DTH-impulsive	154 SELss	Reyff & Heyvaert (2019).
24-inch DTH-non-impulsive	166 dB RMS	Denes *et al.* (2016).
24-inch Steel Impact	211.2 Pk, 183.2 SEL, 197 RMS	Caltrans (2015) Table I.2.1 90th percentile.
14-inch Timber Vibratory	157 RMS	Caltrans (2015) Table I.2.2.
14-inch Steel Small Pile Clipper	154 RMS	NAVFAC SW (2020).
20- or 24-inch Steel Large Pile Clipper	161 RMS	NAVFAC SW (2020).

Note: SEL = single strike sound exposure level; RMS = root mean square.

Level B Harassment Zones

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

TL = B * Log10 (R1/R2),

Where

TL = transmission loss in dB
B = transmission loss coefficient; for practical spreading equals 15
R1 = the distance of the modeled SPL from the driven pile, and
R2 = the distance from the driven pile of the initial measurement

The recommended TL coefficient for most nearshore environments is the practical spreading value of 15. This value results in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions, which is the most appropriate assumption for NOAA's proposed activity in the absence of specific modelling.

NOAA determined underwater noise would fall below the behavioral effects threshold of 160 dB RMS for impact driving at 2,530 m and the 120 dB rms threshold for the other methods at between 1,848 and 11,659 m (Table 6). It should be noted that based on the bathymetry and geography of the project area, sound will not reach the full distance of the harassment isopleths in all directions.

Level A Harassment Zones

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of take by Level A harassment. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources such as pile driving or removal and DTH using any of the methods discussed above, NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would not incur PTS. We used the User Spreadsheet to determine the Level A harassment isopleths. Inputs used in the User Spreadsheet or models are reported in Table 1 and the resulting isopleths are reported in Table 6 for each of the construction methods and scenarios.

TABLE 6—LEVEL A AND LEVEL B ISOPLETHS (METERS) FOR EACH METHOD

Method	Pile type	Low-frequency	Mid-frequency	High-frequency	Phocids	Otariids	Level B
DTH	24-inch steel	130	5	155	70	5	11,659
Impact	24-inch steel	151	5	179	81	6	2,530
Vibratory	14-inch Timber	2	0	3	1	0	2,929
Small Pile Clipper	14-inch Steel	1	0	1	1	0	1,848
Large Pile Clipper	20- or 24-inch Steel.	1	1	2	1	0	5,412

Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide the information about the presence or group dynamics of marine mammals that will inform the take calculations. No density data are available for species in the project area. Here we describe how the information provided above is brought together to produce a quantitative take estimate. The estimates below are similar to and informed by prior projects in the Ketchikan area as discussed above. A summary of proposed take is in Table 9.

Humpback Whale

Humpback whales are expected to occur in the project area no more than twice per five-day work week. Typical group size for humpback whales in the project area is two animals. The project involves 47 days (10 work weeks) of in-water work where take could occur. Therefore, we estimate total take at 2 whales × 2/week × 10 weeks = 40 takes. All of these takes are expected to be Level B harassment takes as we believe the Level A shutdown zones can be fully implemented by Protected Species Observers (PSO) because of the large size, short dive duration, and obvious behaviors of humpback whales.

Given the data in Wade *et al.* (2021) discussed above on the relative frequencies of Hawaii and Mexico DPS humpback whales in the project area the 40 takes is expected to comprise 39

Hawaii DPS animals and 1 Mexico DPS animal.

Minke Whale

As discussed above minke whales have not been seen in the project area but could occur there. They are often solitary. Therefore we conservatively propose to authorize a single take of minke whales. This one estimated take is expected to be by Level B harassment as we believe the Level A shutdown zones can be fully implemented by PSOs because of the large size, short dive duration, and obvious behaviors of minke whales.

Gray Whale

Gray whales are expected to occur in the project area no more than once per month. Typical group size for gray whales in the project area is two animals. The project involves 47 days of in-water work where take could occur. Therefore, we estimate total take at two whales × two full months = four takes. All of these takes are expected to be Level B harassment takes as we believe the Level A shutdown zones can be fully implemented by PSOs because of the large size, short dive duration, and obvious behaviors of gray whales.

Killer Whale

Killer whales are expected to occur in the project area no more than once per month. Typical group size for killer whales in the project area is conservatively estimated at 10 animals. The project involves 47 days of in-water work where take could occur. Therefore, we estimate total take at 10 whales × 2 full months = 20 takes. All of these takes are expected to be Level B harassment takes as we believe the Level A shutdown zones can be fully implemented by PSOs because of the large size, short dive duration, and obvious behaviors of killer whales and the smaller size of the shutdown zones.

Pacific White-Sided Dolphin

Pacific white-sided dolphins are expected to occur in the project area no more than once per week. Typical group size for Pacific white-sided dolphins in the project area is 20 animals. The project involves 10 work weeks of in-water work where take could occur. Therefore, we estimate total take at 20 dolphins × 10 weeks = 200 takes. All of these takes are expected to be Level B harassment takes as we believe the Level A shutdown zones can be fully implemented by PSOs because of the large group size, short dive duration, and obvious behaviors of Pacific white-sided dolphins and the smaller size of the shutdown zones.

Harbor Porpoise

Harbor porpoises are expected to occur in the project area no more than three times per month. Typical group size for harbor porpoises in the project area is 5 animals. The project involves 47 days (2 months) of in-water work where take could occur. Therefore, we estimate total take at 5 porpoises × 6/month = 30 takes. Twenty of these takes are expected to be Level B harassment takes. Because the shutdown zone is not the full size of the large Level A harassment zone, and because harbor porpoises are small and cryptic and could sometimes remain undetected within the estimated harassment zones for a duration sufficient to experience PTS, we propose to authorize 10 takes by Level A harassment.

Dall's Porpoise

Dall's porpoises are expected to occur in the project area no more than three times. Typical group size for Dall's porpoises in the project area is 20 animals. The project involves two months of in-water work where take could occur. Therefore, we estimate total take at 20 porpoises × 3 = 60 takes. Forty of these takes are expected to be Level B harassment takes. Because the shutdown zone is not the full size of the large Level A harassment zone, and because Dall's porpoises are small and cryptic and could sometimes remain undetected within the estimated harassment zones for a duration sufficient to experience PTS, we propose to authorize 20 takes by Level A harassment.

Harbor Seal

Harbor seals are expected to occur in the project area once per day. The typical number of harbor seals per day in the project area is up to 12 animals. The project involves 47 days of in-water work where take could occur. Therefore, we estimate total take at 12 seals × 47 days = 564 takes. Seventy-five percent or 423 of these takes are expected to be Level B harassment takes. Because the shutdown zone is not the full size of the large Level A harassment zone, and because harbor seals are small and cryptic and could sometimes remain undetected within the estimated harassment zones for a duration sufficient to experience PTS, we propose to authorize 141 takes by Level A harassment.

Steller Sea Lion

Steller sea lions are expected to occur in the project area once per day. The typical number of Steller sea lions per day in the project area is up to 10 animals. The project involves 47 days of in-water work where take could occur. Therefore, we estimate total take at 10 sea lions × 47 days = 470 takes. Because the shutdown zone is small and Steller sea lions are not cryptic we believe the Level A shutdown zones can be fully implemented by PSOs and no Level A harassment take is proposed.

TABLE 7—PROPOSED AUTHORIZED AMOUNT OF TAKING, BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT, BY SPECIES AND STOCK AND PERCENT OF TAKE BY STOCK

Common name	Stock	Level B harassment	Level A harassment	Percent of stock
Humpback whale *	Central North Pacific	40	0	0.4
Minke whale	Alaska	1	0	<0.1
Gray whale	Eastern North Pacific	4	0	<0.1
Killer whale	Northern Resident; Alaska Resident; West Coast Transient.	20	0	<6.7
Pacific White-sided dolphin	North Pacific	200	0	0.7
Dall's porpoise	Alaska	40	20	<0.1
Harbor porpoise	Southeast Alaska	20	10	0.3
Harbor seal	Clarence Strait	423	141	2.1
Steller sea lion	Eastern DPS	470	0	1.1

* 1 take from the ESA listed Mexico DPS.

Proposed 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 IHAs 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.

Because of the need for an ESA Section 7 consultation for effects of the project on ESA listed humpback whales, there are a number of mitigation measures that go beyond, or are in addition to, typical mitigation measures we would otherwise require for this sort of project. The proposed measures are however typical for actions in the Ketchikan area. Additional or revised measures may be required once the consultation is finalized. The following mitigation measures are proposed in the IHA:

- Avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions;
- Conduct training between construction supervisors and crews and the marine mammal monitoring team and relevant NOAA staff prior to the start of all pile driving and DTH activity and when new personnel join the work, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood;
- Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone. If an ESA listed marine mammal is determined by the PSO to have been disturbed, harassed, harmed, injured, or killed (*e.g.,* a listed marine mammal is observed entering a shutdown zone before operations can be shut down, or is injured or killed as a direct or indirect result of this action), the PSO will report the incident to within one business day to *akr.section7@noaa.gov;*
- NOAA will establish and implement the shutdown zones indicated in Table 8. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones typically vary based on the activity type and marine mammal hearing group. To simplify implementation of shutdown zones NOAA has proposed to implement a single shutdown zone size for impact pile driving and DTH activities, with the shutdown zone being the largest of the Level A harassment isopleths for any of the hearing groups for those activities (180 m). For comparison purposes, Table 8 shows both the minimum shutdown zones we would normally require and the shutdown zones NOAA proposes to implement. NMFS proposes to include the latter in the requested IHA;
- Employ PSOs and establish monitoring locations as described in the Marine Mammal Monitoring Plan and Section 5 of the IHA. The Holder must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions. For all pile driving and removal at least three PSOs must be used;
- The placement of the PSOs during all pile driving and removal and DTH activities will ensure that the entire shutdown zone is visible during pile installation. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone will not be visible (*e.g.,* fog, heavy rain), pile driving and removal must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected;
- Monitoring must take place from 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine the shutdown zones clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made;
- If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal (30 minutes for humpback whales);
- For humpback whales, if the boundaries of the harassment zone have not been monitored continuously during a work stoppage, the entire harassment zone will be surveyed again to ensure that no humpback whales have entered the harassment zone that were not previously accounted for;
- In-water activities will take place only: Between civil dawn and civil dusk when PSOs can effectively monitor for the presence of marine mammals; during conditions with a Beaufort Sea State of 4 or less; when the entire shutdown zone and adjacent waters are visible (*e.g.,* monitoring effectiveness is not reduced due to rain, fog, snow, etc.). Pile driving activities may continue for up to 30 minutes after sunset during evening civil twilight, as necessary to secure a pile for safety prior to demobilization for the evening. PSO(s) will continue to observe shutdown and monitoring zones during this time. The length of the post-activity monitoring period may be reduced if darkness precludes visibility of the shutdown and monitoring zones;
- Vessel operators will maintain a watch for marine mammals at all times while underway; stay at least 91 m (100 yards (yd)) away from listed marine mammals, except they will remain at least 460 m (500 yd) from endangered

North Pacific right whales (in the unlikely event that the species were to occur in the area); travel at less than 5 knots (9 km/hr) when within 274 m (300 yd) of a whale; avoid changes in direction and speed when within 274 m (300 yd) of whales, unless doing so is necessary for maritime safety; not position vessel(s) in the path of whales, and will not cut in front of whales in a way or at a distance that causes the whales to change their direction of travel or behavior (including breathing/surfacing pattern); check the waters immediately adjacent to the vessel(s) to ensure that no whales will be injured when the propellers are engaged; reduce vessel speed to 10 knots or less when weather conditions reduce visibility to 1.6 km (1 mi) or less; adhere to the Alaska Humpback Whale Approach Regulations when transiting to and from the project site (see 50 CFR 216.18, 223.214, and 224.103(b)); not allow lines to remain in the water, and no trash or other debris will be thrown overboard, thereby reducing the potential for marine mammal entanglement; follow established transit routes and will travel <10 knots while in the harassment zones; the speed limit within Tongass Narrows is 7 knots for vessels over 23 ft in length. If a whale's course and speed are such that it will likely cross in front of a vessel that is underway, or approach within 91 m (100 yards (yd)) of the vessel, and if maritime conditions safely allow, the engine will be put in neutral and the whale will be allowed to pass beyond the vessel, except that vessels will remain 460 m (500 yd) from North Pacific right whales; and

- NOAA must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

TABLE 8—MINIMUM REQUIRED SHUTDOWN ZONES (METERS) BY HEARING GROUP AND VOLUNTARY PLANNED SHUTDOWN ZONES FOR EACH METHOD

Method	Pile type	Low frequency	Mid-frequency	High frequency	Phocids	Otariids	All
DTH	24-inch steel	130	10	160	70	10	180
Impact	24-inch steel	160	10	180	90	10	180
Vibratory	14-inch Timber	10	10	10	10	10	10
Small Pile Clipper	14-inch Steel	10	10	10	10	10	10
Large Pile Clipper	20- or 24-inch Steel.	10	10	10	10	10	10

Note: *First five columns are what NMFS would consider appropriate in this circumstance, and the last column is what applicant has proposed and what NMFS proposes to include in the IHA.*

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed 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.

Proposed 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 proposed action area. 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.

Visual Monitoring

Monitoring must be conducted by qualified, NMFS-approved PSOs, in accordance with the following:

- PSOs must be independent (*i.e.,* not construction personnel) and have no other assigned tasks during monitoring periods. At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued IHA. Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training. PSOs must be approved by NMFS prior to beginning any activity subject to this IHA; and
- PSOs must record all observations of marine mammals as described in the Section 5 of the IHA and the Marine Mammal Monitoring Plan, regardless of distance from the pile being driven. PSOs shall document any behavioral reactions in concert with distance from piles being driven or removed;

PSOs must have the following additional qualifications:

• Ability to conduct field observations and collect data according to assigned protocols;
• Experience or training in the field identification of marine mammals, including the identification of behaviors;
• Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
• Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
• Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary;

NOAA must establish the following monitoring locations. For all pile driving and DTH activities, a minimum of one PSO must be assigned to the active pile driving or DTH location to monitor the shutdown zones and as much of the Level B harassment zones as possible. For all pile driving and DTH activities, two additional PSOs are required. The additional PSOs will start at the project site and travel along Tongass Narrows, counting all humpback whales present, until they have reached the edge of the respective harassment zone. At this point, the PSOs will identify suitable observation points from which to observe the width of Tongass Narrows for the duration of pile driving activities. For the largest DTH zones these are expected to be on South Tongass Highway near Mountain Point and North Tongass Highway just northwest of the intersection with Carlanna Creek. See application Figure 11–1 for map of PSO locations. If visibility deteriorates so that the entire width of Tongass Narrows at the harassment zone boundary is not visible, additional PSOs may be positioned so that the entire width is visible, or work will be halted until the entire width is visible to ensure that any humpback whales entering or within the harassment zone are detected by PSOs.

Reporting

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of pile driving and removal activities, or 60 days prior to a requested date of issuance of any future IHAs for projects at the same location, whichever comes first. The report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:
• Dates and times (begin and end) of all marine mammal monitoring;
• Construction activities occurring during each daily observation period, including the number and type of piles driven or removed and by what method (*i.e.*, impact, vibratory or DTH) and the total equipment duration for vibratory removal or DTH for each pile or hole or total number of strikes for each pile (impact driving);
• PSO locations during marine mammal monitoring;
• Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
• Upon observation of a marine mammal, the following information: Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; Time of sighting; Identification of the animal(s) (*e.g.*, genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; Distance and bearing of each marine mammal observed relative to the pile being driven for each sighting (if pile driving was occurring at time of sighting); Estimated number of animals (min/max/best estimate); Estimated number of animals by cohort (adults, juveniles, neonates, group composition, etc.); Animal's closest point of approach and estimated time spent within the harassment zone; Description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.*, no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
• Number of marine mammals detected within the harassment zones, by species;
• Detailed information about any implementation of any mitigation triggered (*e.g.*, shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any; and
• If visibility degrades to where the PSO(s) cannot view the entire impact or vibratory harassment zones, take of humpback whales will be extrapolated based on the estimated percentage of the monitoring zone that remains visible and the number of marine mammals observed.

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the IHA-holder must immediately cease the specified activities and report the incident to the Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov*), NMFS and to the Alaska Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, NOAA must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. The IHA-holder must not resume their activities until notified by NMFS. The report must include the following information:
• Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
• Species identification (if known) or description of the animal(s) involved;
• Condition of the animal(s) (including carcass condition if the animal is dead);
• Observed behaviors of the animal(s), if alive;
• If available, photographs or video footage of the animal(s); and
• General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

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'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.*, intensity, duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the 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's 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 environmental 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, or ambient noise levels).

Pile driving and removal and DTH activities have the potential to disturb or displace marine mammals. Specifically, the project activities may result in take, in the form of Level A and Level B harassment from underwater sounds generated from pile driving and removal and DTH. Potential takes could occur if individuals are present in the ensonified zone when these activities are underway.

The takes from Level A and Level B harassment would be due to potential behavioral disturbance, TTS, and PTS. No serious injury or mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for harassment is minimized through the construction method and the implementation of the planned mitigation measures (see Proposed Mitigation section).

The Level A harassment zones identified in Table 6 are based upon an animal exposed to impact pile driving multiple piles per day. Considering the short duration to impact drive or vibe each pile and breaks between pile installations (to reset equipment and move pile into place), this means an animal would have to remain within the area estimated to be ensonified above the Level A harassment threshold for multiple hours. This is highly unlikely given marine mammal movement throughout the area. If an animal was exposed to accumulated sound energy, the resulting PTS would likely be small (*e.g.*, PTS onset) at lower frequencies where pile driving energy is concentrated, and unlikely to result in impacts to individual fitness, reproduction, or survival.

The nature of the pile driving project precludes the likelihood of serious injury or mortality. For all species and stocks, take would occur within a limited, confined area (adjacent to the project site) of the stock's range. Level A and Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Further the amount of take proposed to be authorized is extremely small when compared to stock abundance.

Behavioral responses of marine mammals to pile driving at the project site, if any, are expected to be mild and temporary. Marine mammals within the Level B harassment zone may not show any visual cues they are disturbed by activities (as noted during modification to the Kodiak Ferry Dock) or could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns. Given the short duration of noise-generating activities per day, any harassment would be temporary. There are no other areas or times of known biological importance for any of the affected species.

In addition, it is unlikely that minor noise effects in a small, localized area of habitat would have any effect on the stocks'' ability to recover. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- Authorized Level A harassment would be very small amounts and of low degree;
- No important habitat areas have been identified within the project area;
- For all species, Tongass Narrows is a very small and peripheral part of their range;
- NOAA would implement mitigation measures such as soft-starts, and shut downs; and
- Monitoring reports from similar work in Tongass Narrows have documented little to no effect on individuals of the same species impacted by the specified activities.

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 proposed monitoring and mitigation measures, NMFS preliminarily 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 section 101(a)(5)(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.

The amount of take NMFS proposes to authorize is below one third of the estimated stock abundance for all species (in fact, take of individuals is less than 10 percent of the abundance of the affected stocks, see Table 7). This is likely a conservative estimate because we assume all takes are of different individual animals, which is likely not the case. Some individuals may return multiple times in a day, but PSOs would count them as separate takes if they cannot be individually identified. The Alaska stock of Dall's porpoise has no official NMFS abundance estimate for this area as the most recent estimate is greater than eight years old. Nevertheless, the most recent estimate was 83,400 animals and it is highly unlikely this number has drastically declined. Therefore, the 60 authorized takes of this stock clearly represent small numbers of this stock. Likewise, the Southeast Alaska stock of harbor porpoise has no official NMFS abundance estimate as the most recent estimate is greater than eight years old. Nevertheless, the most recent estimate was 11,146 animals (Muto *et al.,* 2021) and it is highly unlikely this number has drastically declined. Therefore, the 30 authorized takes of this stock clearly

represent small numbers of this stock. There is no current or historical estimate of the Alaska minke whale stock, but there are known to be over 1,000 minke whales in the Gulf of Alaska (Muto *et al.,* 2018) so the 1 authorized take clearly represents small numbers of this stock.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily 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

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Alaska Native hunters in the Ketchikan vicinity do not traditionally harvest cetaceans (Muto *et al.*, 2021). Harbor seals are the most commonly targeted marine mammal that is hunted by Alaska Native subsistence hunters within the Ketchikan area. In 2012 an estimated 595 harbor seals were taken for subsistence uses, with 22 of those occurring in Ketchikan (Wolfe *et al.*, 2013). This is the most recent data available. The harbor seal harvest per capita in both communities was low, at 0.02 for Ketchikan. ADF&G subsistence data for Southeast Alaska shows that from 1992 through 2008, plus 2012, from zero to 19 Steller sea lions were taken by Alaska Native hunters per year with typical harvest years ranging from zero to five animals (Wolfe *et al.*, 2013). In 2012, it is estimated 9 sea lions were taken in all of Southeast Alaska and only from Hoonah and Sitka. There are no known haulout locations in the project area. Both the harbor seal and the Steller sea lion may be temporarily displaced from the action area. However, neither the local population nor any individual pinnipeds are likely to be adversely impacted by the proposed action beyond noise-induced harassment or slight injury. The proposed project is anticipated to have no long-term impact on Steller sea lion or harbor seal populations, or their habitat no long term impacts on the availability of marine mammals for subsistence uses is anticipated.

Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the proposed mitigation and monitoring measures, NMFS has preliminarily determined that there will not be an unmitigable adverse impact on subsistence uses from NOAA's proposed activities.

Endangered Species Act

Section 7(a)(2) of the 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 internally, in this case with the Alaska Regional Office, whenever we propose to authorize take for endangered or threatened species.

NMFS is proposing to authorize take of Mexico DPS of humpback whales which are listed under the ESA. The NMFS Office of Protected Resources has requested initiation of Section 7 consultation with the Alaska Region for the issuance of this IHA. NMFS will conclude the ESA consultation prior to reaching a determination regarding the proposed issuance of the authorization.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the NOAA to conduct the NOAA Port Facility Project in Ketchikan, Alaska from 1 February 2022 through 31 January 2023, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed NOAA Ketchikan Port project. We also request at this time comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent Renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, one-year Renewal IHA following to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Description of Proposed Activity section of this notification is planned or (2) the activities as described in the Description of Proposed Activity section of this notification would not be completed by the time the IHA expires and a Renewal IHA would allow for completion of the activities beyond that described in the Dates and Duration section of this notification, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA);
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take); and

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and

- Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: November 26, 2021.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–26122 Filed 11–30–21; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Civil Penalties; Notice of Adjusted Maximum Amounts

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of adjusted maximum civil penalty amounts.

SUMMARY: In 1990, Congress enacted statutory amendments to adjust the maximum civil penalty amounts authorized under the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), and the Flammable Fabrics Act (FFA). On August 14, 2008, the Consumer Product Safety Improvement Act of 2008 (CPSIA) increased the maximum civil penalty amounts to $100,000 for each violation and $15,000,000 for any related series of violations. The CPSIA tied the effective date of the new amounts to the earlier of the date on which final regulations are issued or 1 year after August 14, 2008. The new amounts became effective on August 14, 2009. The CPSIA also revised the starting date, from December 1, 1994 to December 1, 2011, and December 1 of each fifth calendar year, thereafter, on which the Commission must prescribe and publish in the **Federal Register**, the schedule of maximum authorized penalties. On November 23, 2016, the CPSC published increased maximum authorized civil penalty amounts of $110,000 for each violation and $16,025,000 for any related series of violations. As calculated in accordance with the amendments, the new amounts are $120,000 for each violation and $17,150,000 for any related series of violations.

DATES: The new amounts will become effective after January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Amy S. Colvin, Attorney, Office of the General Counsel, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone (301) 504–7639; email *acolvin@cpsc.gov.*

SUPPLEMENTARY INFORMATION: The Consumer Product Safety Improvement Act of 1990 (Improvement Act), Public Law 101–608, 104 stat. 3110 (Nov. 16, 1990), and the CPSIA, Public Law 110–314, 122 stat. 3016 (Aug. 14, 2008), amended the CPSA, FHSA, and the FFA. The Improvement Act added civil penalty authority to the FHSA and FFA, which previously contained only criminal penalties. 15 U.S.C. 1264(c) and 1194(e). The Improvement Act also increased the maximum civil penalty amounts applicable to civil penalties under the CPSA and set the same maximum amounts for the newly created FHSA and FFA civil penalties. 15 U.S.C. 2069(a)(1), 1264(c)(1) and 1194(e)(1).

The Improvement Act amended the CPSA, FHSA, and FFA to adjust the maximum civil penalty amounts periodically for inflation. 15 U.S.C. 2069(a)(3), 1264(c)(6), and 1194(e)(5). The Improvement Act required that the Commission ''prescribe and publish in the **Federal Register** a schedule of maximum authorized penalties that shall apply for violations that occur after January 1 of the year immediately following such publication'' not later than December 1, 1994, and December 1 of each fifth calendar year thereafter and directed how the Commission must calculate the schedule. Section 115(a)–(c) of Public Law 101–608.

The CPSIA amended the CPSA, FHSA, and FFA to increase the maximum authorized civil penalty amounts to $100,000 for each violation, and $15,000,000 for any related series of violations. 15 U.S.C. 2069(a)(1), 1264(c)(1), and 1194(e)(1). The CPSIA amended the starting date in the CPSA from not later than December 1, 1994, and December 1 of each fifth calendar year thereafter, to not later than December 1, 2011, and December 1 of each fifth calendar year thereafter, as the date on which ''the Commission shall prescribe and publish in the **Federal Register** a schedule of maximum authorized penalties that shall apply for violations that occur after January 1 of the year immediately following such publication.'' Section 217 (a)(1)–(3) of Public Law 110–314. The CPSIA tied the effective date of the new amounts to the earlier of the date on which final regulations are issued under section 217(b)(2) of Public Law 110–314, or 1 year after August 14, 2008. Section 217(a)(4) of Public Law 110–314. The new amounts became effective on August 14, 2009.

The Commission's Directorate for Economics calculated the cost-of-living adjustment increases the maximum civil penalty amounts to $117,656 for each violation, and to $17,140,340 for any related series of violations. In accordance with statutory directions regarding rounding, the adjusted maximum amounts are $120,000 for each violation, and $17,150,000 for any related series of violations. These new amounts apply to violations that occur after January 1, 2022.

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2021–26082 Filed 11–30–21; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF ENERGY

Notice of Request for Information (RFI) on Using a Consent-Based Siting Process To Identify Federal Interim Storage Facilities

AGENCY: Office of Spent Fuel and Waste Disposition, Office of Nuclear Energy, Department of Energy.

ACTION: Request for information.

SUMMARY: The Office of Nuclear Energy (NE), U.S. Department of Energy (DOE), requests information on how to site Federal facilities for the temporary, consolidated storage of spent nuclear fuel using a consent-based approach. DOE anticipates that communities; governments at the local, State, and Tribal levels; members of the public; energy and environmental justice groups; organizations or corporations; and other stakeholders may be interested in responding to this Request for Information (RFI). We especially welcome insight from people, communities, and groups that have historically not been well-represented in these discussions. Responses to the RFI will inform development of a consent-based siting process, overall strategy for an integrated waste management system, and possibly a funding opportunity.

DATES: Responses to the RFI must be received by March 4, 2022 by 5:00 p.m. (ET).

ADDRESSES: Interested parties may submit comments electronically to *consentbasedsiting@hq.doe.gov.* Include ''RFI: Consent-Based Siting and Federal Interim Storage'' in the subject line of the email. Email attachments can be provided as a Microsoft Word (.docx) file or an Adobe PDF (.pdf) file, prepared in accordance with the detailed instructions in the RFI. Documents submitted electronically should clearly indicate which topic areas and specific questions are being addressed, and should be limited to no more than 45MB in size.

FOR FURTHER INFORMATION CONTACT: Please send any questions to *consentbasedsiting@hq.doe.gov,* or to Alisa Trunzo at 301–903–9600.

SUPPLEMENTARY INFORMATION:

Background

In 2015, DOE began developing a consent-based process for siting storage or disposal facilities collaboratively with members of the public, communities, stakeholders, and governments at the Tribal, State, and local levels. As part of this initiative, the Department issued an Invitation for Public Comment (*www.energy.gov/sites/prod/files/2016/12/f34/Summary of Public Input Report FINAL.pdf*) and conducted a series of public meetings to seek feedback and inform future efforts. Based on that feedback, as well as the findings of several expert groups, DOE developed and requested public comment on the *Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Waste (*the ''*Draft Consent-Based Siting Process,*'' *www.energy.gov/sites/prod/files/2017/01/f34/Draft Consent-Based Siting Process and Siting Considerations.pdf*) in January 2017.

In the Consolidated Appropriations Act, 2021, Congress appropriated funds to the Department for interim storage activities. Interim storage is an important component of a waste management system and will enable near-term consolidation and temporary storage of spent nuclear fuel. This will allow for removal of spent nuclear fuel from reactor sites, provide useful research opportunities, and build trust and confidence with stakeholders and the public by demonstrating a consent-based approach to siting.

DOE anticipates that an interim storage facility would need to operate until the fuel can be moved to final disposal. The duration of the interim period depends on the completion of a series of significant steps, such as the need to identify, license, and construct a facility, plus the time needed to move the spent nuclear fuel.

Questions for Input

Given Congressional appropriations to move forward with interim storage activities, we are seeking input on using a consent-based process to site federal interim storage facilities. We will use responses to this RFI, along with comments received in 2017 on the *Draft Consent-Based Siting Process* (*www.energy.gov/sites/prod/files/2017/01/f34/Draft Consent-Based Siting Process and Siting Considerations.pdf*), to help develop a consent-based siting process for use in siting federal interim storage facilities, the overall strategy for development and operation of an integrated waste management system, and possibly a funding opportunity.

Respondents to this RFI do not need to address every question, but DOE welcomes input in all of the following areas.

Area 1: Consent-Based Siting Process

1. How should the Department build considerations of social equity and environmental justice into a consent-based siting process?
2. What role should Tribal, State, and local governments and officials play in determining consent for a community to host a federal interim storage facility?
3. What benefits or opportunities could encourage local, State, and Tribal governments to consider engaging with the Department as it works to identify federal interim storage sites?
4. What are barriers or impediments to successful siting of federal interim storage facilities using a consent-based process and how could they be addressed?
5. How should the Department work with local communities to establish reasonable expectations and plans concerning the duration of storage at federal interim storage facilities?
6. What organizations or communities should the Department consider partnering with to develop a consent-based approach to siting?
7. What other issues, including those raised in the *Draft Consent-Based Siting Process* (*www.energy.gov/sites/prod/files/2017/01/f34/Draft Consent-Based Siting Process and Siting Considerations.pdf*), should the Department consider in implementing a consent-based siting process?

Area 2: Removing Barriers to Meaningful Participation

1. What barriers might prevent meaningful participation in a consent-based siting process and how could those barriers be mitigated or removed?
2. What resources might be needed to ensure potentially interested communities have adequate opportunities for information sharing, expert assistance, and meaningful participation in the consent-based siting process?
3. How could the Department maximize opportunities for mutual learning and collaboration with potentially interested communities?
4. How might the Department more effectively engage with local, State, and Tribal governments on consent-based siting of federal interim storage facilities?
5. What information do communities, governments, or other stakeholders need to engage with the Department on consent-based siting of federal interim storage facilities?

Area 3: Interim Storage as Part of a Waste Management System

1. How can the Department ensure considerations of social equity and environmental justice are addressed in developing the nation's waste management system?
2. What are possible benefits or drawbacks to co-locating multiple facilities within the waste management system or co-locating waste management facilities with manufacturing facilities, research and development infrastructure, or clean energy technologies?
3. To what extent should development of an interim storage facility relate to progress on establishing a permanent repository?
4. What other issues should the Department consider in developing a waste management system?

Response Preparation and Transmittal Instructions

Please submit responses to this RFI electronically to *consentbasedsiting@hq.doe.gov* no later than 5:00 p.m. (ET) on March 4, 2022. Please include in the subject line ''RFI: Consent-Based Siting and Federal Interim Storage.'' Responses must be received by March 4, 2022, for immediate consideration; however, DOE will continue to accept responses after that date and will review as time permits. Responses may be directly emailed or provided as attachments to an email. It is recommended that attachments with file sizes exceeding 25MB be compressed (*i.e.,* zipped) to ensure message delivery; however, no email shall exceed a total of 45MB, including all attachments. Responses sent as an email attachment must be provided as a Microsoft Word (.docx) or Portable Document Format (.pdf) document.

Please identify your answers by responding to a specific question or topic, if applicable. Please clearly state the specific question to which you are responding. All proprietary and restricted information must be clearly marked. Respondents may answer as many or as few questions as they wish. DOE will not respond to individual submissions. A response to this RFI will not be viewed as a binding commitment to develop or pursue the project or ideas discussed.

Please provide the following information at the start of your response:

- Community, organization, or company (if applicable)
- Contact name
- Contact's address, phone number, and email address

Data collected from this RFI will not be protected from the public view in any way. Individual commentors' names and addresses (including email addresses) received as part of this RFI are part of the public record. DOE plans to post all comment documents received in their entirety at following the close of the public comment period. Any person wishing to have their name, address, email address, or other identifying information withheld from the public record of comment documents must state this request prominently at the beginning of any comment document, or else no redactions will be made.

Disclaimer and Important Note

This RFI is not a Funding Opportunity Announcement (FOA), prize, or any other type of solicitation; therefore, DOE is not accepting applications at this time. DOE may issue a FOA or other solicitation in the future based on or related to the content and responses to this RFI; however, there is no guarantee that a FOA or solicitation will be issued as a result of this RFI. Responding to this RFI does not provide any advantage or disadvantage to potential applicants if DOE chooses to issue a FOA regarding the subject matter. Final details, including the anticipated award size, quantity, and timing of DOE-funded awards, will be subject to Congressional appropriations and direction.

Any information obtained as a result of this RFI is intended to be used by the Government on a non-attribution basis for planning and strategy development. This RFI does not constitute a formal solicitation for proposals or abstracts. Your response to this notice will be treated as information only. DOE will review and consider all responses in its formulation of program strategies for the identified materials of interest that are the subject of this request. DOE will not provide reimbursement for costs incurred in responding to this RFI. Respondents are advised that DOE is under no obligation to acknowledge receipt of the information received or provide feedback to respondents with respect to any information submitted under this RFI. Responses to this RFI do not bind DOE to any further actions related to this topic.

If you need assistance in a language other than English, please visit *www.energy.gov/consentbasedsiting* where additional resources will be made available or contact *consentbasedsiting@hq.doe.gov.*

Thank you in advance for your input, and we look forward to receiving your responses.

Signing Authority

This document of the Department of Energy was signed on November 18, 2021, by Dr. Kathryn Huff, Principal Deputy Assistant Secretary for the Office of Nuclear Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the 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 November 19, 2021.

Treena V. Garrett,

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

[FR Doc. 2021–25724 Filed 11–30–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC22–22–000.
Applicants: Hattiesburg Farm, LLC, Lancaster Solar LLC, SR Arlington II, LLC, SR Arlington II MT, LLC, SR Georgia Portfolio I MT, LLC, SR Baxley, LLC, SR Georgia Portfolio II Lessee, LLC, SR Lumpkin, LLC, SR Snipesville II, LLC, SR Hazlehurst III, LLC, SR Meridian III, LLC, SR Millington, LLC, SR Perry, LLC, SR Snipesville, LLC, SR South Loving LLC, SR Terrell, LLC.
Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Hattiesburg Farm, LLC, et al.
Filed Date: 11/24/21.
Accession Number: 20211124–5109.
Comment Date: 5 p.m. ET 12/15/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–580–001.
Applicants: Axium Modesto Solar, LLC.
Description: Supplement to January 13, 2020. Notice of Change in of Facts Axium Modesto Solar, LLC.
Filed Date: 11/24/21.
Accession Number: 20211124–5017.
Comment Date: 5 p.m. ET 12/15/21.

Docket Numbers: ER20–676–007.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: Compliance filing: Amendment to Compliance Filing to be effective N/A.
Filed Date: 11/24/21.
Accession Number: 20211124–5150.
Comment Date: 5 p.m. ET 12/15/21.

Docket Numbers: ER21–1293–001.
Applicants: ISO New England Inc., NSTAR Electric Company.
Description: Compliance filing: ISO New England Inc. submits tariff filing per 35: NSTAR Electric Company, Docket No. ER21–1293; Amended Supp. Order 864 Compliance to be effective 1/1/2020.
Filed Date: 11/24/21.
Accession Number: 20211124–5125.
Comment Date: 5 p.m. ET 12/15/21.

Docket Numbers: ER22–474–000.
Applicants: Talen Energy Marketing, LLC.
Description: § 205(d) Rate Filing: Filing of Letter Agreement and Requests for Waivers to be effective 1/25/2022.
Filed Date: 11/24/21.
Accession Number: 20211124–5002.
Comment Date: 5 p.m. ET 12/15/21.

Docket Numbers: ER22–475–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Rev. to OA, Sch. 12 & RAA, Sch. 17 RE termination of Switch Energy, LL to be effective 1/24/2022.
Filed Date: 11/24/21.
Accession Number: 20211124–5030.
Comment Date: 5 p.m. ET 12/15/21.

Docket Numbers: ER22–476–000.
Applicants: Alabama Power Company.
Description: § 205(d) Rate Filing: Revisions to Southeast EEM Agreement to be effective 11/25/2021.
Filed Date: 11/24/21.
Accession Number: 20211124–5041.
Comment Date: 5 p.m. ET 12/15/21.

Docket Numbers: ER22–477–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2021–11–24_Attachment GGG MHVDC Self-Funding Filing to be effective 2/2/2022.
Filed Date: 11/24/21.
Accession Number: 20211124–5081.
Comment Date: 5 p.m. ET 12/15/21.

Docket Numbers: ER22–478–000.
Applicants: Pacific Gas and Electric Company.
Description: Notice of Cancellation of Service Agreement No. 32 with King City Energy Center, LLC of Pacific Gas and Electric Company.

Filed Date: 11/23/21.
Accession Number: 20211123–5230.
Comment Date: 5 p.m. ET 12/14/21.

Docket Numbers: ER22–479–000.
Applicants: Northern Wind Energy Redevelopment, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 1/24/2022.
Filed Date: 11/24/21.
Accession Number: 20211124–5143.
Comment Date: 5 p.m. ET 12/15/21.

Docket Numbers: ER22–480–000.
Applicants: Rock Aetna Power Partners, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 1/24/2022.
Filed Date: 11/24/21.
Accession Number: 20211124–5145.
Comment Date: 5 p.m. ET 12/15/21.

Docket Numbers: ER22–481–000.
Applicants: Red Barn Energy, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 1/24/2022.
Filed Date: 11/24/21.
Accession Number: 20211124–5149.
Comment Date: 5 p.m. ET 12/15/21.

Docket Numbers: ER22–482–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA #6016; Queue No. B02; Original ISA, SA #6017; Queue No. F08 to be effective 4/6/2001.
Filed Date: 11/24/21.
Accession Number: 20211124–5152.
Comment Date: 5 p.m. ET 12/15/21.

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: November 24, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–26133 Filed 11–30–21; 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: PR22–7–000.
Applicants: Kinder Morgan Border Pipeline LLC.
Description: NGPA Section 311 Rate Approval to be effective 11/1/2021.
Filed Date: 11/23/2021.
Accession Number: 20211123–5156.
Comments/Protests Due: 5 p.m. ET 12/14/21.

Docket Numbers: RP22–339–000.
Applicants: Columbia Gas Transmission, LLC.
Description: § 4(d) Rate Filing: OTRA and Settlement Interim Rate Clarification to be effective 12/1/2021.
Filed Date: 11/23/21.
Accession Number: 20211123–5123.
Comment Date: 5 p.m. ET 12/6/21.

Docket Numbers: RP22–340–000.
Applicants: Mississippi Hub, LLC.
Description: § 4(d) Rate Filing: Mississippi Hub, LLC Tariff Housekeeping Filing to be effective 12/23/2021.
Filed Date: 11/23/21.
Accession Number: 20211123–5127.
Comment Date: 5 p.m. ET 12/6/21.

Docket Numbers: RP22–341–000.
Applicants: ANR Pipeline Company.
Description: § 4(d) Rate Filing: Removal of Fuel Surcharges to be effective 1/1/2022.
Filed Date: 11/23/21.
Accession Number: 20211123–5195.
Comment Date: 5 p.m. ET 12/6/21.

Docket Numbers: RP22–342–000.
Applicants: Dominion Energy Overthrust Pipeline, LLC.
Description: § 4(d) Rate Filing: Statement of Negotiated Rates Version 14, Rockies Express TSA No. 6693 to be effective 12/1/2021.
Filed Date: 11/23/21.
Accession Number: 20211123–5204.
Comment Date: 5 p.m. ET 12/6/21.

Docket Numbers: RP22–343–000.
Applicants: Caledonia Energy Partners, L.L.C.
Description: § 4(d) Rate Filing: Caledonia Energy Partners, LLC Housekeeping Filing to be effective 12/23/2021.
Filed Date: 11/23/21.
Accession Number: 20211123–5215.
Comment Date: 5 p.m. ET 12/6/21.

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.

Filings in Existing Proceedings

Docket Numbers: RP18–923–009.
Applicants: Enable Mississippi River Transmission, LLC.
Description: Compliance filing: Implement Settlement SCT Tariff Sheet in Dockets RP18–923, RP20–131 and RP20–212 to be effective 2/1/2022.
Filed Date: 11/23/21.
Accession Number: 20211123–5210.
Comment Date: 5 p.m. ET 12/6/21.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR § 385.211) on or before 5:00 pm Eastern time on the specified comment date.

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: November 24, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–26129 Filed 11–30–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP22–15–000]

Texas Eastern Transmission, LP; Notice of Application and Establishing Intervention Deadline

Take notice that on November 10, 2021, Texas Eastern Transmission, LP (Texas Eastern), P.O. Box 1396, Houston, Texas 77251, filed an application under sections 7(b) and 7(c) of the Natural Gas Act (NGA), and Part 157 of the Commission's regulations requesting that the Commission authorize its Venice Extension Project (Project) which will provide up to 1,260,000 Dth/d of firm natural gas transportation service in Louisiana.

Texas Eastern projects the total cost for the Project will be $360,306,366, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Specifically, Texas Eastern requests authorization to: (1) Construct, install, own, operate and maintain a 3.0-mile, 36-inch-diameter pipeline segment on Texas Eastern's Line 40 located in Pointe Coupee Parish; (2) abandon-in-place a 2.2-mile, 36-inch-diameter existing pipeline segment on Line 40; (3) construct a new 31,900 horsepower (hp) compressor station and metering and regulating facilities in Pointe Coupee Parish, Louisiana; (4) abandon-in-place the existing, inactive 19,800 hp compressor unit at the compressor station located in Iberville Parish, Louisiana, and the existing, inactive 19,800 compressor unit at the compressor station in Lafourche Parish, Louisiana; (5) install one new 31,900 hp compressor unit and related appurtenances at each compressor station in Iberville Parish and Lafourche Parish; (6) upgrade a metering and regulating facility on a platform in Plaquemines Parish; and (7) establish initial incremental recourse reservation rate and usage rates for firm transportation service on the Project under Rate Schedule FT–1 and an incremental fuel retainage percentage that will apply to service provided on the Project facilities.

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 regarding the proposed project should be directed to Arthur Diestel, Director, Rate and Certificates, Texas Eastern Transmission, LP, P.O. Box 1642, Houston, Texas 77251–1642, by phone (713) 627–5116, or by email at *arthur.diestel@enbridge.com.*

Pursuant to Section 157.9 of the Commission's Rules of Practice and Procedure,[1] within 90 days of this Notice the Commission staff will either: Complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are two ways to become involved in the Commission's review of this project: You can file comments on the project, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5:00 p.m. Eastern Time on December 16, 2021.

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please submit your comments on or before December 16, 2021.

There are three methods you can use to submit your comments to the Commission. In all instances, please reference the Project docket number CP22–15–000 in your submission.

(1) 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;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. 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 ''Comment on a Filing''; or

(3) You may file a paper copy of your comments by mailing them to the following address below.[2] Your written comments must reference the Project docket number (CP22–15–000). Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. However, 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. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,[3] 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 16, 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

[1] 18 CFR (Code of Federal Regulations) § 157.9.

[2] Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

[3] 18 CFR 385.102(d).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

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.*

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP22–15–000 in your submission.

(1) You may file your motion to intervene 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 ''Intervention.'' The eFiling feature includes a document-less intervention option; for more information, visit *https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf.;* or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below.[6] Your motion to intervene must reference the Project docket number CP22–15–000. Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Motions to intervene must be served on the applicant either by mail or email at: P.O. Box 1642, Houston, Texas 77251–1642 or at *arthur.diestel@enbridge.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. Service can be via email with a link to the document.

All timely, unopposed[7] motions to intervene are automatically granted by operation of Rule 214(c)(1).[8] 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.[9] 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.

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 *http://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.*

Intervention Deadline: 5:00 p.m. Eastern Time on December 16, 2021.

Dated: November 24, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–26131 Filed 11–30–21; 8:45 am]

BILLING CODE 6717–01–P

[6] Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

[7] The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

[8] 18 CFR 385.214(c)(1).

[9] 18 CFR 385.214(b)(3) and (d).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2970–004]

The Village of Argyle, Wisconsin; Notice of Application for Surrender of Exemption, 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 surrender of exemption.

b. *Project No:* P–2970–004.

c. *Date Filed:* October 6, 2021.

d. *Applicant:* The Village of Argyle, Wisconsin.

e. *Name of Project:* Argyle Hydroelectric Project.

f. *Location:* The project is located on the East Branch Pecatonica River, in Argyle, Lafayette County, Wisconsin. The project does not occupy any federal lands.

g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705, 2708.

h. *Applicant Contact:* Randall Martin, Superintendent, Argyle Municipal Electric Utility, P.O. Box 246, Argyle, WI 53504, (608) 543–3335, *argylepower@argylewi.org.*

i. *FERC Contact:* Ashish Desai, (202) 502–8370, *Ashish.Desai@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* December 27, 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–2970–004. 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 applicant proposes to surrender its exemption. The applicant states the project has experienced significant deterioration and has become uneconomical to maintain and operate. The applicant proposes to decommission the project by disconnecting all electrical equipment, cleaning and retiring-in-place all mechanical components, and securing all structural components. The applicant will continue to use the powerhouse as an office and diesel generating station, leaving all public safety signage in place. After decommissioning, the applicant would continue operating the dam in accordance with the Wisconsin State Dam Safety Program.

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: November 24, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–26132 Filed 11–30–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic review at the Commission in the Public Reference Room or 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. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket Nos.	File date	Presenter or requester
Prohibited		
ER21–1111–002	11–12–2021	Patrick J. McGarry.
Exempt		
1. CP17–40–000, CP17–40–007	11–12–2021	U.S. Congress.[1]
2. CP17–40–000	11–17–2021	City of St Louis, Missouri, Board of Alderman.[2]
3. CP17–40–000	11–17–2021	Representative Cori Bush.
4. CP17–40–000	11–22–2021	Missouri House of Representatives Derek Grier.

Docket Nos.	File date	Presenter or requester
5. CP17–40–010	11–23–2021	St Louis County, Missouri Councilman, Ernest Trakas.

[1] Representatives Blaine Luetkemeyer, Ann Wagner, Vicky Hartzler, Billy Long, Jason Smith, and Sam Graves.
[2] Alderwoman Christine Ingrassia, Annie Rice, Anne Schweitzer, Megan Green, Tina Pihl, Heather Navarro, Alderman James Page, Bill Stephens, Shane Cohn, Councilwoman Lisa Clancy, and Kelli Dunaway.

Dated: November 24, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–26130 Filed 11–30–21; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OA–2021–0848; FRL–9320–01–OA]

National Environmental Justice Advisory Council; Notification for a Virtual Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification for a public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), the U.S. Environmental Protection Agency (EPA) hereby provides notice that the National Environmental Justice Advisory Council (NEJAC) will meet on the date and time described below. The meeting is open to the public. Members of the public are encouraged to provide comments relevant to the specific issues being considered by the NEJAC. For additional information about registering to attend the meeting or to provide public comment, please see ''REGISTRATION'' under **SUPPLEMENTARY INFORMATION** Pre-registration is required.

DATES: The NEJAC will hold a virtual public meeting on Wednesday, January 5, 2022, from approximately 1:00 p.m. to 4:00 p.m., Eastern Time. A public comment period relevant to the specific issues will be considered by the NEJAC during the meeting (see **SUPPLEMENTARY INFORMATION**). Members of the public who wish to participate during the public comment period must pre-register by 11:59 p.m., Eastern Time, one (1) week prior to the start of the meeting date.

FOR FURTHER INFORMATION CONTACT: Fred Jenkins, NEJAC Designated Federal Officer, U.S. EPA; please send via email to *jenkins.fred@epa.gov* or contact Fred Jenkins at (703) 308–7049. Additional information about the NEJAC is available at *https://www.epa.gov/environmentaljustice/national-environmental-justice-advisory-council.*

SUPPLEMENTARY INFORMATION: The meeting discussion will focus on the environmental justice and civil rights compliance elements in the EPA's next multiyear strategic plan draft and the future implementation of those elements, as well as other aligned efforts and plans of the agency. The Charter of the NEJAC states that its purpose is to provide independent advice and recommendations to the EPA Administrator about broad, crosscutting issues related to environmental justice. The NEJAC's efforts will include evaluation of a broad range of strategic, scientific, technological, regulatory, community engagement and economic issues related to environmental justice.

Registration: Individual registration is required for the virtual public meeting. Two individuals cannot share the same registration link during the meeting. Information on how to register is located *https://www.epa.gov/environmental justice/national-environmental-justice-advisory-council-meetings.* Registration to attend the meetings is open through the scheduled end time of the meeting day. Registration to speak during the public comment period will close at 11:59 p.m., Eastern Time, one (1) week prior to meeting date. When registering, please provide your name, organization, city and state, and email address for follow up. Please also indicate whether you would like to provide public comment during the meeting, and whether you are submitting written comments at time of registration.

A. Public Comment

Every effort will be made to hear from as many registered public commenters during the time specified on the agenda. Individuals or groups making remarks during the oral public comment period will be limited to three (3) minutes. Submitting written comments for the record are strongly encouraged. You can submit your written comments in three different ways, (1.) by creating comments in the Docket ID No. EPA–HQ–OA–2021–0848 at *http://www.regulations.gov,* (2.) by using the webform at *https://www.epa.gov/environmentaljustice/forms/national-environmental-justice-advisory-council-nejac-public-comment,* and (3.) by sending comments via email to *nejac@epa.gov* . Written comments can be submitted up until two (2) weeks after the meeting date.

B. Information About Services for Individuals With Disabilities or Requiring English Language Translation Assistance

For information about access or services for individuals requiring assistance, please contact Fred Jenkins, via email at: *nejac@epa.gov* or contact by phone at (703) 308–7049. To request special accommodations for a disability or other assistance, please submit your request at least seven (7) working days prior to the meeting, to give EPA sufficient time to process your request. All requests should be sent to the email, listed in the **FOR FURTHER INFORMATION CONTACT** section.

Matthew Tejada,

Director for the Office of Environmental Justice.

[FR Doc. 2021–26097 Filed 11–30–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9280–01–R5]

Great Lakes Advisory Board Notice for Virtual Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting for Great Lakes Advisory Board.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), the Environmental Protection Agency (EPA) provides notice of a public meeting for the Great Lakes Advisory Board. Pre-registration is required.

DATES: This virtual public meeting will be held on December 15th, 2021 from 12:30 p.m. to 4:30 p.m. Central Standard Time. Members of the public seeking to view the meeting must register by 3:00 p.m. Central Standard Time on December 8th, 2021. Members of the public seeking to make comments relevant to issues discussed at the virtual meeting must register and indicate a request to make oral and/or written public comments in advance of the meeting. For information on how to register, please see [How do I participate in the meeting] below.

FOR FURTHER INFORMATION CONTACT: Edlynzia Barnes, Designated Federal Officer (DFO), at *Barnes.Edlynzia@epa.gov* or 312–886–6249.

SUPPLEMENTARY INFORMATION:

I. General Information

The GLAB is chartered in accordance with the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix 2, as amended) and 41 CFR 102–3.50(d). The Advisory Board provides advice and recommendations on matters related to the Great Lakes Restoration Initiative. The Advisory Board also advises on domestic matters related to implementation of the Great Lakes Water Quality Agreement between the U.S. and Canada. The major objectives are to provide advice and recommendations on: Great Lakes protection and restoration activities; long-term goals, objectives, and priorities for Great Lakes protection and restoration; and other issues identified by the Great Lakes Interagency Task Force/Regional Working Group.

II. How do I participate in the remote public meeting?

A. Remote Meeting

This meeting will be conducted as a virtual meeting on December 15th, 2021 from 12:30 p.m. to 4:30 p.m. Central Standard Time. You must register by 3:00 p.m. Central Standard Time on December 8th, 2021 to receive information on how to participate. You may also submit written or oral comments for the committee by following the processes outlined below.

B. Registration

Individual registration is required for participation in this meeting. Information on registration for this meeting can be found at *https://event.capconcorp.com/form/view.php?id=128193.* When registering, please provide your name, email, organization, city, and state. Please also indicate whether you would like to provide oral and/or written comments during the meeting at the time of registration.

C. Procedures for Providing Public Comments

Oral Statements: In general, 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 up to three minutes per individual or group and may submit further information as written comments. Persons interested in providing oral statements should register at *https://event.capconcorp.com/form/view.php?id=128193* for the meeting and indicate your interest to provide public comments. Oral commenters will be provided an opportunity to speak in the order in which their request was received by the DFO and to the extent permitted by the number of comments and the scheduled length of the meeting. Persons not able to provide oral comments during the meeting will be given an opportunity to provide written comments after the meeting.

Written Statements: Persons interested in providing written statements pertaining to this committee meeting may do so by indicating at *https://event.capconcorp.com/form/view.php?id=128193.* Written comments will be accepted before, during, and after the public meeting and will be considered by the Great Lakes Advisory Board members.

D. Availability of Meeting Materials

The meeting agenda and other materials for the virtual conference will be posted on the GLAB website at *www.glri.us/glab.*

E. Accessibility

Persons with disabilities who wish to request reasonable accommodations to participate in this event may contact the DFO at *Barnes.edlynzia@epa.gov* or 312–886–6249 by 3:00 p.m. Central Standard Time on December 8th, 2021. All final meeting materials will be posted to the GLAB website in an accessible format following the meeting, as well as a written summary of this meeting.

Dated: November 18, 2021.

Cheryl Newton,

Deputy Regional Administrator, Region 5.

[FR Doc. 2021–25922 Filed 11–30–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2021–0828; FRL–9300–01–OGC]

Proposed Settlement Agreement, Clean Water Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Environmental Protection Agency (EPA) Administrator's October 16, 2017, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements, notice is hereby given of a proposed consent decree to address several claims in a lawsuit filed by Sierra Club, Center for Environmental Law and Policy, and plaintiff-intervenor, the Spokane Tribe of Indians (''Plaintiffs'') in the U.S. District Court for the Western District of Washington. On October 21, 2011, the Plaintiffs Sierra Club and Center for Environmental Law and Policy filed a complaint alleging, among other things, that EPA failed to perform duties mandated by the Clean Water Act (''CWA'') with respect to Total Maximum Daily Loads (''TMDLs'') for segments of the Spokane River and adjacent water bodies that were listed as impaired due to polychlorinated biphenyls (''PCBs''). EPA seeks public input on the proposed consent decree prior to its final decision-making to settle the litigation.

DATES: Written comments on the proposed consent decree must be received by January 3, 2022.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2021–0828, online at *www.regulations.gov* (EPA's preferred method). For comments submitted at *www.regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA generally will not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). The EPA encourages the public to submit comments via *www.Regulations.gov,* as there will be a delay in processing mail and no hand deliveries will be accepted. For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Stephen Sweeney, Water Law Office (2355A), Office of General Counsel, U.S.

Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone: (202) 564–5491; email address: *sweeney.stephen@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

On October 11, 2011, Plaintiffs Sierra Club and Center for Environmental Law and Policy filed suit in the federal district court for the Western District of Washington. Plaintiff's original Complaint alleged a failure by EPA to perform nondiscretionary duties under CWA section 303(d)(2), 33 U.S.C. 1313(d)(2), to approve or disapprove TMDLs for PCBs that Plaintiffs asserted the Washington Department of Ecology had constructively submitted for various segments of the Spokane River, and, upon disapproval, to promulgate such TMDLs. Subsequently, the Spokane Tribe of Indians intervened as plaintiffs and Plaintiffs amended their complaints to file additional claims. The proposed consent decree would resolve all claims brought by Plaintiffs.

Under the proposed consent decree, EPA's obligations would be to issue the TMDLs for PCBs by a deadline of September 30, 2024, for the following PCB-impaired water segments Assessment Units in the Spokane River, the Little Spokane River, and or Lake Spokane (Long Lake) located in Washington State (or as these same PCB-impaired Assessment Units have been or may be subsequently renumbered by the Washington State Department of Ecology): 17010305000009; 17010305000010; 17010305000011; 17010305000012; 17010307000010; 17010307000774; 17010307009102; 17010307009615; 17010308000018; 47117H513; 47117I6C1; 47117I7d4; 47117I8C2; 47117I5A4; 47117H5J8; 47117I7E2; 47117I7D3; 47117I7B9 and 47117I5A5. EPA also would file status reports with the court every 180 days to apprise the parties to the litigation and the court of EPA's progress satisfying the requirement to issue the TMDLs and of the work EPA intended to undertake during the next 180 day period. The proposed consent decree would not resolve Plaintiffs' claims for attorney's fees, which Plaintiffs would need to file within 165 days of entry of the consent decree.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the obligations of EPA for resolution of the claims contained in the proposed consent decree from persons who are not named as original parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the CWA or any other provision of law. Unless EPA or the Department of Justice determine that they should not consent to this proposed consent decree, the terms of the proposed consent decree will be affirmed and filed for entry by the Court.

II. Additional Information About Commenting on the Proposed Settlement Agreement

A. How can I get a copy of the proposed settlement agreement?

The official public docket for this action (identified by EPA–HQ–OGC–2021–0828) contains a copy of the proposed settlement agreement. The official public docket is located at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The regular hours of the EPA Docket Center Public Reading Room are from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays; however, due to the COVID–19 pandemic, there may be limited or no opportunity to enter the docket center. At the time of this printing, the docket center is closed to public visitors out of an abundance of caution for members of the public and EPA staff to reduce the risk of transmitting COVID–19. During the closure, Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information on EPA Docket Center services, see *https://www.epa.gov/dockets*. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available on EPA's website at *www.regulations.gov*. You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.'' It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket.

EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. EPA has not included any copyrighted material in the docket for this proposed settlement. If commenters submit copyrighted material in a public comment, it will be placed in the official public docket and made available for public viewing when the EPA Docket Center is open.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section in this document. Please ensure that your comments are submitted within the specified comment period. The EPA encourages the public to submit comments via *www.Regulations.gov*. There will be a delay in processing mail and no hand deliveries will be accepted due to the COVID–19 pandemic.

EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment

directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: November 24, 2021.

Steven Neugeboren,

Associate General Counsel.

[FR Doc. 2021–26085 Filed 11–30–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, with revision, the Complex Institution Liquidity Monitoring Report (FR 2052a; OMB No. 7100–0361).

DATES: The revisions will be effective May 1, 2022, for banking organizations subject to Category I standards and October 1, 2022, for banking organizations subject to Category II–IV standards.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are available at *https://www.reginfo.gov/public/do/PRAMain.* These documents are also available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection

Report title: Complex Institution Liquidity Monitoring Report.

Agency form number: FR 2052a.

OMB control number: 7100–0361.

Effective date: May 1, 2022, for banking organizations subject to Category I standards and October 1, 2022, for banking organizations subject to Category II–IV standards.

Frequency: Monthly, daily.

Respondents: Certain U.S. bank holding companies (BHCs), top-tier savings and loan holding companies (SLHCs), U.S. global systemically important BHCs, and foreign banking organizations (FBOs).

Estimated number of respondents: Monthly (ongoing): 26, monthly (one-time): 26; daily (ongoing): 15, daily (one-time): 15.

Estimated average hours per response: Monthly (ongoing): 121, monthly (one-time): 140; daily (ongoing): 221, daily (one-time): 238.

Estimated annual burden hours: Monthly (ongoing): 37,752; monthly (one-time): 3,640; daily (ongoing): 828,750; daily (one-time): 3,570.

General description of report: The FR 2052a collects quantitative information on select assets, liabilities, funding activities, and contingent liabilities of certain large banking organizations with $100 billion or more in total consolidated assets supervised by the Board on a consolidated basis. The Board uses this information to monitor the liquidity profile of these banking organizations.

Legal authorization and confidentiality: The information collection under the FR 2052a is authorized by section 5 of the Bank Holding Company Act (BHCA),[1] section 8 of the International Banking Act (IBA),[2] section 10 of the Home Owners' Loan Act (HOLA),[3] and section 165 of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd Frank Act).[4] Section 5(c) of the BHCA authorizes the Board to require BHCs to submit reports to the Board regarding their financial condition. Section 8(a) of the IBA subjects FBOs to the provisions of the BHCA. Section 10 of the HOLA authorizes the Board to require reports and examine SLHCs. Section 165 of the Dodd Frank Act requires the Board to establish prudential standards for certain BHCs and FBOs; these standards include liquidity requirements.

The FR 2052a is mandatory. The information collected on the FR 2052a is collected as part of the Board's supervisory process. Therefore, such information is entitled to confidential treatment under exemption 8 of the Freedom of Information Act (FOIA).[5] Additionally, to the extent a respondent submits nonpublic commercial or financial information, which is both customarily and actually treated as private by the respondent, in connection with the FR 2052a, the respondent may request confidential treatment pursuant to exemption 4 of the FOIA.[6]

Current actions: On March 29, 2021, the Board published a notice in the **Federal Register** (86 FR 16365) requesting public comment for 60 days on the extension, with revision, of the Complex Institution Liquidity Monitoring Report. The Board proposed revisions to the reporting form and instructions of the FR 2052a to accurately reflect the net stable funding ratio (NSFR) final rule[7] and to capture other data elements necessary to monitor banking organizations' liquidity positions and compliance with Liquidity Risk Measurement (LRM) Standards. The comment period for this notice expired on May 28, 2021. The Board received six comments: Three from trade associations, one from a group of banking organizations, and two from individual banking organizations. Board staff also conducted two follow-up calls, one with a trade association and another with the trade association along with banking organizations, to better understand their concerns and recommendations.

Detailed Discussion of Public Comments

Comments Related to Effective Date

Several commenters requested an extension of the proposed effective date of July 1, 2021. Some of these commenters suggested a phased-in approach that would require the reporting of FR 2052a data elements related to the NSFR rule earlier than FR 2052a data elements not related to the NSFR rule.[8] Other commenters

[1] 12 U.S.C. 1844.

[2] 12 U.S.C. 3106.

[3] 12 U.S.C. 1467a.

[4] 12 U.S.C. 5365.

[5] 5 U.S.C. 552(b)(8).

[6] 5 U.S.C. 552(b)(4).

[7] 86 FR 9120 (February 11, 2021).

[8] For example, commenters suggested April 1, 2022, for revisions to the FR 2052a related to the

requested a later effective date for banking organizations that are not subject to the NSFR rule. The Board is finalizing the effective date of the revised FR 2052a as May 1, 2022, for banking organizations subject to Category I standards and October 1, 2022, for banking organizations subject to Category II–IV standards. These effective dates are tailored to the risks of large banking organizations, with an earlier effective date applying to the largest and most complex banking organizations and a later effective date applying to banking organizations with less risk. In addition, these effective dates will provide banking organizations with sufficient time to update their internal reporting processes and systems and facilitate the monitoring and accurate collection of FR 2052a data elements by the Board.

Comments Related to Submission Timing

Commenters raised concerns that the different submission cycles for various proposed FR 2052a data elements would increase burden and cause confusion, as banking organizations would be required to submit different FR 2052a data elements either daily, monthly, or quarterly and with different time lags (for example, T+2 business days, T+10 calendar days, or T+15 calendar days) based on criteria specified in the FR 2052a. One commenter also argued that the FR 2052a data elements required to be submitted on a monthly and quarterly submission cycle should be reported based on business days rather than calendar days.

The Board is finalizing the submission timing for the FR 2052a data elements as proposed. The timeliness of data is critical to effective liquidity monitoring and basing the submission of monthly and quarterly FR 2052a data elements on a business day cadence would impede the Board's ability to effectively monitor the liquidity risks of banking organizations. Moreover, the approach the Board is taking is consistent with the current requirement for monthly filers of the FR 2052a to report data on a calendar day cadence. In addition, the Board has the authority to require banking organizations to report FR 2052a data elements more frequently or with less delay when necessary (for example, during periods of market stress). Banking organizations that build reporting processes based on a rigid and lengthy data production cycle may struggle to provide data more frequently or with less delay in these scenarios. Thus, to mitigate burden, the final FR 2052a instructions clarify that data elements that are reported based on calendar days are due on the next good business day if the calendar day submission deadline falls on a weekend or holiday.

Additionally, commenters requested clarification regarding (i) how the Board plans to use the FR 2052a to monitor NSFR rule compliance, (ii) which FR 2052a data elements should be used to fulfill NSFR rule public disclosure requirements, and (iii) the reporting approach for FR 2052a data elements on a monthly or quarterly submission cycle. Specifically, commenters asked whether banking organizations that submit FR 2052a data elements daily would need to submit static monthly FR 2052a data elements each business day using data from the previous month end, prior to the required monthly refresh of these data elements. Commenters also asked whether banking organizations should update previously submitted balances of daily FR 2052a data elements with the same as-of date when filing their monthly FR 2052a data elements, and whether these monthly FR 2052a data elements should be based on the final or estimated month-end balance sheet. Commenters further noted that some required FR 2052a data elements may not be available at the submission frequency required by the proposed FR 2052a. In particular, commenters observed that the risk weights that are needed for reporting certain FR 2052a data elements are generally reported on a quarterly basis for purposes of existing regulatory reports.

The Board will use the FR 2052a to calculate a banking organization's NSFR in accordance with Appendix VIII [9] and may conduct sensitivity analyses on an ongoing basis to estimate the banking organization's compliance with the NSFR rule requirements. Data collected via the FR 2052a also inform the Board's supervisory assessment of a banking organization's liquidity position and funding stability. Although there may be challenges associated with providing certain FR 2052a data elements daily, a banking organization must follow the FR 2052a and NSFR rule public disclosure requirements to ensure supervisors have sufficient information to monitor and assess funding risks and to ensure the accuracy of information disclosed to the public, where applicable.

Further, the NSFR rule public disclosure requirements, which are based on daily averages, are independent of and not modified by the FR 2052a. The Board is allowing banking organizations to report certain FR 2052a data elements less frequently than daily, as banking organizations have less time to compile, validate, and submit these data elements compared to the NSFR rule public disclosures, which are reported publicly on a semi-annual basis and disclosed with a longer delay. Nonetheless, banking organizations can choose to align the submission cycles of FR 2052a data elements by submitting the T+10 or T+15 FR 2052a data elements prior to their submission deadlines, provided that they have the capability to accurately produce the data.

With respect to the FR 2052a data elements that are submitted less frequently (that is, monthly for daily filers or quarterly for certain monthly filers) and with a T+15 time lag, the Board is requiring banking organizations to report the information as of the end of the submission cycle, and not for each business day. The Board is not requiring banking organizations to re-submit FR 2052a data elements that must be submitted daily or with less delay in tandem with FR 2052a data elements that are submitted less frequently and with longer delay. However, the Board is requiring banking organizations to re-submit previously submitted FR 2052a data elements that contain material errors. In addition, the Board is requiring banking organizations to report FR 2052a data elements in accordance with the submission cycles required by the FR 2052a and NSFR rule public disclosure requirements, even if related data are currently reported less frequently and with less granularity on other regulatory reports (for example, the risk weights of a banking organization's exposures are reported quarterly). In the case of risk weights that are needed for daily or monthly FR 2052a data elements, the Board does not anticipate material variation on an intra-quarter basis since these are standardized parameters.

Comments Related to Balance Sheet Reconciliation and Validation Checks

Some commenters expressed concern with the lack of alignment between the reporting of FR 2052a data elements and the balance sheet under U.S. generally accepted accounting principles (U.S. GAAP), and asserted that the proposed FR 2052a approach (that is, through FR 2052a data element field ''S.B.6: Carrying Value Adjustment'') to align the two would be overly burdensome. Commenters noted that banking organizations would incur significant

NSFR rule and October 1, 2022, for all other revisions.

[9] Appendix VIII maps FR 2052a data elements to the NSFR rule requirements.

additional burden due to the complexity and granularity required to tie FR 2052a data elements to the U.S GAAP balance sheet. One commenter proposed an alternative approach that would add a field for carrying value for each table in the FR 2052a.

Relatedly, commenters requested guidance on how banking organizations are expected to reconcile their U.S. GAAP balance sheet with the FR 2052a. These commenters requested a comprehensive list of FR 2052a data elements and how those elements map to the U.S. GAAP balance sheet. Commenters also requested clarification regarding how banking organizations should report reconciliations between settlement date positions, on which the FR 2052a is primarily based, and trade date positions, on which parts of the U.S. GAAP balance sheet are based. In addition, to assist with reconciling the FR 2052a with U.S. GAAP balance sheet reporting, commenters recommended that the Board provide a list of validation checks and checks with other regulatory reports to ensure the accuracy and reasonableness of data submissions. One commenter also requested that the Board provide a new list of edit checks.

The Board is finalizing the FR 2052a data elements designed to align the FR 2052a with a U.S. GAAP balance sheet (that is, through FR 2052a data element field ''S.B.6: Carrying Value Adjustment'') as proposed. The Board clarifies that the FR 2052a does not require a banking organization to report carrying value adjustments at the transaction level. Instead, these carrying value adjustments may be aggregated and reported at a level sufficient for the Board to monitor and assess the adequacy of a banking organization's asset liquidity and funding stability. Hence, banking organizations may generally apply these carrying value adjustments at the FR 2052a product [10] and counterparty level. However, banking organizations that are subject to the NSFR rule must apply these carrying value adjustments at a level sufficient to align these adjustments with the applicable NSFR rule provisions, as mapped in Appendix VIII. Banking organizations should adopt reasonable assumptions and methodologies to facilitate alignment of these adjustments with the associated underlying FR 2052a data elements. The Board is not adopting the approach recommended by a commenter to add a carrying value field to each applicable FR 2052a table, as this approach would be more burdensome than the approach the Board is adopting (for example, by explicitly requiring banking organizations to report carrying values at a transaction level).

Further, the FR 2052a does not require banking organizations to wholly reconcile FR 2052a data elements to the details reported on a U.S. GAAP balance sheet. Rather, the FR 2052a requires banking organizations to report data that conceptually cover the entirety of their balance sheet exposures and certain off-balance sheet exposures in a manner sufficient to measure funding stability and asset liquidity. Banking organizations subject to the NSFR rule should refer to Appendix VIII, which reflects the level at which the Board requires the FR 2052a to align with a U.S. GAAP balance sheet and includes methods to reconcile between trade date and settlement date accounting. Board staff will coordinate with each banking organization not subject to the NSFR rule to determine the appropriate level to reconcile the FR 2052a reporting requirements with U.S. GAAP balance sheet reporting requirements, commensurate with each banking organization's size, complexity, and risk profile.

Additionally, FR 2052a validation checks have historically been implemented following the finalization of changes to the FR 2052a, as developing new validation checks benefits from interactions with banking organizations on technical issues. Moreover, the Board expects banking organizations to independently develop appropriate validation checks and controls to ensure the quality and integrity of submitted data.

Comments on Data Fields Unrelated to LRM Standards

One commenter argued that certain FR 2052a data fields that are unrelated to liquidity risk management should be removed, including the ''global systematically important Bank (G–SIB)'' field, ''Fixed Income Clearing Corporation (FICC)'' settlement specification, ''Collateral Level'' field, identification of total loss absorbing capacity (TLAC) instruments in the ''Loss Absorbency'' field, ''Accounting Designation'' field, and ''Business Line'' field. Similarly, commenters asserted that the Board should not adopt the proposed expansions of certain FR 2052a data fields, such as the counterparty and collateral class data fields, as these expansions are not necessary to implement the NSFR and LCR rules.

The Board is finalizing these aspects of the FR 2052a as proposed. The Board uses the FR 2052a to collect data in support of its supervisory mandates, including monitoring the microprudential and financial stability risks associated with large banking organizations' asset and liability profiles. These new FR 2052a data fields play an important role in the Board's monitoring of these risks.

For example, the ''G–SIB'' field, which identifies data elements where the underlying counterparty is a G–SIB, captures necessary information for monitoring potential interdependencies between G–SIBs that could be a channel for the transmission of systemic funding risks. It also provides visibility into interdependencies with non-U.S. G–SIBs, including exposures in the U.S. capital markets that are booked through non-U.S. affiliates or are otherwise less transparent to the Board. The Board notes that there is significant precedent for the collection of counterparty data in regulatory reports and through supervisory monitoring.

The ''FICC'' settlement specification identifies repurchase and reverse repurchase transactions (repo-style transactions) cleared and novated to the FICC. These transactions represent a material and critical segment of the repo-style transactions market, and accordingly the FICC settlement specification provides substantial insight into banking organization-specific and banking system-wide liquidity risks in this market segment. Understanding a banking organization's repo-style transactions cleared through FICC could have significant implications for the Board's supervisory assessments of the banking organization's strategies to obtain liquidity from high-quality liquid assets (HQLA) and any associated financial stability implications. In addition, an understanding of how a banking organization's repo-style transactions are settled, including through FICC, would help the Board to assess the risks of a banking organization's repo-style transactions and access to funding markets. Further, reporting a banking organization's relationship with a central counterparty such as FICC by name is less sensitive compared to reporting a banking organization's relationship with a commercial counterparty by name. Finally, introducing the FICC settlement specification addresses ambiguities in the current FR 2052a instructions regarding the classification of repo-style transactions that may be cleared and net settled with FICC, but may individually

[10] The FR 2052a uses product definitions to provide guidance on the classification of inflows, outflows, and supplemental items. An example of a product is ''I.A.1: Unencumbered Assets'' under the category ''I.A: Inflows-Assets.''

originate through both bilateral and triparty settlement mechanisms.

The ''Collateral Level'' field is used to differentiate the derivative asset and liability values and the balances of variation margin posted and received for all derivative contracts. This field is required for banking organizations to determine the extent to which variation margin posted and received is eligible for netting under the NSFR rule. This field is referenced in Appendix VIII, which maps the FR 2052a to the applicable NSFR rule provisions.

The information collected in the ''Loss Absorbency'' field is required to distinguish between tier 2 capital instruments and other long-term liabilities. The TLAC indicator is a natural extension of the ''Loss Absorbency'' field and distinguishes TLAC instruments from other long-term liabilities. This indicator also provides insight into the composition of a banking organization's capital markets debt issuances that is critical to monitoring the execution of its funding strategy. Moreover, TLAC instruments are typically issued with early call options that are not deemed to be exercised when determining the maturity of these instruments for purposes of the LCR and NSFR rules. These call options could introduce sudden and unexpected liquidity needs during a period of stress. An indicator that clearly identifies TLAC instruments enables supervisory monitoring of risks associated with these potential liquidity needs, as the call dates of TLAC instruments are relatively standardized.

The ''Accounting Designation'' field differentiates a banking organization's unencumbered inventory based on its designated treatment for accounting purposes. The data collected in the ''Accounting Designation'' field provide information about potential constraints to a banking organization's liquidity buffer management strategies. Classification of assets as Held-to-Maturity has significant implications on a banking organization's possible channels for obtaining liquidity from those assets. This field also facilitates reconciliation to other regulatory reports.

The ''Business Line'' field designates the business line responsible for or associated with all applicable exposures reported on the FR 2052a. The information collected in the ''Business Line'' field helps the Board in conducting reviews of banking organizations' internal liquidity stress tests (ILSTs) required under the Board's Regulation YY and Regulation LL, since a key factor in a banking organization's own assessment of its liquidity risk for certain transactions can be the line of business in which these transactions are managed. Appropriately, this field only applies to the largest and most complex banking organizations, where distinguishing transactions by business lines is particularly important given the breadth and complexity of their operations. This information also enhances supervisory coordination with banking organizations, as it will provide a mechanism to align certain data collected in regulatory reports with the banking organization's ILST results and other internal management information systems. Further, the current FR 2052a instructions already capture limited business line information by requiring a banking organization to differentiate between exposures that are associated with its prime brokerage operations versus other exposures. Therefore, the ''Business Line'' field is an expansion of the current reporting requirement for banking organizations subject to Category I standards and not a new reporting requirement. Moreover, the Board is providing relief to banking organizations subject to Category II–IV standards by removing the reporting requirement to designate transactions associated with prime brokerage business lines. Additionally, banking organizations should not incur significant burden in implementing this field, as the ''Business Line'' field only requires banking organizations to designate the existing business lines in which a particular transaction is managed and does not create new regulatory categories.

The Board is adding more granular counterparty types to the counterparty class data field because the current definitions do not provide for mutually exclusive categories of financial counterparties. These changes fully align with the financial counterparty types specified in Regulation WW,[11] and do not create counterparty types beyond these existing defined terms. More granular knowledge of the types of financial counterparties facing a banking organization would assist the Board in understanding a banking organization's liquidity risks, as different types of financial counterparties may exhibit meaningfully different behavioral responses to a liquidity stress event or have different implications on a banking organization's decision-making around franchise and reputational risks.

The expansion of the collateral class data field, which identifies the types of collateral for relevant FR 2052a data elements, recognizes that the liquidity characteristics of exchange traded funds (ETFs) and mutual funds can be different from the individual securities or assets that underlie the ETF or mutual fund. ETFs can also play a significant role in the funding strategies of banking organizations that engage in dealing activities, such as providing financing to and acting as an intermediary for the trading activities of their clients. Additionally, the Board is expanding the collateral class data field to include equity investments in subsidiaries because information about these equity investments is required to construct an accurate view of a banking organization's balance sheet and can be necessary to calculate the NSFR.

Comments Related to Banking Organizations Not Subject to the NSFR Rule

Several commenters argued that certain banking organizations, including FBOs, should not be required to report FR 2052a data elements that are related to the NSFR rule (NSFR-related FR 2052a data elements) for a material entity if the material entity is not subject to the NSFR rule. Some commenters argued that FBOs should not be required to report NSFR-related FR 2052a data elements for material entities that are part of its combined U.S. operations but not subject to the NSFR rule (such as a U.S. branch that is not required to be held under a FBO's U.S. intermediate holding company (IHC)). In this case, commenters argued that FBOs should report the NSFR-related FR 2052a data elements only for their IHCs. Additionally, one commenter requested the Board to differentiate between the category of standards applicable to an FBO's IHC and its combined U.S. operations under Regulation YY to avoid misinterpretation of requirements for reporting NSFR-related FR 2052a data elements and to align the FR 2052a instructions with the tailoring final rules.

The Board is clarifying that certain banking organizations, including FBOs, may provide certain NSFR-related FR 2052a data elements (for example, FR 2052a data element field ''S.L.10: Net Stable Funding Ratio'') exclusively at the level of the material entity that is subject to the NSFR rule. Other NSFR-related FR 2052a data elements (for example, FR 2052a data element field ''S.B.1 Regulatory Capital Element'') would be required to be reported by a banking organization for material entities not subject to the NSFR rule to assist the Board in assessing the banking organization's funding risks under a range of market conditions, as an adequate assessment requires an

[11] *See* 12 CFR 249.3.

understanding of these risks at a legal entity level. However, after considering the commenter's request to differentiate on the basis of the category of standards applicable to an FBO's IHC and its combined U.S. operations under Regulation YY, the Board is amending the FR 2052a instructions to base the reporting of certain NSFR-related FR 2052a data elements on the scope of application of the Board's LRM Standards. Therefore, an FBO's requirements with respect to these NSFR-related FR 2052a data elements would be based on its IHC's category of standards under Regulation YY, where applicable. As an example, an FBO would not need to provide the NSFR-related FR 2052a data elements in the ''S.L: Supplemental-Liquidity Risk Measurement (LRM)'' table for its U.S. branches.

Comments Related To Leveraging Existing Regulatory Reports

One commenter recommended that the Board should leverage existing regulatory reports, when possible, to collect NSFR-related FR 2052a data elements. This commenter pointed out several comparable data elements in the FR 2052a and FR Y–9C reports as examples. The Board has leveraged existing data from other regulatory reports to the extent possible, but the data provided in other regulatory reports do not consistently align with the FR 2052a data elements and would not provide the same granularity as the NSFR-related FR 2052a data elements. Although the FR Y–9C data elements and related FR 2052a data elements cited by the commenter share some characteristics, the FR 2052a data elements have unique features and greater granularity requirements to provide the Board with the necessary insight into a banking organization's balance sheet funding risks.

Other Comments Received

Commenters also raised a number of requests for technical clarifications and recommendations pertaining to the FR 2052a instructions, as listed below.

One commenter asked whether resubmissions of a FR 2052a report that was filed prior to the effective date of the revised FR 2052a would be based on FR 2052a requirements as of the filing date, or whether such resubmissions would need to incorporate changes made in the revised FR 2052a. The Board is clarifying that resubmissions of the FR 2052a must be based on the FR 2052a requirements as of the original filing date. However, the Board will only require banking organizations to resubmit data using the FR 2052a requirements as of a filing date prior to the effective date of the revised FR 2052a for up to 180 days after this effective date.

The same commenter requested clarification regarding how banking organizations should map the proposed FR 2052a maturity time buckets to the NSFR rule's standardized maturity buckets used for the application of certain NSFR parameters. The Board is amending the proposed FR 2052a maturity time buckets to match the NSFR rule's standardized maturity buckets. The commenter also asked how the proposed FR 2052a effective maturity buckets are to be applied to tables other than the ''I.S: Inflows-Secured'' table. Effective maturity buckets must be used to designate the period of encumbrance for assets that have been pledged to secure other assets. These assets include unsecured loans reported in the ''I.U: Inflows-Unsecured'' table or securities reported in the ''I.A: Inflows-Assets'' table. The commenter also asked how banking organizations should treat products that have both evergreen and extendable features (for example, a contract with an option to extend its maturity that also requires a minimum number of days' notice before the contract can mature). Banking organizations should use the ''Evergreen'' maturity optionality designation for products with both evergreen and extendable features. The commenter also asked for an example of an asset that would fall within the ''Not Accelerated'' maturity optionality designation. Examples include where a banking organization holds an option to accelerate the maturity of an asset, or where the banking organization holds an option to accelerate the maturity of a liability with an original maturity of more than one year but the option is not exercisable for the first six months.

The same commenter also asked the Board to clarify the distinction between the ''IG–2–Q'' collateral class, which refers to investment grade municipal obligations, and the ''IG–2'' collateral class, which refers to investment grade U.S. municipal general obligations. The Board is clarifying that the ''IG–2'' collateral class includes only general obligations and the ''IG–8'' collateral class includes all other municipal obligations. The ''IG–2–Q'' collateral class includes investment grade municipal obligations that are liquid and readily marketable and that qualify as level 2B HQLA.

One commenter asked the Board to allow banking organizations to provide general descriptions of the ''Other'' FR 2052a data element fields monthly as opposed to daily. After considering the commenter's request regarding the frequency of reporting general descriptions of the ''Other'' FR 2052a data element fields, the Board is amending the instructions to require monthly reporting of these general descriptions.

The commenter also asked for examples of assets that should be reported in the FR 2052a data element field ''I.A.7: Encumbered Assets.'' Examples of assets that should be reported in the FR 2052a data element field ''I.A.7: Encumbered Assets'' include, without limitation, securities owned by a banking organization that are pledged to a repo-style transaction, loan, or derivative transaction. The commenter further requested clarification on the types of assets in the ''S.DC: Supplemental-Derivatives & Collateral'' table that require the reporting of an encumbrance type. The Board is clarifying that the encumbrance type field is only required in circumstances where assets held or received by the banking organization have been encumbered to other transactions or exposures. On this basis, the FR 2052a data element fields ''S.DC.1: Gross Derivative Asset Values,'' ''S.DC.7: Initial Margin Received,'' and ''S.DC.10: Variation Margin Received'' can require the assignment of an encumbrance type.

The commenter asked whether the collateral class designation of ''Y–4,'' which refers to equity investment in affiliates, for the FR 2052a data element field ''O.O.19: Interest & Dividends Payable'' would apply to only inter-affiliate dividends or all dividends. The Board is clarifying that the designation applies to all dividends. A question was also asked regarding how banking organizations should report the maturity amount of a secured financing transaction where they have elected the fair value option for accounting purposes. The Board is clarifying that the maturity amount must reflect the cash settlement obligation of the secured financing transaction. Banking organizations must also use the FR 2052a data element field ''S.B.6: Carrying Value Adjustment'' to align the maturity amount with the balance sheet carrying value based on the fair value option election.

The commenter also asked questions related to a banking organization's capacity to engage in collateral substitution for purposes of the FR 2052a data element field ''S.DC.21: Other Collateral Substitution Capacity.'' The commenter asked whether banking organizations could include encumbered assets that would become unencumbered after the first good

business day. In response, the Board is clarifying that banking organizations may disclose additional collateral substitution capacity based on assets that will become unencumbered following the first good business day if they specify the exact date upon which the assets will become unencumbered. The commenter also asked whether banking organizations could disclose capacity based on the ability to borrow assets from affiliates if the standalone reporting entity did not have assets to substitute. The Board is clarifying that a standalone reporting entity may disclose capacity to the extent that the assets are held by the standalone reporting entity or its subsidiaries. Therefore, while a consolidated standalone reporting entity may consider the ability to transfer assets among its consolidated subsidiaries for purposes of the ''S.DC.21: Other Collateral Substitution Capacity'' FR 2052a data element field, it should not consider the ability to transfer assets between affiliates that are not its consolidated subsidiaries. The commenter also asked for an example on quantifying collateral substitution capacity, taking into account the LCR rule haircuts between assets received and assets pledged. As an example, if a banking organization has posted $25 of U.S. Treasury securities and could substitute those U.S. Treasury securities with sufficient non-HQLA to fully collateralize the liability to which the U.S. Treasury securities were pledged, the reportable value would be $25. If, alternatively, the liability would require $30 of level 2B HQLA, the capacity would be calculated as: $25 (U.S. Treasury securities) * 100% − $30 (level 2B HQLA) * 50% = $25 − ;$15 = $10.

The commenter further requested clarification on whether banking organizations could exclude from their required stable funding (RSF) amount [12] subsidiary liquidity that cannot be transferred under the LCR rule. The Board is clarifying that banking organizations cannot exclude such subsidiary liquidity. As the FR 2052a data element field ''S.L.1: Subsidiary Liquidity That Cannot Be Transferred'' refers to the LCR rule, it does not factor into NSFR calculations.

In addition, the commenter asked whether non-cash items should be included in the FR 2052a data element fields ''S.B.2: Other Liabilities'' and ''S.B.4: Other Assets.'' The Board is clarifying that these two FR 2052a data element fields should reflect all other assets and liabilities that are (i) not otherwise reported in other FR 2052a data elements, (ii) reportable under U.S. GAAP, and (iii) within the scope of the NSFR rule, regardless of whether these assets or liabilities are cash or non-cash items.

The commenter also requested clarification with respect to the FR 2052a data element field ''S.B.5: Counterparty Netting.'' Specifically, the commenter asked whether banking organizations should follow U.S. GAAP or the NSFR rule. The Board is clarifying that banking organizations are required to follow the NSFR rule. The Board believes that requiring banking organizations to follow the NSFR rule when filing the FR 2052a is appropriate, as the Board will use information collected through the FR 2052a to monitor compliance with the NSFR rule in addition to evaluating the liquidity and funding risks of banking organizations. The commenter also asked whether amounts reported under the FR 2052a data element field ''S.B.5: Counterparty Netting'' could be excluded from the FR 2052a data element field ''S.B.6: Carrying Value Adjustment.'' The Board is clarifying that the FR 2052a data element fields ''S.B.5: Counterparty Netting'' and ''S.B.6: Carrying Value Adjustment'' are mutually exclusive; therefore, amounts reported under the FR 2052a data element field ''S.B.5: Counterparty Netting'' must be excluded from amounts reported under FR 2052a data element field ''S.B.6: Carrying Value Adjustment.''

The commenter also asked the Board to confirm that currency is not a required field in ''Appendix I: FR 2052a Data Format, Tables, and Fields.'' The Board is confirming that currency is a required field. The currency and converted fields are not displayed for each value field in this appendix to simplify its visual representation of the FR 2052a data structure.

The Board is also revising the FR 2052a instructions to correct typographical errors, align the FR 2052a with previously issued FAQs, or remove certain FR 2052a data elements as the Board no longer considers those items to be critical to monitoring the liquidity and funding risks of banking organizations and across the entire banking system by:

- Removing interest receivable from the products reportable in the ''I.U: Inflows-Unsecured'' table;
- Changing ''I.O.6: Interest and Dividends Receivable'' so that the counterparty to be reported is the payor of the interest;
- Changing the definition of an operational escrow account, found in ''O.D.7: Operational Escrow Accounts,'' to match the definition provided in Question 5 of the FR 2052a FAQ Volume 12;
- Updating the ''other cash'' reference in ''I.A.3: Unrestricted Reserve Balances'' to refer to ''Currency and Coin;''
- Removing ''I.U.8: Unposted Debits;'' and
- Completing the instructions to ''S.L.9: Additional Funding Requirement for Off-Balance Sheet Rehypothecated Assets'' by adding the phrase ''has been rehypothecated.''

A commenter requested clarification with respect to the reporting of certain secured financing transactions, including the process of netting in cases where the collateral value exceeds the netted on-balance sheet cash leg and the collateral potentially consists of more than one instrument. Relatedly, the commenter asked how banking organizations should allocate the RSF factors [13] to a netting set of secured financing transactions where the netting set includes reverse repurchase transactions and the collateral received consists of assets that have different RSF factors. Additionally, the commenter asked the Board to confirm a ''look-through'' approach for the reporting of an asset exchange transaction where the asset sourced through the asset exchange transaction is used as initial margin in a derivatives transaction. Under the commenter's proposed ''look-through'' approach, a banking organization would not be required to reflect an RSF requirement for both the asset pledged in the asset exchange transaction and the initial margin. The commenter also asked how the FR 2052a encumbrance type designation should apply to off-balance sheet collateral that is not used in a transaction that results in an NSFR liability.[14]

The Board notes that the FR 2052a provides clear instructions regarding the reporting of secured financing transactions, asset exchange transactions, and the encumbrance type designation. Additionally, the information collected through the FR 2052a regarding these types of transactions and the encumbrance type designation provides the Board with important insights into banking organization-specific and banking

[12] *See* 12 CFR 249.105 for the calculation of the RSF amount.

[13] RSF factors are assigned in 12 CFR 249.106.

[14] An NSFR liability generally includes liabilities that are reported on a banking organization's balance sheet that are not excluded from the banking organization's regulatory capital. *See* 12 CFR 249.3.

system-wide liquidity and funding risks. Therefore, these aspects of the FR 2052a instructions remain unchanged. Additionally, the commenter's requests for clarification involve, in part, interpretations of the NSFR rule. The Board typically responds to interpretative questions concerning its regulations in another forum and questions regarding interpretations of the NSFR rule should be emailed to *LCR-NSFR.INFO@occ.treas.gov*.

The Board received several comments related to the mapping appendices associated with the FR 2052a. The Board will respond to these inquiries in a different forum, as the mapping appendices do not represent FR 2052a instructions.

Board of Governors of the Federal Reserve System, November 24, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–26103 Filed 11–30–21; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Notice of Hearing: Reconsideration of Disapproval South Carolina Medicaid State Plan Amendment (SPA) 19–0004–A

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice of hearing: reconsideration of disapproval.

SUMMARY: This notice announces an administrative hearing to be held on January 12, 2022, at the Department of Health and Human Services, Division of Medicaid Field Operations, South, Centers for Medicare & Medicaid Services, Division of Medicaid and Children's Health Operations, 61 Forsyth St., Suite 4T20, Atlanta, Georgia 30303–8909 to reconsider CMS' decision to disapprove South Carolina's Medicaid SPA 19–0004–A.

DATES:

Closing Date: Requests to participate in the hearing as a party must be received by the presiding officer by December 16, 2021.

FOR FURTHER INFORMATION CONTACT: Benjamin R. Cohen, Presiding Officer, CMS, 7500 Security Blvd., MS B1–01–31, Baltimore MD 21244–1850, *Telephone:* (410) 786–3169.

SUPPLEMENTARY INFORMATION: This notice announces an administrative hearing to reconsider CMS's decision to disapprove South Carolina's Medicaid state plan amendment (SPA) 19–0004–A, which was submitted to the Centers for Medicare & Medicaid Services (CMS) on June 28, 2019 and disapproved on May 21, 2021. This SPA requested CMS approval to update annual supplemental teaching physician (STP) payment program using the Average Commercial Rate (ACR) methodology effective April 1, 2019. This SPA included Greenville Memorial Hospital, and Palmetto Health, Richland/USC.

The issues to be considered at the hearing are whether South Carolina SPA 19–0004–A is inconsistent with the requirements of:

- Section 1902(a)(2) of the Social Security Act (the Act), providing that the state plan must assure adequate funding for the non-federal share of expenditures from state or local sources, such that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services available under the plan.
- Sections 1903(a) and 1905(b) of the Act, providing that states receive a statutorily determined Federal Medicaid Assistance Percentage (FMAP) for allowable state expenditures on medical assistance.
- Section 1903(w)(1)(A)(i)(I) of the Act, providing that, notwithstanding the previous provisions of section 1903, for purposes of determining the amount to be paid to a State (as defined in paragraph (7)(D)) under subsection (a)(1) for quarters in any fiscal year, the total amount expended during such fiscal year as medical assistance under the State plan (as determined without regard to section 1903(w)) shall be reduced, inter alia, by the sum of any revenues received by the State (or by a unit of local government in the State) during the fiscal year from provider-related donations other than bona fide provider-related donations, as defined in section 1903(w)(2)(B).
- Section 1903(w)(2)(A) of the Act, providing that, in section 1903(w), except as provided in section 1903(w)(6), the term ''provider-related donation'' means any donation or other voluntary payment (whether in cash or in kind) made (directly or indirectly) to a State or unit of local government by—(i) a health care provider (as defined in section 1903(w)(7)(B)), (ii) an entity related to a health care provider (as defined in section 1903(w)(7)(C)), or (iii) an entity providing goods or services under the State plan for which payment is made to the State under paragraph (2), (3), (4), (6), or (7) of section 1903(a).
- Section 1903(w)(2)(B) of the Act, providing that, for purposes of section 1903(w)(1)(A)(i)(I), the term ''bona fide provider-related donation'' means a provider-related donation that has no direct or indirect relationship (as determined by the Secretary) to payments made under title XIX to that provider, to providers furnishing the same class of items and services as that provider, or to any related entity, as established by the State to the satisfaction of the Secretary. The Secretary may by regulation specify types of provider-related donations described in the previous sentence that will be considered to be bona fide provider-related donations.
- Section 1903(w)(6)(A) of the Act, providing that, notwithstanding the provisions of section 1903(w), the Secretary may not restrict States'' use of funds where such funds are derived from State or local taxes (or funds appropriated to State university teaching hospitals) transferred from or certified by units of government within a State as the non-Federal share of expenditures under title XIX, regardless of whether the unit of government is also a health care provider, except as provided in section 1902(a)(2), unless the transferred funds are derived by the unit of government from donations or taxes that would not otherwise be recognized as the non-Federal share under section 1903.
- 42 CFR 433.54(b), (c)(2), and (c)(3), providing that provider-related donations will be determined to have no direct or indirect relationship to Medicaid payments if those donations are not returned to the individual provider, the provider class, or related entity under a hold harmless provision or practice, as described in 42 CFR 433.54(c). A hold harmless practice exists if, inter alia, all or any portion of the Medicaid payment to the donor, provider class, or related entity, varies based only on the amount of the donation, including where Medicaid payment is conditional on receipt of the donation; or if the State (or other unit of government) receiving the donation provides for any direct or indirect payment, offset, or waiver such that the provision of that payment, offset, or waiver directly or indirectly guarantees to return any portion of the donation to the provider (or other parties responsible for the donation).

Section 1116 of the Act and federal regulations at 42 CFR part 430 establish Department procedures that provide an administrative hearing for reconsideration of a disapproval of a state plan or plan amendment. CMS is required to publish in the **Federal Register** a copy of the notice to a state Medicaid agency that informs the

agency of the time and place of the hearing, and the issues to be considered. If we subsequently notify the state Medicaid agency of additional issues that will be considered at the hearing, we will also publish that notice in the **Federal Register**.

Any individual or group that wants to participate in the hearing as a party must petition the presiding officer within 15 days after publication of this notice, in accordance with the requirements contained at 42 CFR 430.76(b)(2). Any interested person or organization that wants to participate as amicus curiae must petition the presiding officer before the hearing begins in accordance with the requirements contained at 42 CFR 430.76(c). If the hearing is later rescheduled, the presiding officer will notify all participants.

The notice to South Carolina announcing an administrative hearing to reconsider the disapproval of its SPAs reads as follows:

Robert M. Kerr
Director, South Carolina Department of Health and Human Services, Post Office Box 8206, Columbia, SC 29202–8206

Dear Mr. Kerr:

I am responding to the July 19, 2021 request for reconsideration of the decision to disapprove South Carolina's State Plan amendment (SPA) 19–0004–A. South Carolina SPA 19–0004–A was submitted to the Centers for Medicare & Medicaid Services (CMS) on June 28, 2019 and disapproved on May 21, 2021. I am scheduling a hearing on the request for reconsideration to be held on January 12, 2022, at the Department of Health and Human Services, Division of Medicaid Field Operations, South, Centers for Medicare & Medicaid Services, Division of Medicaid and Children's Health Operations, 61 Forsyth St., Suite 4T20, Atlanta, Georgia 30303–8909.

I am designating Mr. Benjamin R. Cohen as the presiding officer. If these arrangements present any problems, please contact Mr. Cohen at (410) 786–3169. In order to facilitate any communication that may be necessary between the parties prior to the hearing, please notify the presiding officer to indicate acceptability of the hearing date that has been scheduled and provide names of the individuals who will represent the State at the hearing. If the hearing date is not acceptable, Mr. Cohen can set another date mutually agreeable to the parties. The hearing will be governed by the procedures prescribed by federal regulations at 42 CFR part 430.

This SPA requested CMS approval to update annual supplemental teaching physician (STP) payment program using the Average Commercial Rate (ACR) methodology effective April 1, 2019. This SPA included Greenville Memorial Hospital, and Palmetto Health Richland/USC.

The issues to be considered at the hearing are whether South Carolina SPA 19–0004–A is inconsistent with the requirements of:

- Section 1902(a)(2) of the Social Security Act (the Act), providing that the state plan must assure adequate funding for the non-federal share of expenditures from state or local sources, such that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services available under the plan.
- Sections 1903(a) and 1905(b) of the Act, providing that states receive a statutorily determined Federal Medicaid Assistance Percentage (FMAP) for allowable state expenditures on medical assistance.
- Section 1903(w)(1)(A)(i)(I) of the Act, providing that, notwithstanding the previous provisions of section 1903, for purposes of determining the amount to be paid to a State (as defined in paragraph (7)(D)) under subsection (a)(1) for quarters in any fiscal year, the total amount expended during such fiscal year as medical assistance under the State plan (as determined without regard to section 1903(w)) shall be reduced, inter alia, by the sum of any revenues received by the State (or by a unit of local government in the State) during the fiscal year from provider-related donations other than bona fide provider-related donations, as defined in section 1903(w)(2)(B).
- Section 1903(w)(2)(A) of the Act, providing that, in section 1903(w), except as provided in section 1903(w)(6), the term ''provider-related donation'' means any donation or other voluntary payment (whether in cash or in kind) made (directly or indirectly) to a State or unit of local government by—(i) a health care provider (as defined in section 1903(w)(7)(B)), (ii) an entity related to a health care provider (as defined in section 1903(w)(7)(C)), or (iii) an entity providing goods or services under the State plan for which payment is made to the State under paragraph (2), (3), (4), (6), or (7) of section 1903(a).
- Section 1903(w)(2)(B) of the Act, providing that, for purposes of section 1903(w)(1)(A)(i)(I), the term ''bona fide provider-related donation'' means a provider-related donation that has no direct or indirect relationship (as determined by the Secretary) to payments made under title XIX to that provider, to providers furnishing the same class of items and services as that provider, or to any related entity, as established by the State to the satisfaction of the Secretary. The Secretary may by regulation specify types of provider-related donations described in the previous sentence that will be considered to be bona fide provider-related donations.
- Section 1903(w)(6)(A) of the Act, providing that, notwithstanding the provisions of section 1903(w), the Secretary may not restrict States'' use of funds where such funds are derived from State or local taxes (or funds appropriated to State university teaching hospitals) transferred from or certified by units of government within a State as the non-Federal share of expenditures under title XIX, regardless of whether the unit of government is also a health care provider, except as provided in section 1902(a)(2), unless the transferred funds are derived by the unit of government from donations or taxes that would not otherwise be recognized as the non-Federal share under section 1903.
- 42 CFR 433.54(b), (c)(2), and (c)(3), providing that provider-related donations will be determined to have no direct or indirect relationship to Medicaid payments if those donations are not returned to the individual provider, the provider class, or related entity under a hold harmless provision or practice, as described in 42 CFR 433.54(c). A hold harmless practice exists if, inter alia, all or any portion of the Medicaid payment to the donor, provider class, or related entity, varies based only on the amount of the donation, including where Medicaid payment is conditional on receipt of the donation; or if the State (or other unit of government) receiving the donation provides for any direct or indirect payment, offset, or waiver such that the provision of that payment, offset, or waiver directly or indirectly guarantees to return any portion of the donation to the provider (or other parties responsible for the donation).

In the event that CMS and the State come to agreement on resolution of the issues which formed the basis for disapproval, these SPAs may be moved to approval prior to the scheduled hearing.

Sincerely,

Chiquita Brooks-LaSure,
Administrator

cc: Benjamin R. Cohen

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Evell J. Barco Holland, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Section 1116 of the Social Security Act (42 U.S.C. section 1316; 42 CFR section 430.18) (Catalog of Federal Domestic Assistance Program No. 13.714. Medicaid Assistance Program.)

Dated: November 26, 2021.

Evell J. Barco Holland,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2021–26136 Filed 11–30–21; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–2809]

Advisory Committee; Patient Engagement Advisory Committee; Renewal

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; renewal of Federal advisory committee.

SUMMARY: The Food and Drug Administration (FDA) is announcing the

renewal of the Patient Engagement Advisory Committee by the Commissioner of Food and Drugs (the Commissioner). The Commissioner has determined that it is in the public interest to renew the Patient Engagement Advisory Committee for an additional 2 years beyond the charter expiration date. The new charter will be in effect until the October 6, 2023, expiration date.

DATES: Authority for the Patient Engagement Advisory Committee would have expired on October 6, 2021, unless the Commissioner had formally determined that renewal is in the public interest.

FOR FURTHER INFORMATION CONTACT: Letise Williams, Office of the Center Director, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5407, Silver Spring, MD 20993–0002, 301–796–8398, *Letise.Williams@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to 41 CFR 102–3.65 and approval by the Department of Health and Human Services and by the General Services Administration, FDA is announcing the renewal of the Patient Engagement Advisory Committee (the Committee). The Committee is a discretionary Federal advisory committee established to provide advice to the Commissioner. The Committee advises the Commissioner or designee in discharging responsibilities as they relate to helping to ensure safe and effective devices for human use and, as required, any other product for which the Food and Drug Administration has regulatory responsibility.

The Committee provides advice to the Commissioner on complex scientific issues relating to medical devices, the regulation of devices, and their use by patients. Agency guidance and policies, clinical trial or registry design, patient preference study design, benefit-risk determinations, device labeling, unmet clinical needs, available alternatives, patient reported outcomes, device-related quality of life measures, or health status issues are among the topics that may be considered by the Committee. The Committee provides relevant skills and perspectives to improve communication of benefits, risks, and clinical outcomes, and increase integration of patient perspectives into the regulatory process for medical devices. It performs its duties by identifying new approaches, promoting innovation, recognizing unforeseen risks or barriers, and identifying unintended consequences that could result from FDA policy.

Pursuant to its Charter the Committee shall consist of a core of nine voting members, including the Chair. Members and the Chair are selected by the Commissioner or designee from among authorities who are knowledgeable in areas such as clinical research, patient experience, healthcare needs of patient groups in the United States, or are experienced in the work of patient and health professional organizations, methodologies for patient-reported outcomes and eliciting patient preferences, and strategies for communicating benefits, risks and clinical outcomes to patients and research subjects, as well as other relevant areas. Members will be invited to serve for overlapping terms of up to 4 years. Non-Federal members of this committee will serve as Special Government Employees, representative or Ex-Officio members. Federal members will serve as Regular Government Employees or Ex-Officios. The core of voting members may include one technically qualified member, selected by the Commissioner or designee, who is identified with consumer interests and is recommended by either a consortium of consumer-oriented organizations or other interested persons. The Commissioner or designee shall also have the authority to select from a group of individuals nominated by industry to serve temporarily as non-voting members who are identified with industry interests. The number of temporary members selected for a particular meeting will depend on the meeting topic.

The Commissioner or designee shall also have the authority to select members of other scientific and technical FDA advisory committees (normally not to exceed 10 members) to serve temporarily as voting members and to designate consultants to serve temporarily as voting members when: (1) Expertise is required that is not available among current voting standing members of the Committee (when additional voting members are added to the Committee to provide needed expertise, a quorum will be based on the combined total of regular and added members), or (2) to comprise a quorum when, because of unforeseen circumstances, a quorum is or will be lacking. Because of the size of the Committee and the variety in the types of issues that it will consider, FDA may, in connection with a particular committee meeting, specify a quorum that is less than a majority of the current voting members. The Agency's regulations (21 CFR 14.22(d)) authorize a committee charter to specify quorum requirements.

Further information regarding the most recent charter and other information can be found at *https://www.fda.gov/advisory-committees/committees-and-meeting-materials/patient-engagement-advisory-committee* or by contacting the Designated Federal Officer (see **FOR FURTHER INFORMATION CONTACT**). In light of the fact that no change has been made to the committee name or description of duties, no amendment will be made to 21 CFR 14.100.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app.). For general information related to FDA advisory committees, please visit us at *https://www.fda.gov/AdvisoryCommittees/default.htm.*

Dated: November 23, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–26118 Filed 11–30–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Assistant Secretary for Administration

Privacy Act of 1974; System of Records

AGENCY: Office of the Assistant Secretary for Administration, Department of Health and Human Services (HHS).

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, the U.S. Department of Health and Human Services (HHS) is establishing a new departmentwide system of records, 09–90–2103, Accommodation Records About HHS Civilian Employees, Contractors and Visitors.

DATES: The new system of records is applicable December 1, 2021, subject to a 30-day period in which to comment on the routine uses.

ADDRESSES: The public should address written comments by email to *beth.kramer@hhs.gov* or by mail to Beth Kramer, HHS Privacy Act Officer, FOIA/Privacy Act Division—Suite 729H, Office of the Assistant Secretary for Public Affairs, 200 Independence Ave. SW, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: General questions may be submitted to Beth Kramer, HHS Privacy Act Officer,

by email or telephone at *beth.kramer@hhs.gov* or (202) 690–6941, or by mail addressed to: Beth Kramer, HHS Privacy Act Officer, FOIA/Privacy Act Division—Suite 729H, Office of the Assistant Secretary for Public Affairs, 200 Independence Ave. SW, Washington, DC 20201.

SUPPLEMENTARY INFORMATION: This new system of records will cover all records used by HHS to process and determine requests for accommodation made verbally or in writing by HHS civilian employees, HHS contractors, and HHS visitors (visitors are defined in the Categories of Individuals section of the system of records notice). Accommodation records about federal civilian job applicants are covered by the government-wide system of records notice (SORN) published by the Office of Personnel Management, OPM/&GOVT–5, Recruiting, Examining, and Placement Records, and accommodation records about HHS Public Health Service Commissioned Corps officers and applicants are covered by HHS SORN 09–40–0003 Public Health Service (PHS) Commissioned Corps Board Proceedings, so are not included in this new system of records.

All types of accommodation requests made by HHS civilian employees and HHS contractors and visitors are intended to be covered, including:

- Requests for accommodations based on a medical condition under the Rehabilitation Act of 1973 (Rehab Act), the Americans with Disabilities Act of 1990 (ADA), and the American with Disabilities Act Amendments Act of 2008 (ADAA); and
- Requests for religious accommodation under the First Amendment of the Constitution of the United States of America (First Amendment), Religious Freedom Restoration Act of 1993 (RFRA), or Title VII of the Civil Rights Act of 1964 (Title VII).

The records are used by relevant HHS supervisors, reasonable accommodation coordinators, equal employment opportunity (EEO) specialists, employee relations specialists, attorneys, medical review personnel, contracting officers and their representatives, and other personnel involved in processing or adjudicating accommodation requests.

A reasonable accommodation may be requested by and granted to a qualified individual with a disability in order to allow an employee to perform the essential functions of their position or to enjoy the same benefits and privileges of employment as other similarly situated employees. A reasonable accommodation may also be requested by and granted to an individual with a disability to allow for participation in a federally funded program. A religious accommodation may be requested by and granted to an individual to resolve a conflict between a sincerely held religious belief, practice, or observance and a work requirement or requirement for participation in a federally funded program. An accommodation may include a modification or adjustment to a work requirement, the work environment, or the way things are customarily done by HHS.

HHS determines accommodation requests in accordance with applicable laws, regulations (for example, Equal Employment Opportunity Commission (EEOC) regulations), Department policies and guidance (for example, HHS' Personal Assistant Services (PAS) Accommodation guidance), and any specific guidelines of the relevant Operating Division or Staff Division (for example, the Administration for Children and Families Office of Diversity Management and EEO Reasonable Accommodation Procedures for Individuals with Disabilities (May 17, 2019)).

To control and limit access, use, and disclosure of the records appropriately, HHS may maintain disability-based accommodation records in or with other confidential medical files about the same individual, or otherwise separately from other types of records about the same individual, to the extent possible. Likewise, to the extent possible, HHS maintains religious accommodation records about an individual separately from other types of records about the individual. Disability information is subject to (for example) restrictions stated in 42 U.S.C. 12112(d)(3)(B) and 29 CFR 1630.14(d)(4)(i); and information about how an individual exercises rights guaranteed by the First Amendment (which would include information describing sincerely held religious beliefs, practices, or observances) is subject to the restriction stated in 5 U.S.C. 552a(e)(7).

Prior to the date of publication, HHS relied on an Office of Personnel Management (OPM) governmentwide system of records, OPM/GOVT–10 Employee Medical File System Records, as covering disability-based accommodation records about civilian personnel. In recently reviewing the Department's systems of records HHS determined that a new system of records is necessary and appropriate for all accommodation records (whether based on a disability or a sincerely held religious belief) about HHS civilian employees and HHS contractors and visitors. Accordingly, those accommodation records will now be covered by new system of records 09–90–2103.

HHS provided advance notice of the new system of records to the Office of Management and Budget and Congress as required by 5 U.S.C. 552a(r) and OMB Circular A–108, Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act, 81 FR 94424 (Dec. 23, 2016).

Cheryl Campbell,

Assistant Secretary for Administration.

SYSTEM NAME AND NUMBER:

Accommodation Records About HHS Civilian Employees, Contractors and Visitors, 09–90–2103.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Accommodation records are collected and managed at the HHS Operating Division level and by the Office of Equal Employment Opportunity, Diversity and Inclusion (EEODI) at the Departmental level. The addresses of the HHS components responsible for this system of records are as follows:

- *For the Department:* Office of Equal Employment Opportunity, Diversity & Inclusion (EEODI), 300 C Street SW, Suite 2500, Washington, DC 20201.
- *For the Public Health Service (PHS) Commissioned Corps:* Office of the Assistant Secretary for Health (OASH), 200 Independence Ave. SW, Washington, DC 20201.
- *For the Office of the Secretary (OS) (excluding the PHS Commissioned Corps); the Administration for Community Living (ACL); and the Substance Abuse and Mental Health Services Administration (SAMHSA):* Equal Employment Opportunity Service Center (EEOSC), Mary E. Switzer Bldg.—Suite 2500, 300 C Street SW, Washington, DC 20201.
- *For the Administration for Children and Families:* Office of Diversity Management and Equal Employment Opportunity (ODME), 330 C Street SW, Suite 3018, Washington, DC 20201.
- *For the Centers for Disease Control and Prevention (CDC):* Office of Equal Employment Opportunity, MS US11–1EEO, Centers for Disease Control and Prevention, 1600 Clifton Rd. NE, Atlanta, GA 30329–4027.
- *For the Centers for Medicare & Medicaid Services (CMS):* Office of Equal Opportunity and Civil Rights, 7500 Security Blvd., Baltimore, MD 21244.
- *For the Food and Drug Administration (FDA): Medical accommodation records:* Office of

Enterprise Management Service, 8455 Colesville Rd., Silver Spring, MD 20910; *Religious belief accommodation records:* Office of Equal Employment Opportunity, 10903 New Hampshire Avenue, WO32–2260, Silver Spring, MD 20903–0002.

• *For the Health Resources and Services Administration (HRSA):* Diversity and Inclusion (OCRDI), 5600 Fishers Ln., Room 14N176, Rockville, MD 20857.

• *For the Indian Health Service (IHS):* Diversity Management and Equal Employment Opportunity Staff (DMEEO), 5600 Fishers Ln., Mail Stop 08E61, Rockville, MD 20857.

• *For the National Institutes of Health (NIH):* Access and Equity (A&E) Branch, Division of Guidance, Education and Marketing (GEM), Bldg. 2, Rm. 3W07, 2 Center Dr., Bethesda, MD 20892.

SYSTEM MANAGER(S):

The System Managers to whom individuals may submit Privacy Act requests regarding records about them in this system of records are as follows:

• *For the Public Health Service (PHS) Commissioned Corps:* Assistant Secretary for Health, Office of the Assistant Secretary for Health (OASH), 200 Independence Ave. SW, Washington, DC 20201, *wayne.hall@hhs.gov.*

• *For the Office of the Secretary (OS) (excluding the PHS Commissioned Corps); the Administration for Community Living (ACL); and the Substance Abuse and Mental Health Services Administration (SAMHSA):* Director, Equal Employment Opportunity Service Center (EEOSC), Mary E. Switzer Bldg.—Suite 2500, 300 C Street SW, Washington, DC 20201, *EEOSC.accommodations@hhs.gov.*

• *For the Administration for Children and Families:* OpDiv Senior Officer for Privacy, Administration for Children and Families, 330 C Street SW—Suite 3313A, Washington, DC 20201, *ACF_PIRT@acf.hhs.gov.*

• *For the Centers for Disease Control and Prevention (CDC):* Deputy Director, Office of Equal Employment Opportunity, MS US11–1EEO, Centers for Disease Control and Prevention, 1600 Clifton Rd. NE, Atlanta, GA 30329–4027, *RAInquiry@cdc.gov.*

• *For the Centers for Medicare & Medicaid Services (CMS):* Director, Office of Equal Opportunity and Civil Rights, 7500 Security Blvd., Baltimore, MD 21244, *reasonableaccommodationprogram@cms.hhs.gov.*

• *For the Food and Drug Administration (FDA):* Privacy Coordinator, Division of Information Governance/Privacy, 5630 Fishers Ln., Rockville, MD 20857, *PrivacyOffice@fda.hhs.gov.*

• *For the Health Resources and Services Administration (HRSA):* Accessibility Section Chief, Office of Civil Rights, Diversity and Inclusion (OCRDI), 5600 Fishers Ln., Room 14N176, Rockville, MD 20857, *RA-Request@hrsa.gov.*

• *For the Indian Health Service (IHS):* Privacy Officer, Indian Health Service, 5600 Fishers Ln., Mail Stop 09E70, Rockville, MD 20857, *heather.mcclane@hhs.gov.*

• *For the National Institutes of Health (NIH):* Branch Director, Access and Equity (A&E) Branch, Division of Guidance, Education and Marketing (GEM), Bldg. 2, Rm. 3W07, 2 Center Dr., Bethesda, MD 20892, *edi.ra@nih.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

29 U.S.C. 791 and 793(d); 42 U.S.C. 2000e–16, 12101 through 12117, and 12201 through 12213; and Executive Order (E.O.) 13164, Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, 65 FR 46565 (July 26, 2000).

PURPOSE(S) OF THE SYSTEM:

The purpose of this system of records is to document, track, and support the adjudication of two types of verbal and written requests for accommodation, *i.e.,* disability-based requests and religious-based requests; and to provide data for accommodation program reporting and evaluation purposes. The ultimate purpose of the records is to allow HHS to provide legally required accommodations to individuals with disabilities and sincerely held religious beliefs.

The records are used by relevant HHS supervisors, reasonable accommodation coordinators, equal employment opportunity (EEO) specialists, employee relations specialists, attorneys, medical review personnel, contracting officers and their representatives, and other personnel involved in processing or adjudicating accommodation requests.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals are HHS civilian employees and HHS contractors and visitors who make accommodation requests, verbally or in writing, to HHS.

For purposes of this system of records, visitors are individuals who seek to access an HHS facility or to participate in an HHS-sponsored federally funded meeting, event, medical trial, or other program but are neither HHS employees nor HHS contractors. Visitors may include employees and contractors of other federal agencies, guest speakers participating in an HHS-hosted meeting or training event, members of the public attending an HHS-hosted meeting, participants in medical trials, interns, detailees, student volunteers, visiting scientists, intramural research trainees, fellows, or other non-employees performing work for HHS.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system of records includes all records that may support a determination regarding an accommodation request.

The categories of records include:

• Documentation of the original request, whether made verbally or in writing.

• Records submitted by the individual in support of a request for reasonable accommodation based on disability, such as records describing the individual's medical conditions and the accommodation requested.

• Records submitted by the individual in support of a request for religious accommodation, such as records describing the individual's religious beliefs, practices, or observances, explaining the conflict(s) experienced by the individual with a particular HHS practice, policy, custom, or environment, and describing the accommodation requested.

• Correspondence from professionals such as physicians who know the individual and provide information supporting the individual's request for the accommodation.

• Notes memorializing verbal conversations.

• Records of consultations with third parties within or outside the agency who provide technical assistance to the agency.

• Communications about the substance of the request, the processing of the request, and burdens and other issues identified.

• Records of the agency's analysis, adjudication, and determination of the request.

• Records associated with requests for reconsideration or appeal, if appropriate.

• Notices provided to the individual about the agency's determination and agency procedures for reconsideration or other appeal processes, if applicable.

• Records documenting any accommodation provided.

RECORD SOURCE CATEGORIES:

The records are provided by the individual making the request, by HHS personnel involved in processing or adjudicating the request (including

supervisors, reasonable accommodation coordinators, equal employment opportunity (EEO) specialists, employee relation specialists, attorneys, medical review personnel, and contracting officers and their representatives), and by others furnishing records pertinent to the request (such as, the individual's medical professionals, or technical experts).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to other disclosures authorized directly in the Privacy Act at 5 U.S.C. 552a(b)((1) and (2) and (b)(4) through (11), HHS may disclose a record about an individual from this system of records to parties outside HHS as described in the following routine uses, without the individual's prior written consent:

1. HHS may disclose records about individuals' accommodation requests to a contractor or agent engaged by HHS to assist in administering aspects of accommodation request handling, including information technology (IT) system support contractors, when it is necessary for the contractor or agent to have access to the records to provide that assistance.

2. HHS may disclose relevant information about an HHS employee's accommodation request to a labor organization recognized under E.O. 11491 Labor Management Relations in the Federal Service or 5 U.S.C. Chapter 71 upon receipt of a formal request from the labor organization and in accord with the conditions of 5 U.S.C. 7114 when a contract between the labor organization and an HHS component provides that the component will disclose personal information relevant and necessary to the labor organization's mission or duties of exclusive representation concerning personnel policies and practices and matters affecting working conditions.

3. HHS may disclose to an HHS contractor's employer the existence, status, and determination of the contractor's accommodation request, but not records that reveal whether the request is based on a medical condition or a religious conflict.

4. HHS may disclose relevant records about a federal employee's accommodation request to an authorized appeal grievance examiner, formal complaint examiner, administrative judge, equal employment opportunity investigator, arbitrator, or other authorized official engaged in investigation or settlement of a grievance, complaint, or appeal filed by an employee; however, most such disclosures will be authorized by the individual's prior, written consent.

5. HHS may disclose relevant accommodation records about a federal employee to any of the following agencies or entities when needed by the agency or entity to discharge its below-described role:

a. To the Office of Personnel Management (OPM) to evaluate the individual's application for disability retirement.

b. To the Equal Employment Opportunity Commission (EEOC) to investigate, adjudicate, and litigate the individual's complaint of employment discrimination or to ensure compliance by HHS under 29 CFR part 1630.14(b)(1)(iii)).

c. To the Merit Systems Protection Board (MSPB) to adjudicate and litigate the individual's appeal of a personnel action.

d. To the Office of Special Counsel (OSC) in order to investigate claims of prohibited personnel practices against HHS.

e. To the Federal Labor Relations Authority (FLRA) to evaluate and arbitrate a claim of unfair labor practices against HHS.

f. To the Federal Mediation and Conciliation Service (FMCS) or other alternative dispute resolution (ADR) or arbitration service to conduct a confidential mediation between HHS management and employees or between the individual and HHS.

6. A record may be disclosed to the U.S. Department of Justice (DOJ) or to a court or other adjudicative body in litigation or administrative proceedings when (1) HHS or any component thereof; or (2) any employee of HHS acting in the employee's official capacity; or (3) any employee of HHS acting in the employee's individual capacity where the DOJ or HHS has agreed to represent the employee; or (4) the United States Government, is a party to the proceedings or has an interest in the proceedings and, by careful review, HHS determines that the record is both relevant and necessary to DOJ's representation or to the proceedings.

7. Records may be disclosed to a congressional office in response to an inquiry from the congressional office made at the written request of the subject individual.

8. Records may be disclosed to representatives of the National Archives and Records Administration (NARA) in records management inspections conducted pursuant to 44 U.S.C. 2904 and 2906.

9. Records may be disclosed to appropriate agencies, entities, and persons when (1) HHS suspects or has confirmed that there has been a breach of the system of records, (2) HHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HHS (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 HHS' efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

10. Records may be disclosed to another federal agency or federal entity, when HHS 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.

Any other disclosures require the individual's prior written consent.

Note also that if an individual's accommodation records become part of a related proceeding covered by a different System of Records Notice (SORN), the records will be subject to disclosures under routine uses published in that SORN (see, for example: 09–90–0009 Discrimination Complaint Records; 09–90–0069 Unfair Labor Practice Records; EEOC/GOVT–1 Equal Employment Opportunity in the Federal Government Complaint and Appeals Records; MSPB/GOVT–1 Appeals and Case Records; and 09–90–0062 Administrative Claims).

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

All records (including those received in paper form) are stored in electronic media to comply with OMB Memorandum M–19–21, Transition to Electronic Records (June 28, 2019).

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

The records are retrieved by the subject individual's name, assigned case number (if any), or HHS identification number (if applicable).

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Accommodation records about federal employees are retained and disposed of in accordance with the following disposition authorities:

• *General Records Schedule (GRS) 2.2 Employee Management Records, Item 080, supervisor's personnel files (these include employee medical documents until replaced by the agency's accommodation decision, and exclude records that become part of a grievance file, an appeal or discrimination complaint file, a performance-based reduction-in-grade or removal action, or an adverse action, which are governed by GRS 2.3 Employee Relations Records):* Review annually and destroy superseded documents. Destroy remaining documents one year after employee separation or transfer.

• *GRS 2.3 Employee Relations Records, Item 020, reasonable accommodation case files:* Destroy three years after employee separation from the agency or after all appeals are concluded, whichever is later, but longer retention is authorized if required for business use.

Accommodation records about federal contractors are retained and disposed of in accordance with the following disposition authority:

• *GRS 2.3 Employee Relations Records, Item 120, records documenting contractor compliance with EEO regulations:* Destroy when 7 years old, but longer retention is authorized if required for business use.

Accommodation records about HHS visitors who are neither federal employees nor federal contractors are currently unscheduled and will be retained indefinitely until authorized for disposition under a schedule approved by the National Archives and Records Administration.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Safeguards conform to the HHS Information Security and Privacy Program, *https://www.hhs.gov/ocio/securityprivacy/index.html,* including the HHS Information Security and Privacy Policy (IS2P), which ensures that information is safeguarded in accordance with applicable federal laws, rules, and policies, including: 44 U.S.C. 3541 through 3549 and 3551 through 3558; all pertinent National Institutes of Standards and Technology (NIST) publications; and OMB Circular A–130, Managing Information as a Strategic Resource, 81 FR 49689 (July 28, 2016).

Records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include protecting the facilities where records are received and electronically stored with security guards, identification badges, and cameras; securing any hard copies in locked file cabinets, file rooms or offices during off-duty hours; requiring contractors to maintain appropriate safeguards and to comply with the Privacy Act with respect to the records; limiting authorized users' access to electronic records based on role and either two-factor authentication or password protection; requiring passwords to be complex and to be changed frequently; using a secured operating system protected by encryption, firewalls, and intrusion detection systems; maintaining an activity log of users' access; requiring encryption for any records stored or accessed on removable media; training personnel in Privacy Act and information security requirements; and reviewing security controls on an ongoing basis.

To control and limit access, use, and disclosure of the records appropriately, HHS may maintain disability-based accommodation records in or with other confidential medical files about the same individual, or otherwise separately from other types of records about the same individual, to the extent possible. Likewise, to the extent possible, HHS maintains religious accommodation records about an individual separately from other types of records about the individual.

RECORD ACCESS PROCEDURES:

Individuals may request access to records about them in this system of records by submitting a written access request to the System Manager identified in the ''System Manager'' section of this SORN. The request must contain the requester's full name, home or work address, date of birth, signature, and assigned case identification number (if any) and must identify the employing or hiring component pertinent to the request. To verify the requester's identity, the signature must be notarized or the request must include the requester's written certification that the requester is the individual who the requester claims to be and that the requester understands that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense subject to a fine of up to $5,000. To access the records in person, the requester should make an appointment, and may be accompanied by a person of the requester's choosing if the requester provides written authorization for agency personnel to discuss the records in that person's presensce. An individual may also request an accounting of disclosures that have been made of the records, if any.

CONTESTING RECORD PROCEDURES:

Individuals may seek to amend records about them in this system of records by submitting an amendment request to the System Manager identified in the ''System Manager'' section of this SORN, containing the same information required for an access request. The request must include verification of the requester's identity in the same manner required for an access request; must reasonably identify the record and specify the information contested, the corrective action sought, and the reasons for requesting the correction; and should include supporting information to show how the record is not accurate, complete, timely, or relevant.

NOTIFICATION PROCEDURES:

Individuals who wish to know if this system of records contains records about them should submit a notification request to the System Manager identified in the ''System Manager'' section of this SORN. The request must contain the same information required for an access request and must include verification of the requester's identity in the same manner required for an access request.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

[FR Doc. 2021–26090 Filed 11–30–21; 8:45 am]

BILLING CODE 4151–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of meetings of the National Advisory Allergy and Infectious Diseases Council.

The meeting will be open to the public. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov*). Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

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 Advisory Allergy and Infectious Diseases Council.
Date: January 31, 2022.
Open: 10:30 a.m. to 11:30 a.m.
Agenda: Report of Institute Director.
Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4G30, Rockville, MD 20892 (Virtual Meeting).
Closed: 11:45 a.m. to 12:00 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 4G30, Rockville, MD 20892 (Virtual Meeting).
Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4F50, Bethesda, MD 20892, 301–496–7291, *fentonm@niaid.nih.gov.*

Name of Committee: National Advisory Allergy and Infectious Diseases Council; Acquired Immune Deficiency Syndrome Subcommittee.
Date: January 31, 2022.
Closed: 8:30 a.m. to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4G30, Rockville, MD 20892 (Virtual Meeting).
Open: 1:00 p.m. to 4:00 p.m.
Agenda: Report of Division Director and Division Staff.
Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4G30, Rockville, MD 20892 (Virtual Meeting).
Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4F50, Bethesda, MD 20892, 301–496–7291, *fentonm@niaid.nih.gov.*

Name of Committee: National Advisory Allergy and Infectious Diseases Council; Microbiology and Infectious Diseases Subcommittee.
Date: January 31, 2022.
Closed: 8:30 a.m. to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4G30, Rockville, MD 20892 (Virtual Meeting).
Open: 1:00 p.m. to 4:00 p.m.
Agenda: Report of Division Director and Division staff.
Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4G30, Rockville, MD 20892 (Virtual Meeting).
Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4F50, Bethesda, MD 20892, 301–496–7291, *fentonm@niaid.nih.gov.*

Name of Committee: National Advisory Allergy and Infectious Diseases Council; Immunology and Transplantation Subcommittee.
Date: January 31, 2022.
Closed: 8:30 a.m. to 10:15 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4G30, Rockville, MD 20892 (Virtual Meeting).
Open: 1:00 p.m. to 4:00 p.m.
Agenda: Report of Division Director and Division Staff.
Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4G30, Rockville, MD 20892 (Virtual Meeting).
Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4F50, Bethesda, MD 20892, 301–496–7291, *fentonm@niaid.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *https://www.niaid.nih.gov/about/advisory-council,* where an agenda and any additional information for the meeting will be posted when available.

(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: November 24, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26134 Filed 11–30–21; 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; Special Topics: Vision and Low Vision Technologies.
Date: December 13, 2021.
Time: 12:00 p.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: 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.*

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: Center for Scientific Review Special Emphasis Panel; Special Topics: Drug Discovery in Neuroscience.
Date: December 16, 2021.
Time: 1:00 p.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: Aurea D. De Sousa, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, Bethesda, MD 20892, 301–827–6829, *aurea.desousa@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. 93.306, 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: November 24, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26115 Filed 11–30–21; 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 a meeting of the Vaccine Research Center Board of Scientific Counselors, NIAID.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Allergy And Infectious Diseases, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Vaccine Research Center Board of Scientific Counselors, NIAID.

Date: December 16–17, 2021.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 40 Convent Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sarah J. Austin, Committee Manager, Vaccine Research Center, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 40 Convent Drive, Room 1100, Bethesda, MD 20892, (301) 761–7187, *austinsj@niaid.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the intramural research review 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: November 24, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26117 Filed 11–30–21; 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 Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the AIDS Research Advisory Committee, NIAID.

The meeting will be open to the public. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov*).

Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: AIDS Research Advisory Committee, NIAID.

Date: January 31, 2022.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: Report of Division Director and Division Staff.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 8D49, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Pamela Gilden, Branch Chief, Science Planning and Operations Branch, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 8D49, Rockville, MD 20852–9831, 301–594–9954, *pamela.gilden@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(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: November 24, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26114 Filed 11–30–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Child Health and Human Development Council.

The Open Session of the meeting will be held as a virtual meeting and is open to the public. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

The Closed Session of 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 Advisory Child Health and Human Development Council.

Date: January 11–12, 2022.

Open Session: January 11, 2022, 12:00 p.m. to 5:00 p.m.

Agenda: The agenda will include opening remarks, administrative matters, NICHD Director's Report, presentation from Director of the Center for Scientific Review; presentation from Director of the National Eye Institute; Inclusion Triennial Report; NICHD Division of Extramural Research discussion; and other business of Council.

Place: National Institutes of Health, Building 31, 31 Center Drive, C-Wing, Conference Room 6, Bethesda, MD 20892 (Virtual Meeting).

Open Session: January 12, 2022, 12:00 p.m to 1:00 p.m.

Agenda: The agenda will include opening remarks, administrative matters, NICHD Director's Report, presentation from Director of the Center for Scientific Review; presentation from Director of the National Eye Institute; Inclusion Triennial Report; NICHD Division of Extramural Research discussion; and other business of Council.

Place: National Institutes of Health Building 31, 31 Center Drive, C-Wing Conference Room 6, Bethesda, MD 20892 (Virtual Meeting).

Closed Session: January 12, 2022, 1:00 p.m to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, C-Wing, Conference Room 6, Bethesda, MD 20894 (Virtual Meeting).

Contact Person: Ms. Lisa Neal, Committee Management Officer, Committee

Management Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6701B Rockledge Drive, Room 2208, Bethesda, MD 20892, (301) 204–1830 *lisa.neal@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Individuals will be able to view the meeting via NIH Videocast. Select the following link for Videocast access instructions: *http://www.nichd.nih.gov/about/advisory/nachhd/Pages/virtual-meeting.aspx.*

Information is also available on the Institute's/Center's home page: *https://www.nichd.nih.gov/about/advisory/council*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS).

Natasha M. Copeland,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26121 Filed 11–30–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[22X.LLAZ921000.L14400000 .BJ0000.LXSSA2250000.241A]

Notice of Filing of Plats of Survey; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of the following described land are scheduled to be officially filed 30 days after the date of this publication in the Bureau of Land Management (BLM), Arizona State Office, Phoenix, Arizona. The surveys announced in this notice are necessary for the management of lands administered by the agency indicated.

ADDRESSES: These plats will be available for inspection in the Arizona State Office, Bureau of Land Management, One North Central Avenue, Suite 800, Phoenix, Arizona 85004–4427. Protests of any of these surveys should be sent to the Arizona State Director at the above address.

FOR FURTHER INFORMATION CONTACT: Mark Morberg, Chief Cadastral Surveyor of Arizona at (602) 417–9558 or *mmorberg@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at (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:

The Gila and Salt River Meridian, Arizona

The plat, in two sheets, representing the dependent resurvey of a portion of the east boundary of Township 5 North, Range 10 West, Navajo Special Meridian, the survey of the south, east and north boundaries, a portion of the subdivisional lines, the subdivision of certain sections and the metes-and-bounds survey of portions of the Canyon de Chelly National Monument boundary, partially surveyed Township 31 North, Range 27 East, accepted May 27, 2021, for Group 1190, Arizona. This plat was prepared at the request of the Bureau of Indian Affairs.

The plat, in one sheet, representing the dependent resurvey of portions of the east and south boundaries, a portion of the subdivisional lines, Blue Thunder millsite and Victory No. 1 millsite, Mineral Survey No. 3022B, and the subdivision of sections 35 and 36, Township 12 North, Range 1 East, accepted September 21, 2021, for Group 1207, Arizona. This plat was prepared at the request of the United States Forest Service.

The supplemental plat, in one sheet, showing the administrative boundary of Box Canyon Recreation Area, Township 5 North, Range 2 East, accepted October 25, 2021, for Supplemental Group 9118, Arizona. This plat was prepared at the request of the Bureau of Land Management.

The supplemental plat, in one sheet, showing the administrative boundaries of Baldy Mountain Recreation Area, Church Camp Recreation Area and Saddleback Recreation Area, Township 6 North, Range 1 West, accepted October 25, 2021, for Supplemental Group 9118, Arizona. This plat was prepared at the request of the Bureau of Land Management.

The supplemental plat, in one sheet, showing the administrative boundary of Narramore Recreation Area, Township 1 South, Range 5 West, accepted October 25, 2021, for Supplemental Group 9118, Arizona. This plat was prepared at the request of the Bureau of Land Management.

A person or party who wishes to protest against any of these surveys must file a written notice of protest within 30 calendar days from the date of this publication with the Arizona State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within 30 days after the protest is filed. Before including your address, or other personal information in your protest, please be aware that your entire protest, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 43 U.S.C. Chap. 3.)

Mark Morberg,

Chief Cadastral Surveyor of Arizona.

[FR Doc. 2021–26112 Filed 11–30–21; 8:45 am]

BILLING CODE 4310–32–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–560–561 and 731–TA–1317–1328 (Review)]

Carbon and Alloy Steel Cut-to-Length Plate From Austria, Belgium, Brazil, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the countervailing duty orders on carbon and alloy steel cut-to-length plate (''CTL plate'') from China and Korea and the antidumping duty orders on CTL plate from Austria, Belgium, Brazil, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted December 1, 2021. To be assured of consideration, the

deadline for responses is January 3, 2022. Comments on the adequacy of responses may be filed with the Commission by February 14, 2022.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones (202–205–3358), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—Effective January 26, 2017, the Department of Commerce (''Commerce'') issued antidumping duty orders on imports of CTL plate from Brazil, South Africa, and Turkey (82 FR 8911, February 1, 2017). On March 20, 2017, Commerce issued antidumping and countervailing duty orders on imports of CTL plate from China (82 FR 14346–14352). On May 25, 2017, Commerce issued antidumping and countervailing duty orders on imports of CTL plate from Korea and antidumping duty orders on imports of CTL plate from Austria, Belgium, France, Germany, Italy, Japan, and Taiwan (82 FR 24096–24105). The Commission is conducting reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) *The Subject Countries* in these reviews are Austria, Belgium, Brazil, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, the Commission defined a single *Domestic Like Product* consisting of all CTL plate coextensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, the Commission defined the *Domestic Industry* as all U.S. producers of CTL plate, including steel service center processors.

(5) The *Order Dates* are the dates that the antidumping and countervailing duty orders under review became effective. In these reviews, the *Order Dates* are January 26, 2017 (Brazil, South Africa, and Turkey), March 20, 2017 (China), and May 25, 2017 (Austria, Belgium, France, Germany, Italy, Japan, Korea, and Taiwan).

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will

sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is January 3, 2022. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is February 14, 2022. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's H*andbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 21–5–503, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information to be provided in response to this notice of institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in § 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry*.

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date*.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2020, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit,

(iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2020 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2020 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* since the *Order Date,* and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: November 24, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26107 Filed 11–30–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–470–471 and 731–TA–1169–1170 (Second Review)]

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From China and Indonesia; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping and countervailing duty orders on certain coated paper suitable for high-quality print graphics using sheet-fed presses from China and Indonesia would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted December 1, 2021. To be assured of consideration, the deadline for responses is January 3, 2022. Comments on the adequacy of responses may be filed with the Commission by February 10, 2022.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones (202–205–3358), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On November 17, 2010, the Department of Commerce (''Commerce'') issued antidumping and countervailing duty orders on imports of certain coated paper suitable for high-quality print graphics using sheet-fed presses from China and Indonesia (75 FR 70201–70208, as corrected in 75 FR 75663, December 6, 2010). Following the full first five-year reviews by Commerce and the Commission,

effective January 6, 2017, Commerce issued a continuation of the antidumping and countervailing duty orders on imports of certain coated paper suitable for high-quality print graphics using sheet-fed presses from China and Indonesia (82 FR 1692). The Commission is now conducting second reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Countries* in these reviews are China and Indonesia.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original and full first five-year review determinations, the Commission defined a single *Domestic Like Product* consisting of coated paper meeting the physical specifications of Commerce's scope definition, including free sheet and sheeter rolls.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original and full first five-year determinations, the Commission defined a single *Domestic Industry* consisting of U.S. producers and converters of the *Domestic Like Product,* which includes free sheet and CCP.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is January 3, 2022. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is February 10, 2022. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this

time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 21–5–504, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information to be provided in response to this notice of institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2015.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2020, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2020 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2020 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* after 2015, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (*Optional*) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: November 24, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26072 Filed 11–30–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–457 (Fifth Review)]

Heavy Forged Hand Tools From China; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping duty orders on heavy forged hand tools from China would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted December 1, 2021. To be assured of consideration, the deadline for responses is January 3, 2022. Comments on the adequacy of responses may be filed with the Commission by February 10, 2022.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones (202–205–3358), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.— On February 19, 1991, the Department of Commerce (''Commerce'') issued antidumping duty orders on imports of the following classes or kinds of heavy forged hand tools from China: (1) Axes and adzes, (2) bars and wedges, (3) hammers and sledges, and (4) picks and mattocks (56 FR 6622). Following full first five-year reviews by Commerce and the Commission, effective August 10, 2000, Commerce issued a continuation of the antidumping duty orders on imports of heavy forged hand tools from China (65 FR 48962). Following expedited second, third, and fourth five-year reviews by Commerce and the Commission, Commerce issued continuations of the antidumping duty orders on imports of heavy forged hand tools from China (71 FR 8276, February 16, 2006; 76 FR 52313, August 22, 2011; and 82 FR 1695, January 6, 2017). The Commission is now conducting fifth reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Country* in these reviews is China.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, its full first five-year review determinations, and its expedited second, third, and fourth five-

year review determinations, the Commission found four *Domestic Like Products:* (1) Axes, adzes and hewing tools, other than machetes, with or without handles; (2) bar tools, track tools and wedges; (3) hammers and sledges, with heads weighing two pounds or more, with or without handles; and (4) picks and mattocks, with or without handles.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, its full first five-year review determinations, and its expedited second, third, and fourth five-year review determinations, the Commission found four *Domestic Industries:* (1) Domestic producers of axes, adzes and hewing tools, other than machetes, with or without handles; (2) domestic producers of bar tools, track tools, and wedges; (3) domestic producers of hammers and sledges, with heads weighing two pounds or more, with or without handles; and (4) domestic producers of picks and mattocks, with or without handles. In the original investigations, the Commission excluded from the *Domestic Industries* companies that did no more than assemble imported heads with handles purchased from a domestic manufacturer. The Commission also excluded one domestic producer, Madison Mill, from the *Domestic Industries* under the related parties provision in the original investigations. In its full first five-year reviews and its expedited second, third, and fourth five-year reviews, the Commission did not exclude any company as a related party.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is January 3, 2022. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is February 10, 2022. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 21–5–505, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden

estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information to be provided in response to this notice of institution: Please provide the requested information separately for each *Domestic Like Product,* as defined by the Commission in its original determinations and its first, second, third, and fourth five-year review determinations, and for each of the products identified by Commerce as *Subject Merchandise.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandi*se, a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2015.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2020, except as noted (report quantity data in units and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2020 (report quantity data in units and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2020 (report quantity data in units and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in

the *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* after 2015, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country,* and such merchandise from other countries.

(13) (*Optional*) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: November 24, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26073 Filed 11–30–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–379 and 731–TA–788, 792, and 793 (Fourth Review)]

Stainless Steel Plate From Belgium, South Africa, and Taiwan; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the countervailing duty order on stainless steel plate from South Africa and the antidumping duty orders on stainless steel plate from Belgium, South Africa, and Taiwan would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted December 1, 2021. To be assured of consideration, the deadline for responses is January 3, 2022. Comments on the adequacy of responses may be filed with the Commission by February 8, 2022.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones (202–205–3358), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On May 11, 1999, the Department of Commerce (''Commerce'') issued a countervailing duty order on imports of certain stainless steel plate from South Africa (64 FR 25288). On May 21, 1999, Commerce issued antidumping duty orders on imports of certain stainless steel plate from Belgium, South Africa, and Taiwan (64 FR 27756). On March 11, 2003, as a result of intervening litigation of the Commission's original determinations, Commerce amended those antidumping and countervailing duty orders on imports of certain stainless steel plate to remove the original language that excluded cold-rolled stainless steel plate in coils (68 FR 11520 and 68 FR 11524). Following full first and second five-year reviews and expedited third five-year reviews by Commerce and the Commission, Commerce issued continuations of the countervailing duty order on imports of stainless steel plate from South Africa and the antidumping duty orders on imports of stainless steel plate from Belgium, South Africa, and Taiwan (70 FR 41202, July 18, 2005; 76 FR 53882, August 30, 2011; and 82 FR 2322, January 9, 2017). The Commission is now conducting fourth five-year reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Countries* in these reviews are Belgium, South Africa, and Taiwan.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations after remand, its full first and second five-year review determinations, and its expedited third five-year review determinations, the Commission defined a single *Domestic Like Product* as certain (hot-rolled and cold-rolled) stainless steel plate in coils, coextensive with Commerce's scope definition. Certain Commissioners defined the *Domestic Like Product* differently in the original determinations. While the Commission majority in the original determinations defined two separate *Domestic Like*

Products (*i.e.,* hot-rolled stainless steel plate in coils and cold-rolled stainless steel plate in coils), on remand the Commission majority's determinations involved a single *Domestic Like Product,* certain stainless steel plate in coils.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations after remand, its full first and second five-year review determinations, and its expedited fourth five-year review determinations, the Commission defined the *Domestic Industry* as all producers of certain stainless steel plate in coils. Certain Commissioners defined the *Domestic Industry* differently in the original determinations.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is January 3, 2022. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is February 8, 2022. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 21–5–507, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b))

in making its determinations in the reviews.

Information to be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandi*se, a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2015.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2020, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2020 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2020 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand

conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* after 2015, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: November 24, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26077 Filed 11–30–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Video Processing Devices, Components Thereof, and Digital Smart Televisions Containing the Same II, DN 3578;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of DivX, LLC, on November 24, 2021. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain video processing devices, components thereof, and digital smart televisions containing the same. The complainant names as respondents: TCL Technology Group Corporation of China; TCL Electronics Holdings Limited of China; TTE Technology, Inc. of Corona, CA; Shenzhen TCL New Technologies Co. Ltd. of China; TCL King Electrical Appliances (Huizhou) Co. Ltd. of China; TCL MOKA International Limited of Hong Kong; and TCL Smart Device (Vietnam) Co., Ltd. of Vietnam. The complainant requests that the Commission issue a limited exclusion order and cease and desist orders and impose a bond upon respondents alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3578'') in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: November 26, 2021.

Katherine Hiner,

Supervisory Attorney.

[FR Doc. 2021–26126 Filed 11–30–21; 8:45 am]

BILLING CODE 7020–02–P

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Playards and Strollers, DN 3577* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Graco Children's Products Inc. and Wonderland Nurserygoods Co., Ltd. on November 24, 2021. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain playards and strollers. The complainant names as respondents: Baby Trend, Inc. of Fontana, CA; Dongguan Golden Prosper Baby Products Co., Ltd. of China; Sichuan Hobbies Baby Products Co., Ltd. of China; and Anhui Chile Baby Products Co., Ltd. of China. The complainant requests that the Commission issue a limited exclusion order and cease and desist orders, and impose a bond upon respondents alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice

are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3577'') in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: November 26, 2021.

Katherine Hiner,

Supervisory Attorney.

[FR Doc. 2021–26125 Filed 11–30–21; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–249 and 731–TA–262, 263, and 265 (Fifth Review)]

Iron Construction Castings From Brazil, Canada, and China; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the countervailing duty order on heavy iron construction castings from Brazil, the antidumping duty order on heavy iron construction castings from Canada, and the antidumping duty orders on iron construction castings from Brazil and China would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted December 1, 2021. To be assured of consideration, the deadline for responses is January 3, 2022. Comments on the adequacy of responses may be filed with the Commission by February 8, 2022.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones (202–205–3358), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—The Department of Commerce (''Commerce'') issued antidumping duty orders on imports of ''heavy'' and ''light'' iron construction castings from Canada on March 5, 1986 (51 FR 7600) and from Brazil and China on May 9, 1986 (51 FR 17220). On May 15, 1986, Commerce issued a countervailing duty order on imports of ''heavy'' iron construction castings from Brazil (51 FR 17786). On September 23, 1998, Commerce issued the final results of a changed circumstance review concerning iron construction castings from Canada, in which the antidumping duty order with respect to ''light'' castings was revoked (63 FR 50881). Following full first five-year reviews by Commerce and the Commission, effective November 12, 1999, Commerce issued a continuation of the countervailing duty order on ''heavy'' iron construction castings from Brazil, a continuation of the antidumping duty order on ''heavy'' iron construction castings from Canada, and a continuation of the antidumping duty orders on ''heavy'' and ''light'' iron construction castings from Brazil and China (64 FR 61590–61592). Following expedited second and third five-year reviews, and full fourth five-year reviews by Commerce and the Commission, Commerce issued continuations of the subject orders (70 FR 37326–37327, June 29, 2005; 75 FR 70900, November 19, 2010; and 82 FR 1699, January 6, 2017). The Commission is now conducting fifth reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Countries* in these reviews are Brazil, Canada, and China.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the

absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, its full first five-year review determinations, its expedited second and third five-year review determinations, and its full fourth five-year review determinations concerning iron construction castings from Brazil, Canada, and China, the Commission found two separate *Domestic Like Products:* ''heavy'' and ''light'' iron construction castings.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, its full first five-year review determinations, its expedited second and third five-year review determinations, and its full fourth five-year review determinations, the Commission found two *Domestic Industries:* (1) All domestic producers of ''heavy'' iron construction castings and (2) all domestic producers of ''light'' iron construction castings.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is January 3, 2022. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is February 8, 2022. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 21–5–506, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification

(or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information to be Provided in Response to This Notice of Institution: Please provide the requested information separately for each *Domestic Like Product,* as defined by the Commission in its original and five-year review determinations, and for each of the products identified by Commerce as *Subject Merchandise.* If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2015.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2020, except as noted (report quantity data in pounds and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2020 (report quantity data in pounds and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2020 (report quantity data in pounds and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment

and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* after 2015, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: November 24, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26075 Filed 11–30–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1125–0009]

Agency Information Collection Activities; Proposed Collection Comments Requested; Application for Suspension of Deportation (EOIR–40)

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until January 31, 2022.

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.

If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2500, Falls Church, VA 22041, telephone: (703) 305–0289.

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 Executive Office for Immigration Review, 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:* Renewal, with change, of a currently approved collection.

2. *The Title of the Form/Collection:* Application for Suspension of Deportation.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is EOIR–40; the sponsoring component is Executive Office for Immigration Review, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individual aliens determined to be deportable from the United States. Other: None. Abstract: This information collection is necessary to determine the statutory eligibility of individual aliens, who have been determined to be deportable from the United States, for suspension of their deportation pursuant to former section 244 of the Immigration and Nationality Act and 8 CFR 1240.55 (2011), as well as to provide information relevant to a favorable exercise of discretion.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 133 respondents will complete the form annually with an average of 5 hour and 45 minutes per response.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden associated with this collection is 765.75 hours. It is estimated that respondents will take 1 hour to complete the form.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405B, Washington, DC 20530.

Dated: November 24, 2021.

Melody D. Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–26104 Filed 11–30–21; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

[OMB Number 1125–0016]

Agency Information Collection Activities; Proposed Collection Comments Requested; Unfair Immigration-Related Employment Practices Complaint Form

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** on September 28, 2021, allowing for a 60-day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 days until January 3, 2022.

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.

If you need a copy of the proposed information collection or additional information, please contact Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2500, Falls Church, VA 22041, telephone: (703) 305–0289.

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;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—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:* Renewal, with change, of a currently approved collection.

2. *The Title of the Form/Collection:* Unfair Immigration-Related Employment Practices Complaint Form.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is EOIR–58, Office of the Chief Administrative Hearing Officer (OCAHO), Executive Office for Immigration Review, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals who wish to file a complaint alleging unfair immigration-related employment practices under section 274B of the Immigration and Nationality Act (INA). Other: None. Abstract: Section 274B of the INA prohibits: Employment discrimination on the basis of citizenship status or national origin; retaliation or intimidation by an employer against an individual seeking to exercise his or her right under this section; and ''document abuse'' or over-documentation by the employer, which occurs when the employer asks an applicant or employee for more or different documents than required for employment eligibility verification under INA section 274A, with the intent of discriminating against the employee in violation of section 274B. Individuals who believe that they have suffered discrimination in violation of section 274B may file a charge with the Department of Justice, Immigrant and Employee Rights Section (IER). The IER then has 120 days to determine whether to file a complaint with OCAHO on behalf of the individual charging party. If the IER chooses not to file a complaint, the individual may then file his or her own complaint directly with OCAHO. This information collection may be used by an individual to file his or her own complaint with OCAHO. The Form EOIR–58 will elicit, in a uniform manner, all of the required information for OCAHO to assign a section 274B complaint to an Administrative Law Judge for adjudication.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 26 respondents will complete the form annually with an average of 30 minutes per response.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden associated with this collection is 13 hours. It is estimated that respondents will take 30 minutes to complete the form.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405B, Washington, DC 20530.

Dated: November 24, 2021.

Melody D. Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–26105 Filed 11–30–21; 8:45 am]

BILLING CODE 4410–30–P

OFFICE OF MANAGEMENT AND BUDGET

[OMB Control No. 0348–NEW]

Agency Information Collection Activity: United States Digital Service (USDS), Office of Management and Budget Collection of Formative Research on Agency Service Delivery

AGENCY: United States Digital Service (USDS), Office of Management and Budget.

ACTION: Notice and request for public comment.

SUMMARY: The United States Digital Service (USDS) within the Office of Management and Budget is announcing an opportunity for public comment on a new proposed collection of information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and to allow 60 days for public comment in response to the

notice. This notice solicits comments on a new collection proposed by USDS.

DATES: Consideration will be given to all comments received on or before January 31, 2022.

ADDRESSES: You may submit comments by any of the following methods:

- *Web:* Persons with access to the internet may comment on this notice by going to *www.regulations.gov.* You can search for the document by entering ''Docket Number: XXXX'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: pra@usds.gov.* Please include the information collection title and the OMB control number (0348–NEW) in any correspondence.
- *Fax:* 202–969–0364.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Rachel Sauter, who may be reached at 202–881–7793 or *Rachel.E.Sauter@omb.eop.gov.*

SUPPLEMENTARY INFORMATION:

Purpose

Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes certain agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection for OMB approval. To comply with this requirement, USDS is publishing notice of a proposed generic clearance to conduct a variety of formative data collections with more than 9 respondents. The data collections will inform future research and program support but will not be highly systematic nor intended to be statistically representative.

The mission of USDS is to deliver better government services through technology and design. In support of that mission, USDS engages directly with program applicants and beneficiaries, and other people who use or need to use the government systems and services we are helping to improve, and incorporates their feedback into our work and recommendations. By employing human-centered design practices like user research, USDS prioritizes the user's needs and learns what works as quickly as possible, saving time and money while improving services to the public. USDS deploys small, responsive groups of designers, engineers, product managers, and other specialists to work with and empower civil servants, working with many agencies simultaneously.

Under this generic clearance, USDS would engage in a variety of formative data collections with people who use or need to use government systems and services, such as program participants, practitioners, and service providers. The data collections would occur primarily through *Discovery Sprints,* which are short research projects designed to quickly understand complexities of systems or services in order to identify issues with service delivery, their root causes, and opportunities for improvement. Data collections would also occur during longer projects, as needed. USDS's research serves to provide further understanding of whether people engaging directly with government services are having an effective, efficient, and satisfying experience. USDS anticipates undertaking a variety of new research projects related to social safety net and general welfare programs, economic recovery efforts, healthcare, and more. Many Federal agencies and field offices find a need to learn more about the public's perceptions, experiences and expectations; early warnings of issues with service delivery; or areas where communication, training or changes in operations might improve delivery of products or services.

USDS envisions using a variety of techniques including:

- Pre-study self-identification questionnaires
- Unmoderated comment cards/complaint forms
- Unmoderated qualitative user experience surveys (*e.g.,* post-transaction surveys; opt-out web surveys)
- Unmoderated information architecture evaluative methods (*e.g.,* card sorts; tree tests)
- Unmoderated content evaluative methods
- Long-term behavior and experience studies (*e.g.,* diary study)
- Focus groups
- User research studies (*e.g.,* user interviews; usability tests)
- Program assessment questionnaires.

Overall, this research will be designed to fulfill the following goals: (1) Discover barriers to access that create inequities for users of government systems and services; (2) inform the development of USDS and agency research, (3) discover early warnings of issues with service delivery; and (4) focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between Federal agencies and the public. It will also allow feedback to contribute directly to the improvement of program management.

Following standard OMB requirements, USDS will submit a generic clearance information request for each individual data collection activity. Each request will include the individual instrument(s), a justification specific to the individual information collection, and any supplementary documents. OMB will attempt to review requests within 10 days of submission.

Information collected under this generic clearance will not be used to inform public policy (*e.g.,* who is eligible for or receives benefits and services); rather the findings are meant to inform USDS and internal agency discussions about opportunities to improve service delivery. The information collected in this effort will not be the primary subject of any published agency reports. Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency. Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically representative results, but rather provide insight about the challenges that subsets of stakeholders face. All collections will be voluntary, non-controversial, and do not raise issues of concern to other Federal Agencies.

The information collected in this effort may be made public through methodological appendices or footnotes, reports on instrument development, instrument user guides, descriptions of respondent behavior, and other publications or presentations describing findings of methodological interest. The results of this pre-testing research may be prepared for presentation at professional meetings or publication in professional journals. When necessary, in presenting findings, we will describe the study methods and limitations with regard to generalizability, and results will be labeled as exploratory in nature.

For further information: Rachel Sauter, 202–881–7793, *Rachel.E.Sauter@omb.eop.gov.*

Type of review: New.

Affected public: Key stakeholder groups involved in specific Federal and State-administered programs; state or local government officials; participants in specific Federal and State-administered programs or similar comparison groups; and experts in fields pertaining to specific Federal and State research and programs.

USDS estimates that the total burden of this information collection over a three-year period will be 20,676 hours. USDS estimates that the annual burden of this information collection is as follows, with one response per respondent:

ESTIMATED ANNUAL BURDEN

Type of collection	Number of respondents	Minutes per response	Total hours
Pre-study self-identification questionnaire	10,000	5	833
Unmoderated comment cards/complaint forms	2,500	5	208
Unmoderated qualitative user experience questionnaire	2,500	30	1,250
Unmoderated information architecture evaluative methods	800	60	800
Unmoderated content evaluative methods	800	60	800
Long-term behavior and experience studies	50	300	250
Focus groups	100	60	100
User research studies	2,500	60	2,500
Program assessment questionnaires	300	30	150
Total	19,550	610	6,892

Request for Comments

In compliance with the requirements of Section 3506(c)(2)(A) of the PRA, USDS is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained by writing to *pra@usds.gov.* All requests should be identified by the title of the information collection.

USDS specifically requests comments on (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have 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 respondents, including through the use of automated collection techniques 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. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information. Consideration will be given to comments and suggestions submitted 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 unless it displays a currently valid OMB control number.

Authority: USDS is undertaking the collections at the discretion of the agency, and under the general authority of 44 U.S.C. 3504 and the Information Technology Oversight and Reform (ITOR) fund, as provided by the Consolidated Appropriations Act, 2021, Division E, Title II, 116 H.R. 133.

Mina Hsiang,

Administrator, United States Digital Service.

[FR Doc. 2021–26081 Filed 11–30–21; 8:45 am]

BILLING CODE 3110–05–P

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Polly Penhale, ACA Permit Officer, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; 703–292–8030; *email: ACApermits@nsf.gov.*

SUPPLEMENTARY INFORMATION: On October 27, 2021, the National Science Foundation published a notice in the **Federal Register** of permit applications received. The permits were issued on November 26, 2021, to:

1. Nicole Abbott, Wilderness Travel Permit No. 2021–014
2. Walter Barinaga, Crystal Destination Experiences Permit No. 2021–019

Erika N. Davis,

Program Specialist, Office of Polar Programs.

[FR Doc. 2021–26124 Filed 11–30–21; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on the Medical Uses of Isotopes: Meeting Notice

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of meeting.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) will convene a meeting of the Advisory Committee on the Medical Uses of Isotopes (ACMUI) on December 15, 2021 to discuss the NRC staff's draft Alpha Tau Alpha Dart™ Manual Brachytherapy Licensing Guidance and the ACMUI Subcommittee on Alpha Dart draft report on the proposed draft licensing guidance; the NRC staff's draft additional licensing considerations memo for CivaTech Oncology Inc.'s CivaDerm™ and the ACMUI Subcommittee ACMUI Subcommittee on Civaderm draft report on the proposed draft memo; the NRC staff's draft revision of Regulatory Guide 8.39, ''Release of Patients Administered Radioactive Material and the ACMUI Subcommittee on Regulatory Guide

8.39, ''Release of Patients Administered Radioactive Material'' draft report on the proposed draft revision of the regulatory guide. The meeting agenda is subject to change. The current agenda and any updates will be available on the ACMUI's Meetings and Related Documents web page at *https://www.nrc.gov/reading-rm/doc-collections/acmui/meetings/2021.html* or by emailing Mr. Don Lowman at the contact information below.

DATES: The teleconference meeting will be held on Wednesday, December 15, 2021, from 2:00 p.m. to 4:00 p.m. Eastern Standard Time.

ADDRESSES:

Date	Webinar information (Microsoft Teams)
December 15, 2021	*Link: https://teams.microsoft.com/l/meetup-join/19%3ameeting_ODUxNGM4MjgtNjEzMi00ZjM5LTliZDY tODliYTgyODQ1ZTE1%40thread.v2/0?context=%7b%22Tid%22%3a%22e8d01475-c3b5-436a-a065-5def4c64f52e %22%2c%22Oid%22%3a%2246306069-534e-4ca8-95c1-728fcf94561d%22%7d.* *Call in number (audio only):* +1 301–576–2978 (Silver Spring, MD, U.S.) Phone Conference ID: 694 987 19#.

Public Participation: The meeting will be held as a webinar using Microsoft Teams. Any member of the public who wishes to participate in any open sessions of this meeting should click on the link above to join the meeting. It is recommended that attendees should login ten minutes prior to ensure they can properly connect to the meeting. Members of the public should also monitor the NRC's Public Meeting Schedule at *https://www.nrc.gov/pmns/mtg* for any meeting updates. If there are any questions regarding the meeting, persons should contact Mr. Lowman using the information below.

FOR FURTHER INFORMATION CONTACT: Mr. Don Lowman, email: *Donald.Lowman@nrc.gov,* telephone: 301–415–5452.

SUPPLEMENTARY INFORMATION:

Conduct of the Meeting

Darlene F. Metter, M.D. will chair the meeting. Dr. Metter will conduct the meeting in a manner that will facilitate the orderly conduct of business. The following procedures apply to public participation in the meeting:

1. Persons who wish to provide a written statement should submit an electronic copy to Mr. Lowman using the contact information listed above. All submittals must be received by the close of business on December 10, 2021, three business days before the meeting, and must pertain to the topics on the agenda for the meeting.

2. Questions and comments from members of the public will be permitted during the meeting, at the discretion of the ACMUI Chairman.

3. The draft transcript and meeting summary will be available on ACMUI's website *https://www.nrc.gov/reading-rm/doc-collections/acmui/meetings/2021.html* on or about January 21, 2022.

4. Persons who require special services, such as those for the hearing impaired, should notify Mr. Lowman of their planned participation.

This meeting will be held in accordance with the Atomic Energy Act of 1954, as amended (primarily Section 161a); the Federal Advisory Committee Act (5 U.S.C. App); and the Commission's regulations in title 10 of the *Code of Federal Regulations,* Part 7.

Dated at Rockville, Maryland, this 24th day of November, 2021.

For the U.S. Nuclear Regulatory Commission.

Russell E. Chazell,

Federal Advisory Committee Management Officer.

[FR Doc. 2021–26111 Filed 11–30–21; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–7513; NRC–2021–0193]

Kairos Power, LLC

AGENCY: Nuclear Regulatory Commission.

ACTION: Construction permit application; acceptance for docketing.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) staff accepts and dockets an application for a construction permit for the Hermes test reactor to be built in Oak Ridge, Tennessee.

DATES: This action becomes effective on November 29, 2021.

ADDRESSES: Please refer to Docket No. 50–7513 or Docket ID NRC–2021–0193 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0193. 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 individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *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 1–800–397–209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *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.
- *NRC's Public Website:* The construction permit application is available under the NRC's Hermes Construction Permit Application public website at *https://www.nrc.gov/reactors/non-power/kairos-hermes.html.*

FOR FURTHER INFORMATION CONTACT: Benjamin Beasley, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2062; email: *Benjamin.Beasley@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Discussion

On September 29, 2021, Kairos Power LLC (Kairos) filed, pursuant to Part 50 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities,'' the first part of an application (ADAMS Package Accession No. ML21272A375) for a construction permit for the Hermes test reactor (a ''testing facility'' as defined in 10 CFR 50.2), which would be located in Oak

Ridge, Tennessee. Hermes would be a fluoride-salt cooled, high-temperature reactor that uses solid tri-structural isotropic fuel in pebble form. A notice of receipt and availability of this portion of the application was published in the **Federal Register** on October 29, 2021 (86 FR 60077).

The first part of the Kairos construction permit application consisted of the following information:

- The general information required by 10 CFR 50.33.
- The Preliminary Safety Analysis Report required by 10 CFR 50.34(a).
- Exemption requests to support issuance of a construction permit.
- A request to invoice the filing fee required by 10 CFR 50.30(e) and 10 CFR 170.21.

On October 31, 2021, Kairos filed the second part of its application (ADAMS Package Accession No. ML21306A131) for a construction permit, which consisted of the Environmental Report required by 10 CFR 50.30(f). Submission of the Environmental Report completed the application for a construction permit.

The NRC staff determined that Kairos submitted a two-part application in accordance with 10 CFR 2.101(a)(5) and 10 CFR part 50, and that the application is acceptable for docketing under Docket No. 50–7513. The NRC staff provided Kairos notice of the acceptance and docketing determinations by letter dated November 29, 2021 (ADAMS Accession No. ML21319A354).

The NRC staff will perform a detailed technical review of the construction permit application and document its safety findings in a safety evaluation report. Also, in accordance with 10 CFR part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' the NRC staff will prepare an environmental impact statement for the proposed action.

Docketing of the application does not preclude the NRC from requesting additional information from the applicant as the review proceeds, nor does it predict whether the Commission will grant or deny the application. The construction permit application will be referred to the Advisory Committee on Reactor Safeguards for review and report consistent with 10 CFR 50.58, ''Hearings and report of the Advisory Committee on Reactor Safeguards.'' If, after holding an evidentiary hearing, the Commission finds that the construction permit application meets the applicable standards of the Atomic Energy Act and the Commission's regulations, and that any required notifications to other agencies and bodies have been made, the Commission will issue a construction permit, in the form and containing conditions and limitations that the Commission finds appropriate and necessary.

The Commission will announce, in a future **Federal Register** notice, the opportunity to petition for leave to intervene in a proceeding on the construction permit application.

Dated: November 24, 2021.

For the Nuclear Regulatory Commission.

Benjamin G. Beasley,

Senior Project Manager, Advanced Reactor Licensing Branch, Division of Advanced Reactors and Non-Power Production and Utilization Facilities, Office of Nuclear Reactor Regulation.

[FR Doc. 2021–26119 Filed 11–30–21; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Privacy Act of 1974; System of Records

AGENCY: Office of Personnel Management.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Office of Personnel Management (''OPM''), proposes to modify an OPM government-wide system of records, OPM/GOVT–5, Recruiting, Examining, and Placement Records, primarily to make clear that records collected and generated in the process of onboarding Federal employees but prior to their entry-on-duty date are included in this system of records. In addition, OPM proposes additional administrative changes to reflect the current OPM organization.

DATES: Please submit comments on or before January 3, 2022. This modified system of records is effective upon publication.

ADDRESSES: You may submit written comments through the Federal Rulemaking Portal: *http://www.regulations.gov.* All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Dianna Saxman, Associate Director, Human Resources Solutions, Office of Personnel Management at *Dianna.Saxman@opm.gov.* For privacy questions, please contact: Kellie Cosgrove Riley, Chief Privacy Officer, Office of Personnel Management at 202–360–6065 or *privacy@opm.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Office of Personnel Management (''OPM''), proposes to make certain modifications to the OPM/GOVT–5 Recruiting, Examining, and Placement Records system of records pending a comprehensive review and update at a later date. The records in this system of records include all records submitted by an applicant for Federal employment or generated in connection with the application and the onboarding process.

OPM proposes to modify this system of records to add an additional category of records: ''m. Records collected or generated in the process of onboarding an applicant selected to fill a vacant position, to include, for example, vaccination records, proof of citizenship, and agency-specific documentation necessary for the onboarding process.'' This category of records is being added to clarify that records collected or generated in the onboarding process, after applicants have been selected but before they are Federal employees, are included in this system of records. Once an individual completes the onboarding process and is a Federal employee, certain records collected and generated in the onboarding process may be included in other systems of records. For example, proof of vaccination required by Executive Order 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, may later be included in the OPM/GOVT–10 Employee Medical File Systems Records system of records; and personnel forms completed in the onboarding process may later be included in the OPM/GOVT–1 General Personnel Records system of records.

In addition to modifying this system of records to add an additional category of records, OPM also proposes to modify the description of the system location and identification of the system manager. Both modifications are being made to reflect organizational changes at OPM since the last publication of the OPM/GOVT–5 system of records notice.

OPM has provided a report of this modified system of records to the Committee on Oversight and

Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Office of Management and Budget (OMB), pursuant to 5 U.S.C. 552a(r) and OMB Circular A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' dated December 23, 2016. This modified system of records will be included in OPM's inventory of record systems.

Alexys Stanley,

Regulatory Affairs Analyst.

SYSTEM NAME AND NUMBER:

Recruiting, Examining, and Placement Records, OPM/GOVT–5.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Human Resources Solutions, Office of Personnel Management, 1900 E Street NW, Washington, DC 20415, has government-wide responsibility for the records in this system of records. Individual agencies have responsibility for the records pertaining to their applicants.

SYSTEM MANAGER(S):

Associate Director, Human Resources Solutions, U.S. Office of Personnel Management, 1900 E Street NW, Room 6H31, Washington, DC 20415.

CATEGORIES OF RECORDS IN THE SYSTEM:

* * * * *

m. Records collected or generated in the process of onboarding an applicant selected to fill a vacant position, to include, for example, vaccination records, proof of citizenship, and agency-specific documentation necessary for the onboarding process.

* * * * *

HISTORY:

61 FR 36919 (July 15, 1996); 65 FR 24731 (April 27, 2000); 71 FR 35341 (June 19, 2006); 79 FR 16834 (March 26, 2014); 80 FR 74815 (November 30, 2015).

[FR Doc. 2021–26086 Filed 11–30–21; 8:45 am]

BILLING CODE 6325–43–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34426]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

November 26, 2021.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of November 2021. A copy of each application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the relevant applicant with a copy of the request by email, if an email address is listed for the relevant applicant below, or personally or by mail, if a physical address is listed for the relevant applicant below. Hearing requests should be received by the SEC by 5:30 p.m. on December 21, 2021, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to Rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary at *Secretarys-Office@sec.gov*.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov*.

FOR FURTHER INFORMATION CONTACT: Shawn Davis, Assistant Director, at (202) 551–6413 or Chief Counsel's Office at (202) 551–6821; SEC, Division of Investment Management, Chief Counsel's Office, 100 F Street NE, Washington, DC 20549–8010.

First Eagle Senior Loan Fund [File No. 811–22874]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On July 16, 2021, and September 17, 2021, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of approximately $872,000 incurred in connection with the liquidation were paid by the applicant. Applicant also has retained $7,836,833 for the purpose of paying outstanding payments to service providers.

Filing Dates: The application was filed on July 21, 2021, and amended on November 15, 2021.

Applicant's Address: andrew.morris@feim.com.

Gabelli Go Anywhere Trust [File No. 811–23035]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On October 28, 2021, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of $21,170 incurred in connection with the liquidation were paid by the applicant. Applicant also has retained $221,497 for the purpose of paying outstanding expenses.

Filing Date: The application was filed on November 10, 2021.

Applicant's Address: Thomas.DeCapo@skadden.com.

Sound Point Floating Rate 2023 Target Term Fund [File No. 811–23119]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Dates: The application was filed on August 3, 2021, and amended on October 29, 2021.

Applicant's Address: wruberti@soundpointcap.com, mana.behbin@morganlewis.com.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26137 Filed 11–30–21; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 11598]

Designation of Sanaullah Ghafari, Sultan Aziz Azam, and Maulawi Rajab as Specially Designated Global Terrorists

Acting under the authority of and in accordance with section 1(a)(ii)(B) of E.O. 13224 of September 23, 2001, as amended by E.O. 13268 of July 2, 2002, E.O. 13284 of January 23, 2003, and E.O. 13886 of September 9, 2019, I hereby

determine that (a) the person known as Sanaullah Ghafari, also known as Shahab al-Muhajir; (b) the person known as Sultan Aziz Azam, also known as Sultan Aziz; and (c) the person known as Maulawi Rajab, also known as Maulawi Rajab Salahudin, are leaders of ISIL-Khorasan, a group whose property and interests in property are concurrently blocked pursuant to a determination by the Secretary of State pursuant to E.O. 13224.

Consistent with the determination in section 10 of E.O. 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Authority: E.O. 13224.

Dated: November 12, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26098 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 11590]

In the Matter of the Designation of the Revolutionary Armed Forces of Colombia (FARC) (and Other Aliases) as a Foreign Terrorist Organization

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the designation of the Revolutionary Armed Forces of Colombia (FARC) (and other aliases) as a Foreign Terrorist Organization have changed in such a manner as to warrant revocation of the designation.

Therefore, I hereby determine that the designation of the Revolutionary Armed Forces of Colombia (FARC) (and other aliases) as a Foreign Terrorist Organization, pursuant to section 219 of the Immigration and Nationality Act, as amended (hereinafter ''INA'') (8 U.S.C. 1189), shall be revoked.

This determination shall be published in the **Federal Register**.

Authority: 8 U.S.C. 1189.

Dated: November 18, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26083 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice 11595]

Designation of Revolutionary Armed Forces of Colombia People's Army, Nestor Gregorio Vera Fernandez, Miguel Santanilla Botache, and Euclides Espana Caicedo as Specially Designated Global Terrorists

Acting under the authority of and in accordance with section 1(a)(ii)(A) of E.O. 13224 of September 23, 2001, as amended by E.O. 13268 of July 2, 2002, E.O. 13284 of January 23, 2003, and E.O. 13886 of September 9, 2019, I hereby determine that the person known as Revolutionary Armed Forces of Colombia—People's Army, also known as FARC—EP, also known as Fuerzas Armadas Revolucionarias de Colombia—Ejercito del Pueblo, also known as FARC dissidents FARC—EP, also known as Revolutionary Armed Forces of Colombia dissidents FARC—EP, also known as FARC—D FARC—EP, also known as Grupo Armado Organizado Residual FARC—EP, also known as GAO-R FARC—EP, also known as Residual Organized Armed Group FARC—EP, is a foreign person that has committed, attempted to commit, poses a significant risk of committing, or has participated in training to commit acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Acting under the authority of and in accordance with section 1(a)(ii)(B) of E.O. 13224 of September 23, 2001, as amended by E.O. 13268 of July 2, 2002, E.O. 13284 of January 23, 2003, and E.O. 13886 of September 9, 2019, I hereby determine that the persons known as Nestor Gregorio Vera Fernandez, also known as Ivan Mordisco; Miguel Santanilla Botache, also known as Gentil Duarte, also known as Miguel Botache Santillana; and Euclides Espana Caicedo, also known as Jhon Fredey Henao Munoz, also known as Jhonier, also known as Jonier, also known as Jonnier, are leaders of Revolutionary Armed Forces of Colombia—People's Army, a group whose property and interests in property are concurrently blocked pursuant to a determination by the Secretary of State pursuant to E.O. 13224.

Consistent with the determination in section 10 of E.O. 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Authority: E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786.

Dated: November 18, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26123 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 11592]

In the Matter of the Designation of Segunda Marquetalia (and Other Aliases) as a Foreign Terrorist Organization

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter ''INA'') (8 U.S.C. 1189), exist with respect to Segunda Marquetalia, also known as New Marquetalia, also known as Second Marquetalia, also known as La Nueva Marquetalia, also known as FARC dissidents Segunda Marquetalia, also known as Revolutionary Armed Forces of Colombia Dissidents Segunda Marquetalia, also known as FARC–D Segunda Marquetalia, also known as Grupo Armado Organizado Residual Segunda Marquetalia, also known as GAO–R Segunda Marquetalia, also known as Residual Organized Armed Group Segunda Marquetalia, also known as Armed Organized Residual Group Segunda Marquetalia.

Therefore, I hereby designate the aforementioned organization and its aliases as a Foreign Terrorist Organization pursuant to section 219 of the INA.

This determination shall be published in the **Federal Register**.

Authority: 8 U.S.C. 1189.

Dated: November 18, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26088 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 11593]

Designation of Segunda Marquetalia, Luciano Marin Arango, Hernan Dario Velasquez Saldarriaga, and Henry Castellanos Garzon as Specially Designated Global Terrorists

Acting under the authority of and in accordance with section 1(a)(ii)(A) of E.O. 13224 of September 23, 2001, as amended by E.O. 13268 of July 2, 2002, E.O. 13284 of January 23, 2003, and E.O. 13886 of September 9, 2019, I hereby determine that the person known as Segunda Marquetalia, also known as New Marquetalia, also known as Second Marquetalia, also known as La Nueva Marquetalia, also known as FARC dissidents Segunda Marquetalia, also known as Revolutionary Armed Forces of Colombia Dissidents Segunda Marquetalia, also known as FARC–D Segunda Marquetalia, also known as Grupo Armado Organizado Residual Segunda Marquetalia, also known as GAO–R Segunda Marquetalia, also known as Residual Organized Armed Group Segunda Marquetalia, also known as Armed Organized Residual Group Segunda Marquetalia, is a foreign person that has committed, attempted to commit, poses a significant risk of committing, or has participated in training to commit acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Acting under the authority of and in accordance with section 1(a)(ii)(B) of E.O. 13224 of September 23, 2001, as amended by E.O. 13268 of July 2, 2002, E.O. 13284 of January 23, 2003, and E.O. 13886 of September 9, 2019, I hereby determine that the persons known as Luciano Marin Arango, also known as Ivan Marquez, also known as Ivan Marques; Hernan Dario Velasquez Saldarriaga, also known as Hernan Dario Velasquez, also known as El Paisa, also known as Oscar, also known as Carlos Alberto Garcia, also known as Paisa, also known as Hermides Buitrago, also known as Oscar Montero, also known as Antonio Rodríguez Sunce; and Henry Castellanos Garzon, also known as Romana, also known as Edison Romana, are leaders of Segunda Marquetalia, a group whose property and interests in property are concurrently blocked pursuant to a determination by the Secretary of State pursuant to E.O. 13224.

Consistent with the determination in section 10 of E.O. 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Authority: E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786.

Dated: November 18, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26089 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 11597]

In the Matter of the Amendment of the Designation of ISIL Khorasan (and Other Aliases) as a Specially Designated Global Terrorist

Based upon a review of the administrative record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I have concluded that there is a sufficient factual basis to find that ISIL Khorasan, uses the additional alias The Islamic State of Iraq and ash-Sham—Khorasan Province, also known as The Islamic State of Iraq and Syria—Khorasan, Islamic State of Iraq and Levant in Khorasan Province, also known as Islamic State Khurasan, also known as ISISK, also known as ISIS–K, also known as IS-Khorasan.

Therefore, pursuant to Section 1(b) of E.O. 13224, I hereby amend the designation of ISIL Khorasan as a Specially Designated Global Terrorist to include the following new aliases: The Islamic State of Iraq and ash-Sham—Khorasan Province, The Islamic State of Iraq and Syria—Khorasan, Islamic State of Iraq and Levant in Khorasan Province, Islamic State Khurasan, ISISK, ISIS–K, and IS-Khorasan.

This notice shall be published in the **Federal Register**.

Dated: August 9, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26096 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 11594]

In the Matter of the Designation of Revolutionary Armed Forces of Colombia—People's Army (and Other Aliases) as a Foreign Terrorist Organization

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter ''INA'') (8 U.S.C. 1189), exist with respect to Revolutionary Armed Forces of Colombia—People's Army, also known as FARC–EP, also known as Fuerzas Armadas Revolucionarias de Colombia—Ejercito del Pueblo, also known as FARC dissidents FARC–EP, also known as Revolutionary Armed Forces of Colombia dissidents FARC–EP, also known as FARC–D FARC–EP, also known as Grupo Armado Organizado Residual FARC–EP, also known as GAO–R FARC–EP, also known as Residual Organized Armed Group FARC–EP.

Therefore, I hereby designate the aforementioned organization and its aliases as a Foreign Terrorist Organization pursuant to section 219 of the INA.

This determination shall be published in the **Federal Register**.

Authority: 8 U.S.C. 1189.

Dated: November 18, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26091 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 11596]

Review and Amendment of the Designation of ISIL Khorasan (and Other Aliases) as a Foreign Terrorist Organization

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C))

(''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the designation of the aforementioned organization (and other aliases) as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation. I also conclude that there is a sufficient factual basis to find that the following are additional aliases of the aforementioned organization (and other aliases): The Islamic State of Iraq and ash-Sham—Khorasan Province, The Islamic State of Iraq and Syria—Khorasan, Islamic State of Iraq and Levant in Khorasan Province, Islamic State Khurasan, ISISK, ISIS–K, and IS-Khorasan.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained. Additionally, pursuant to Section 219(b) of the INA, as amended (8 U.S.C. 1189(b)), I hereby amend the designation of the aforementioned organization (and other aliases) as a Foreign Terrorist Organization to include the following new aliases: The Islamic State of Iraq and ash-Sham—Khorasan Province, The Islamic State of Iraq and Syria—Khorasan, Islamic State of Iraq and Levant in Khorasan Province, Islamic State Khurasan, ISISK, ISIS–K, and IS-Khorasan.

This determination shall be published in the **Federal Register**.

Dated: August 9, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26095 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 11591]

Revocation of the Designation of the Revolutionary Armed Forces of Colombia (FARC) (and Other Aliases) as a Specially Designated Global Terrorist

I hereby revoke the designation of the following person as a Specially Designated Global Terrorist, pursuant to section 1(a)(ii) of E.O. 13224: Revolutionary Armed Forces of Colombia (FARC) (and other aliases).

This determination shall be published in the **Federal Register**.

Authority: E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786.

Dated: November 18, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26087 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Delegation of Authority No. 520]

Delegation by the Secretary of State to the Assistant Secretary of State for Population, Refugees, and Migration; Facilitating USCIS VTC Interviews of Refugee Applicants

By virtue of the authority vested in the Secretary of State by the laws of the United States, including 22 U.S.C. 2651a, pursuant to authority delegated by the Secretary of the Department of Homeland Security (DHS) on August 6, 2021 (DHS Delegation Number 00117), and subject to the DHS Secretary's oversight, direction, and guidance, I hereby delegate to the assistant secretary for Bureau of Population, Refugees, and Migration, to the extent authorized by law, the authority to designate Department employees as immigration officers to facilitate U.S. Citizenship and Immigration Services (USCIS) video teleconference interviews of overseas refugee applicants, pursuant to section 103(a)(6) of the Immigration and Nationality Act (8 U.S.C. 1103(a)(6)) and 8 CFR 2.1.

Nothing in this delegation shall be construed as superseding or circumventing any authorities delegated within DHS, or as superseding or circumventing the restriction in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, title I, Public Law No 105–119 (8 U.S.C. 1103 note) with respect to the acceptance of fingerprints.

The authority delegated herein may be exercised by the Secretary, Deputy Secretary, Deputy Secretary for Management and Resources, and the Under Secretary for Civilian Security, Democracy, and Human Rights.

This delegation of authority shall be published in the **Federal Register**.

Dated: November 15, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26100 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–33–P

DEPARTMENT OF STATE

[Public Notice: 11599]

Review of the Designations as Foreign Terrorist Organizations of Asbat al-Ansar (and Other Aliases); Harkat al-Mujahideen (and Other Aliases); The Popular Front for the Liberation of Palestine (and Other Aliases); The Popular Front for the Liberation of Palestine—General Command (and Other Aliases); Kata'ib Hizballah (and Other Aliases)

Based upon a review of the Administrative Records assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the bases for the designations of the aforementioned organizations as Foreign Terrorist Organizations have not changed in such a manner as to warrant revocation of the designations and that the national security of the United States does not warrant a revocation of the designations.

Therefore, I hereby determine that the designations of the aforementioned organizations as Foreign Terrorist Organizations, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: August 25, 2021.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2021–26099 Filed 11–30–21; 8:45 am]

BILLING CODE 4710–AD–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Termination of Action in the Section 301 Digital Services Tax Investigation of Turkey and Further Monitoring

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice.

SUMMARY: On October 8, 2021, Turkey joined the United States and 134 other jurisdictions participating in the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting in reaching a political agreement on a two-pillar solution to address tax challenges arising from the digitalization of the world economy. As part of Pillar 1, all parties agreed to remove existing digital services taxes and other relevant similar measures, and to coordinate the

withdrawal of these taxes. On November 22, 2021, the U.S. Department of the Treasury (Treasury) issued a joint statement with Turkey regarding a transitional approach to Turkey's Digital Service Tax (DST) prior to entry into force of Pillar 1. The joint statement reflects a political agreement that DST liabilities accrued during the transitional period will be creditable in defined circumstances against future taxes due under Pillar 1. Based on the commitment of Turkey to remove its DST pursuant to Pillar 1 and on Turkey's political agreement to the transitional approach prior to Pillar 1's entry into force, the U.S. Trade Representative has determined to terminate the section 301 action taken in the investigation of Turkey's DST. In coordination with Treasury, USTR will monitor implementation of the removal of Turkey's DST as provided for under Pillar 1 and the transitional approach as provided in the joint statement.

DATES: The additional duties on products of Turkey are terminated as of November 28, 2021.

FOR FURTHER INFORMATION CONTACT: For questions concerning this notice, please contact Benjamin Allen, Thomas Au, Patrick Childress, or Kate Hadley, Assistant General Counsels at (202) 395–9439, (202) 395–0380, (202) 395–9531, and (202) 395–3911, respectively, Robert Tanner, Director, Services and Investment at (202) 395–6125, or Michael Rogers, Director for Europe at (202) 395–2684.

SUPPLEMENTARY INFORMATION:

I. Proceedings in the Investigation

For background on the proceedings in the section 301 investigation of Turkey's DST, please see prior notices including: 85 FR 34709 (June 5, 2020); 86 FR 2480 (January 12, 2021); 86 FR 16822 (March 31, 2021); and 86 FR 30353 (June 7, 2021).

On June 2, 2021, the U.S. Trade Representative determined to take action in the form of additional duties on certain products of Turkey and to immediately suspend those additional duties for up to 180 days. 86 FR 30353 (June 7, 2021).

II. OECD/G20 Negotiations

One-hundred forty-one jurisdictions are engaged in international tax negotiations under the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting. On October 8, 2021, Turkey joined the United States and 134 other participants in reaching political agreement on a Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. OECD/G20 Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Oct. 8, 2021) at *https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf* (the OECD/G20 Two-Pillar Solution). The statement provides that Pillar 1 will be implemented through a multilateral convention. With respect to DSTs, the statement provides:

> The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The modality for the removal of existing Digital Services Taxes and other relevant similar measures will be appropriately coordinated.

III. Joint Statement

On November 22, 2021, the United States and Turkey issued a joint statement that describes a political compromise reached on a transitional approach to existing Unilateral Measures while implementing Pillar 1. *Joint Statement from the United States and Turkey Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 Is in Effect,* U.S. Dep't of the Treas. (Nov. 22, 2021) at *https://home.treasury.gov/news/press-releases/jy0500.* Under the transitional approach in the joint statement, DST liability that accrues during the transitional period prior to implementation of Pillar 1 will be creditable in defined circumstances against future taxes due under Pillar 1. *See id.* (citing *Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect,* U.S. Dep't of the Treas. (Oct. 21, 2021) at *https://home.treasury.gov/news/press-releases/jy0419*). In return, the United States commits to terminating the existing section 301 trade action on goods of Turkey, and not to impose further trade actions against Turkey with respect to its existing DST until the earlier of the date the Pillar 1 multilateral convention comes into force or December 31, 2023. *Id.*

IV. Termination of Action

Section 307 of the Trade Act of 1974, as amended (Trade Act) (19 U.S.C. 2417), provides that ''[t]he Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section [301] of this title if . . . such action is being taken under section [301(b)] of this title and is no longer appropriate.'' The U.S. Trade Representative has found that that the political agreement of Turkey to the OECD/G20 Two-Pillar Solution, which provides for the removal of DSTs upon entry into force of Pillar 1, and the transitional approach in the joint statement provide a satisfactory resolution of the matters covered by the section 301 investigation of Turkey's DST. Accordingly, pursuant to section 307 of the Trade Act, the U.S. Trade Representative has determined that the suspended trade action in this investigation is no longer appropriate and that the action should be terminated.

The U.S. Trade Representative's determination was made in consultation with Treasury and considers the advice of the interagency Section 301 Committee, consultations with representatives of the domestic industry concerned, and public comments and advisory committee advice received during the investigation.

In order to implement the termination of the section 301 action in the investigation of Turkey's DST, subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) is modified by the Annex to this notice.

V. Ongoing Monitoring

Section 306(a) of the Trade Act (19 U.S.C. 2416(a)) provides that ''[t]he Trade Representative shall monitor the implementation of each measure undertaken, or agreement that is entered into, by a foreign country to provide a satisfactory resolution of a matter subject to investigation. . . .'' Section 306(b) (19 U.S.C. 2416(b)) provides that ''[i]f, on the basis of the monitoring carried out under subsection (a), the Trade Representative considers that a foreign country is not satisfactorily implementing a measure or agreement referred to in subsection (a), the Trade Representative shall determine what further action the Trade Representative shall take under section [301(a)].'' Pursuant to section 306(a) of the Trade Act, the U.S. Trade Representative, in coordination with Treasury, will monitor the implementation of the

political agreement on an OECD/G20 Two-Pillar Solution as pertaining to DSTs, the commitments under the joint statement, and associated measures. Pursuant to section 306(b) of the Trade Act, if the U.S. Trade Representative, in consultation with Treasury, subsequently considers that Turkey is not satisfactorily implementing these political agreements or associated measures, then the U.S. Trade Representative will consider further action under section 301.

Annex

The U.S. Trade Representative has decided to terminate the additional duties under heading 9903.90.06 of the HTSUS on articles the product of Turkey, as provided for in U.S. notes 27(a) and 27(b) to subchapter III of chapter 99 of the HTSUS. The termination of these additional duties is effective on November 28, 2021.

In accordance with this determination, the U.S. Trade Representative has determined to modify the HTSUS by: (1) Deleting U.S. notes 27(a) and 27(b) to subchapter III of chapter 99 of the HTSUS; and (2) by deleting HTSUS heading 9903.90.06. The modifications of the HTSUS are effective on November 28, 2021. Any provisions of previous notices issued in this investigation that are inconsistent with this notice are superseded to the extent of such inconsistency.

Greta Peisch,

General Counsel, Office of the United States Trade Representative.

[FR Doc. 2021–26116 Filed 11–30–21; 8:45 am]

BILLING CODE 3290–F2–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2021–0021]

Infrastructure and Investment Jobs Act Request for Information

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice; request for information (RFI).

SUMMARY: FHWA seeks public input on the implementation of the Infrastructure and Investment Jobs Act.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit all comments by only one of the following ways:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.
- *Instructions:* You must include the agency name and the docket number, FHWA–2021–0021, at the beginning of your comments. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.
- *Privacy Act:* Except as provided below, all comments received into the docket will be searchable by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or at *http://www.regulations.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: For questions about this RFI, please contact Dan Stillson, FHWA Office of Policy, 202–366–9202, or via email at *Dan.Stillson@dot.gov* or email *FHWA.BIL@dot.gov.* Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

A copy of this Notice, all comments received on this Notice, and all background material may be viewed online at *https://www.regulations.gov* using the docket number listed above. Electronic retrieval help and guidelines are also available at *https://www.regulations.gov.* An electronic copy of this document may be downloaded from the Office of the Federal Register's website at: *www.FederalRegister.gov* and the Government Publishing Office's database at: *www.GovInfo.gov.*

Background

On November 15, 2021, President Joseph R. Biden, Jr. signed the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act, Public Law 117–58 (Nov. 15, 2021). The BIL is a once-in-a-generation investment in infrastructure, which will grow the economy, enhance U.S. competitiveness in the world, create good jobs, and make the U.S. economy more sustainable, resilient, and equitable. It includes the largest dedicated bridge investment since the construction of the Interstate System, and the largest investment in electric vehicle charging infrastructure in history. Specific to FHWA, the BIL provides more than $350 billion over 5 fiscal years (FY 22–26) for surface transportation programs. This represents, on an average annual basis, nearly 29 percent more Federal-aid funding for highway programs and activities than under prior law, and it also establishes more than a dozen new highway programs.

The BIL focuses on investing in safety, bridges, equity and reconnecting communities, addressing climate change, and promoting resilience. In addition, there are several new programs offering new opportunities for local governments and other non-traditional entities to receive highway funding. More information on the BIL can be located at *www.whitehouse.gov* or at *www.congress.gov/bill/117th-congress/house-bill/3684.*

In order to make the most of the BIL's historic investment and opportunities, FHWA is seeking your input on the FHWA-related sections of the BIL. Most of those provisions are contained in Title I of Division A and in Title VIII of Division J. Through this RFI, FHWA is soliciting information and suggestions from the public and a broad array of stakeholders across public and private sectors on how best to facilitate FHWA's implementation of the BIL.

Request for Information

This RFI is intended to solicit information on: (i) Potential opportunities and challenges for implementing new BIL programs; (ii) potential opportunities and challenges for implementing existing programs modified by the BIL; (iii) solutions or suggestions as to how FHWA might implement the BIL; (iv) necessity for additional guidance, FAQs, or program changes; and (v) areas requiring new and continued research.

Content of Comments

The Department will review all comments submitted to the docket associated with this Notice, FHWA–2021–0021. To maximize useful comments, FHWA encourages commenters to provide the following information:

1. Specific Reference. A specific reference to the section number of the BIL that the comment discusses (and the associated section of the U.S. Code that

the bill amends, if applicable). A specific reference will assist FHWA in identifying the requirements and relevant documentation that may describe the legislative history of the requirements.

2. Detailed description of the action you think FHWA should take in response to the opportunity or challenge identified.

3. Detailed information that you think FHWA should consider while implementing the provision(s).

Scope of Comments

Although FHWA is seeking comments on the new programs and other changes in the BIL, FHWA is particularly interested in any comments on how best it can implement highway formula programs continued by the BIL. For example, the BIL continues the Surface Transportation Block Program, with some additional eligibilities, under 23 U.S.C. 133. The FHWA is interested not only in comments on the new eligibilities, but also if there are additional opportunities to make improvements or changes to the existing program as FHWA implements the BIL. The same goes for other existing programs such as the National Highway Performance Program, the Highway Safety Improvement Program, the National Highway Freight Program, and the Congestion Mitigation and Air Quality Improvement Program.

Although FHWA is seeking public input on the implementation of the BIL, it will issue guidance and begin other activities related to implementation while this docket remains open.

Under this Notice, FHWA is not soliciting petitions for rulemaking or comments on any ongoing rulemaking action.

Stephanie Pollack,

Deputy Administrator, Federal Highway Administration.

[FR Doc. 2021–26145 Filed 11–30–21; 8:45 am]

BILLING CODE 4910–22–P

FEDERAL REGISTER

Vol. 86 Wednesday,

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Part II

Securities and Exchange Commission

17 CFR Part 240

Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–93614; File No. S7–19–21]

RIN 3235–AM76

Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is proposing amendments to the electronic recordkeeping requirements for broker-dealers, security-based swap dealers (''SBSDs''), and major security-based swap participants (''MSBSPs'').

DATES: Comments should be received on or before January 3, 2022.

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*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–19–21 on the subject line.

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 S7–19–21. 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 (*https://www.sec.gov/rules/proposed.shtml*). Comments are also 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 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 publicly available.

We or the staff may add studies, memoranda, or other substantive items 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: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Associate Director, at (202) 551–5521; Randall W. Roy, Deputy Associate Director, at (202) 551–5522; Raymond A. Lombardo, Assistant Director, at (202) 551–5755; Joseph I. Levinson, Senior Special Counsel, at (202) 551–5598; or Timothy C. Fox, Branch Chief, at (202) 551–5687, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to:

Commission reference	CFR citation
Rule 17a–4	17 CFR 240.17a–4.
Rule 18a–6	17 CFR 240.18a–6.

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I. Background

A. Introduction

Securities Exchange Act of 1934 (''Exchange Act'') Rule 17a–4 (''Rule 17a–4'') [1] sets forth record preservation requirements applicable to broker-dealers, including broker-dealers also registered as SBSDs or MSBSPs.[2] Exchange Act Rule 18a–6 (''Rule 18a–6'') [3] sets forth record preservation requirements for SBSDs and MSBSPs that are not also registered as broker-dealers (''SBS Entities'').[4] The record preservation requirements of Rule 18a–6 were modeled largely on Rule 17a–4.[5] Pursuant to Sections 15F and 17(a) of the Exchange Act, the Commission is proposing amendments to Rules 17a–4 and 18a–6.[6] Specifically, the proposal

[1] *See* 17 CFR 240.17a–4.

[2] As used in this release, the term ''broker-dealer'' includes broker-dealers that are also registered as SBSDs or MSBSPs.

[3] *See* 17 CFR 240.18a–6.

[4] As used in this release, the term ''SBS Entity'' refers to SBSDs and MSBSPs that are not also registered as broker-dealers.

[5] *See Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers,* Exchange Act Release No. 87005 (Sept. 19, 2019), 84 FR 68550 (Dec. 16, 2019) (''SBSD/MSBSP Recordkeeping Adopting Release'').

[6] Section 17(a) of the Exchange Act, in pertinent part, provides the Commission with authority to issue rules requiring broker-dealers to make and keep for prescribed periods such records as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. *See* 15 U.S.C. 78q(a). Section 15F(f)(1)(B)(i) of the Exchange Act provides

would amend the electronic record preservation and prompt production of records requirements of Rules 17a–4 and 18a–6.[7]

As discussed in greater detail in the sections below, the amendments to Rule 17a–4 would provide an audit-trail alternative to the current requirement that electronic records be preserved exclusively in a non-rewriteable, non-erasable format. The audit-trail alternative would require that firms preserve electronic records in a manner that permits the recreation of an original record if it is altered, over-written, or erased. Rule 18a–6 currently does not have a requirement to preserve electronic records: (1) In a manner that permits the recreation of an original record if it is altered, over-written or erased; or (2) exclusively in a non-rewriteable, non-erasable format. The amendments to Rule 18a–6 would provide that an electronic recordkeeping system of an SBS Entity without a prudential regulator (''nonbank SBS Entity'') must meet one of these two requirements. However, this proposed amendment would apply only to newly created records, and not to those created prior to the compliance date of proposed amendments, if adopted by the Commission.[8]

Rule 17a–4 currently requires a broker-dealer to engage a third party who has access to and the ability to download information from the broker-dealer's electronic storage media to any acceptable medium under the rule. The third party must execute undertakings that it will provide access to the broker-dealer's electronic records and provide them to the Commission and other securities regulators upon request. Rule 18a–6 currently does not have this requirement. The amendments to Rule 17a–4 would eliminate the third-party access and undertakings requirements and replace them with a requirement that a senior officer of the broker-dealer provide the access and undertakings. The amendments to Rule 18a–6 would add an analogous senior officer access and undertakings requirement.

The amendments to Rules 17a–4 and 18a–6 would require a broker-dealer or SBS Entity, respectively, to furnish a record and its audit trail (if applicable) preserved on an electronic recordkeeping system pursuant to those rules in a reasonably usable electronic format, if requested by a representative of the Commission. This means the record would need to be produced in an electronic format that is compatible with commonly used systems for accessing and reading electronic records. Electronic records produced in a proprietary electronic format that Commission staff and other securities regulators could not read using commonly available systems for accessing and reading electronic records would not be considered to be in a reasonably usable electronic format.

The amendments to Rule 17a–4 would eliminate a requirement that the broker-dealer notify its designated examining authority (''DEA'') before employing an electronic recordkeeping system. Finally, the amendments to Rules 17a–4 and 18a–6, among other things, would remove or replace text to make those rules more technology neutral and to improve readability.

B. Current Electronic Record Preservation Requirements

1. Rule 17a–4(f)

Exchange Act Rule 17a–3 (''Rule 17a–3'') requires a broker-dealer to make and keep current certain books and records.[9] The required records include, among other records: (1) Blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities; (2) ledgers (or other records) reflecting all assets and liabilities, income and expense, and capital accounts; (3) a securities record or ledger reflecting separately for each security as of the clearance dates all ''long'' or ''short'' positions; (4) a memorandum of each brokerage order; (5) a memorandum of each purchase or sale of a security for the account of the broker-dealer; and (6) a record of proprietary options positions. Rule 17a–4 requires a broker-dealer to preserve additional records if the broker-dealer makes or receives certain categories of records.[10] These categories of records include, among other records, check books, bank statements, bills receivable or payable, communications relating to the broker-dealer's business as such, and written agreements. Rule 17a–4 also establishes retention periods for all records required to be made and kept current under Rule 17a–3 and preserved under Rule 17a–4 (generally three or six years). Additionally, Rule 17a–4 prescribes, among other things, how the records must be retained, including the requirements with respect to preserving records electronically.

The electronic record preservation requirements are set forth in paragraph (f) of Rule 17a–4 (''Rule 17a–4(f)''). These requirements were adopted by the Commission in 1997.[11] The Commission intended these requirements to be technology neutral but was guided by the predominant electronic storage method at that time: Using optical platters, CD–ROMs, or DVDs (collectively, ''optical disks'').[12] In particular, the rule requires that the electronic recordkeeping system preserve the records exclusively in a ''non-rewriteable, non-erasable'' (also known as a ''write once, read many'' or ''WORM'') format. The objective of the WORM requirement is to prevent the alteration, over-writing, or erasure of the records.

In addition to the WORM requirement, Rule 17a–4(f) requires, among other things, that the broker-dealer: (1) Notify its DEA prior to employing electronic storage media and at least 90 days before employing electronic storage media other than optical disk technology; (2) use electronic storage media that (a) verifies

that SBSDs and MSBSPs for which there is a prudential regulator shall keep books and records of all activities related to their business as an SBSD or MSBSP in such form and manner and for such period as may be prescribed by the Commission by rule or regulation. *See* 15 U.S.C. 78o–10(f)(1)(B)(i). Section 15F(f)(1)(B)(ii) of the Exchange Act provides that SBSDs and MSBSPs without a prudential regulator shall keep books and records in such form and manner and for such period as may be prescribed by the Commission by rule or regulation. *See* 15 U.S.C. 78o–10(f)(1)(B)(ii).

[7] *See* paragraph (f) of Rule 17a–4 and paragraph (e) of Rule 18a–6 (setting forth the electronic record preservation requirements) and paragraph (j) of Rule 17a–4 and paragraph (g) of Rule 18a–6 (setting forth the prompt production of records requirements).

[8] A nonbank SBSD would be able to apply the new requirements to legacy records by, for example, transferring them to an electronic recordkeeping system that preserves them: (1) In a manner that permits the recreation of an original record if it is altered, over-written or erased; or (2) exclusively in a non-rewriteable, non-erasable format.

[9] *See* 17 CFR 240.17a–3.

[10] *See, e.g.,* paragraphs (b)(2) through (16) of Rule 17a–4.

[11] *See Reporting Requirements for Brokers or Dealers under the Securities Exchange Act of 1934,* Exchange Act Release No. 38245 (Jan. 31, 1997), 62 FR 6469 (Feb. 12, 1997) (''Rule 17a–4(f) Adopting Release''). The Commission proposed Rule 17a–4(f) in 1993 and at the same time the Commission staff published a no-action letter that the staff would not recommend enforcement action to the Commission if broker-dealers preserved required records using optical storage technology, subject to certain conditions. *See Reporting Requirements for Brokers or Dealers under the Securities Exchange Act of 1934,* Exchange Act Release No. 32609 (July 9, 1993), 58 FR 38092 (July 15, 1993) (proposing Rule 17a–4(f)); Letter from Michael A. Macchiaroli, Associate Director, Division of Market Regulation, Commission, to Michael D. Udoff, Chairman, Ad Hoc Record Retention Committee, Securities Industry Association (June 18, 1993) (staff no-action letter). A staff no-action letter (or other staff statement) represents the views of the staff. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. The staff no-action letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

[12] *See* Rule 17a–4(f) Adopting Release, 62 FR at 6470.

automatically the quality and accuracy of the recording process, (b) serializes the original and duplicate copies of the media, (c) time-dates the required retention period for the records stored on the media, and (d) has the capacity to readily download indexes and records stored on the media; (3) have facilities for immediately and easily readable projection or production of electronically stored records; (4) be ready to immediately provide a facsimile enlargement of a record stored on the media; (5) organize and index accurately information stored on the media; (6) have in place an audit system providing accountability regarding the inputting of records to the media and making any changes to those records; (7) be ready to produce the information necessary to access the records; and (8) engage a third party who has access to and the ability to download the records and that executes written undertakings to do so upon the request of the Commission or other securities regulators.

As to optical disks, firms can meet the WORM requirement by ''burning'' data onto the disk, with the result that it cannot be altered, over-written, or erased, which means that this form of storage media cannot be reused.

After the adoption of the WORM requirement, broker-dealers inquired about whether electronic storage recordkeeping systems that do not permanently ''burn'' records onto the storage media could meet the WORM requirement. Consequently, in 2003, the Commission issued an interpretation to clarify that the rule does not mandate the use of optical disks and, therefore, a broker-dealer can use ''an electronic storage system that prevents the overwriting, erasing or otherwise altering of a record during its required retention period through the use of integrated hardware and software codes'' (''Rule 17a–4(f) Interpretation'').[13] The Rule 17a–4(f) Interpretation noted that electronic recordkeeping systems then in use employed integrated hardware and software codes that prevent the alteration, overwriting, or erasure of records during their required retention periods, and that the codes could not be turned off to remove this feature.[14] Therefore, while the hardware storage medium used by these systems (*i.e.,* magnetic disk) is inherently re-writeable, the integrated codes intrinsic to the system prevent the records from being altered, over-written, or erased during the record's required retention period.[15] The Rule 17a–4(f) Interpretation clarified that broker-dealers need not rely on a hardware solution to meet the WORM requirement (*e.g.,* the burning of data onto an optical disk) but rather could rely on a solution that prevents records from being altered, over-written, or erased during their required retention period under Rule 17a–4 (*e.g.,* three or six years).[16] The Commission stated that its Rule 17a–4(f) Interpretation did not include electronic recordkeeping systems that mitigate the risk that records will be altered, over-written, or erased, but do not prevent alteration, over-writing, or erasure of the records.[17]

In the release adopting Rule 18a–6, the Commission further refined its interpretation of the WORM requirement of Rule 17a–4(f).[18] In particular, the Rule 17a–4 Interpretation provided that the WORM requirement does not mandate a hardware solution (*i.e.,* permanently ''burning'' records onto an optical disk). However, because the Rule 17a–4 Interpretation described a process of integrated *software and hardware* codes, broker-dealers questioned whether they could use a system that relied solely on software codes to meet the WORM requirement. The Commission clarified that ''a software solution that prevents the overwriting, erasing, or otherwise altering of a record during its required retention period would meet the requirements of the rule.'' [19]

In 2017, a group of trade associations filed a petition for rulemaking with the Commission.[20] The petition requested that the Commission replace the WORM requirement with more liberal ''principle-based requirements'' similar to amendments the Commodity Futures Trading Commission (''CFTC'') had made to its electronic recordkeeping rule.[21] The Commission has carefully considered prior comments it received relating to broker-dealer electronic recordkeeping. As discussed below, the Commission is proposing to add an alternative to the WORM requirement that would require a broker-dealer's electronic recordkeeping system to preserve electronic records in a manner that permits the recreation of an original record if it is altered, over-written, or erased. While this proposal would not rely on ''principle-based requirements'' to protect the reliability and authenticity of electronic records, it is designed to address concerns raised by commenters about the WORM requirement.[22]

2. Rule 18a–6(e)

In 2019, the Commission adopted Exchange Act Rules 18a–5 (''Rule 18a–5'') [23] and 18a–6 to establish recordkeeping requirements for SBS Entities. These rules were modeled on Rules 17a–3 and 17a–4, respectively.[24] The electronic preservation requirements of Rule 18a–6 are set forth in paragraph (e) of the rule (''Rule 18a–6(e)''). Rule 18a–6(e) was modeled on Rule 17a–4(f).[25] As proposed, Rule 18a–6(e) would have included the WORM requirement.[26] However, commenters requested that that the Commission not mandate that electronic records be preserved exclusively in a WORM format and not expand the WORM requirement to SBS Entities at that time.[27] Commenters also requested that the Commission act on the Rule 17a–4(f) Rulemaking Petition.[28] The Commission ultimately did not include the WORM requirement or any similar requirement when adopting Rule 18a–6(e). The Commission stated that ''any change to the [WORM requirement] should be addressed in a separate regulatory initiative in which the Commission intends to consider electronic storage

[13] *See Electronic Storage of Broker-Dealer Records,* Exchange Act Release No. 47806 (May 7, 2003), 68 FR 25281, 25282 (May 12, 2003).

[14] Rule 17a–4(f) Interpretation, 68 FR at 25282.

[15] *Id.*

[16] *Id.* at 25282–83.

[17] *See id.* The Commission identified mitigating factors such as limiting access to the records as being insufficient on their own.

[18] *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68568.

[19] *Id.*

[20] *See* Petition 4–713 (Nov. 14, 2017) filed by the Securities Industry Financial Markets Association, Financial Services Roundtable, Futures Industry Association, International Swaps Derivatives Association, and Financial Services Institute available at *https://www.sec.gov/rules/petitions/2017/petn4-713.pdf* (''Rule 17a–4(f) Rulemaking Petition''). An addendum to the Rule 17a–4(f) Rulemaking Petition was filed on May 24, 2018, available at *https://www.sec.gov/rules/petitions/2018/ptn4-713-addendum.pdf* (''Rule 17a–4(f) Rulemaking Petition Addendum''). Comments on the petition were received and are available at *https://www.sec.gov/comments/4-713/4-713.htm.*

[21] *See* CFTC, *Recordkeeping,* 82 FR 24479 (May 30, 2017) (''CFTC Electronic Recordkeeping Release'').

[22] *See* section II.D. of this release (discussing how this proposed alternative is designed to address concerns raised about the WORM requirement).

[23] 17 CFR 240.18a–5.

[24] *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68552–71.

[25] *See id.* at 68567–69.

[26] *See Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers,* Exchange Act Release No. 71958 (Apr. 17, 2014), 79 FR 25194, 25219, 25312 (May 2, 2014) (''SBSD/MSBSP Recordkeeping Proposing Release'').

[27] *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68568.

[28] *Id.*

media issues.'' [29] Further, the Commission recognized that SBS Entities may have existing recordkeeping systems that did not meet the WORM requirement and, therefore, could incur substantial costs building a recordkeeping system that meets the requirement.[30] For these reasons, Rule 18a–6(e) does not include the WORM requirement or the requirement to provide notice before employing an electronic storage system, including a 90-day notice before employing an electronic storage system that does not use optical disk technology.[31] Rule 18a–6(e) also does not include provisions of Rule 17a–4(f) that are tailored for the WORM requirement (particularly to the use of optical disk technology to meet the requirement).[32]

In addition to these differences from Rule 17a–4(f), Rule 18a–6(e) does not include the requirement that the firm engage a third party who has the ability to access the records and who undertakes to do so at the request of the Commission. The Commission cited comments stating that this requirement ''needlessly exposes firms to data leakage and cybersecurity threats.'' [33]

In this rulemaking, the Commission is considering electronic recordkeeping systems of broker-dealers and, therefore, believes it is appropriate to also consider electronic recordkeeping systems of SBS Entities. As discussed below, the Commission is proposing amendments to Rule 18a–6(e) that largely would align with the requirements of Rule 17a–4(f), as proposed to be amended.

C. Current Prompt Production of Records Requirements

Paragraph (j) of Rule 17a–4 (''Rule 17a–4(j)'') requires broker-dealers to furnish promptly to the Commission legible, true, complete, and current copies of those records of the firm that are required to be preserved under Rule 17a–4 or any other record of the firm that is subject to examination under Section 17(b) of the Exchange Act.[34] Paragraph (g) of Rule 18a–6 (''Rule 18a–6(g)'') requires SBS Entities to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the firm that are required to be preserved under Rule 18a–6, or any other records of the firm subject to examination or required to be made or maintained pursuant to Section 15F of the Exchange Act.[35]

II. Proposed Amendments

A. Introductory Text

The introductory text of Rule 17a–4(f) provides, in pertinent part, that the records required to be maintained and preserved pursuant to Rules 17a–3 and 17a–4 may be immediately produced or reproduced on ''micrographic media'' or by means of ''electronic storage media'' that meet the conditions set forth in the rule and be maintained and preserved for the required time in that form. The term ''micrographic media'' refers to microfilm, microfiche, or any similar medium.[36]

The introductory text of Rule 18a–6(e) provides, in pertinent part, that the records required to be maintained and preserved pursuant to Rules 18a–5 and 18a–6 may be immediately produced or reproduced by means of an electronic storage system that meets the conditions set forth in the rule and be maintained and preserved for the required time in that form. This text diverges from Rule 17a–4(f) in two material respects. First, it does not refer to ''micrographic media.'' When proposing Rule 18a–6(e), the Commission expressed a preliminary belief that SBS Entities would not use micrographic media because electronic storage media is more technologically advanced and offers greater flexibility in managing records.[37] The Commission also expressed a preliminary belief that most broker-dealers use electronic storage media rather than micrographic media for the same reasons.[38] The Commission reiterated these beliefs when adopting Rule 18a–6(e) and, consequently, that rule does not include a micrographic media option for preserving records.[39]

The second way in which the introductory text of Rule 18a–6(e) diverges from Rule 17a–4(f) in a material way is that the former refers to an electronic storage *system* rather than electronic storage *media.* As proposed, Rule 18a–6(e) would have used the term ''electronic storage media.'' [40] However, when adopting Rule 18a–6(e), the Commission explained that the phrase ''electronic storage media'' was replaced with the phrase ''electronic storage system'' throughout the rule to clarify that the final rule does not require the use of a particular storage medium such as optical disk or CD–ROM.[41]

The Commission is proposing amendments to the introductory text of Rule 17a–4(f) to make the rule more technology neutral. In particular, the phrase ''electronic storage media'' would be replaced with the phrase ''electronic recordkeeping system'' throughout the rule, including in the introductory text. The Commission is proposing a conforming amendment to Rule 18a–6(e) to replace the phrase ''electronic storage system'' with the phrase ''electronic recordkeeping system'' throughout the rule, including in the introductory text. The Commission preliminarily believes that the phrase ''electronic recordkeeping system'' better characterizes a system that produces and preserves records electronically. The term ''electronic storage media'' generally refers to the devices (hardware) used to store data (*e.g.,* floppy disks, optical disks, universal serial bus (USB) drives, and magnetic disks). The Commission believes ''electronic recordkeeping system'' is a more accurate term because it would encompass both the hardware and software used to store records electronically. Consistent with this proposal, the amendments to Rule 18a–6(e) would replace the term ''electronic storage system'' throughout the rule with the term ''electronic recordkeeping system,'' including in the introductory text. In addition, the Commission is proposing amendments to the introductory text of Rules 17a–4(f) and 18a–6(e) solely to improve clarity and readability, but that otherwise are not intended to alter the meaning of either introductory text.[42]

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68568–69.

[33] *Id.* at 68569.

[34] Section 17(b) of the Exchange Act provides, in pertinent part, that all records of a broker-dealer are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission and the appropriate regulatory agency for such persons as the Commission or the appropriate regulatory agency for such persons deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. *See* 15 U.S.C. 78q(b).

[35] Section 15F(f)(1) of the Exchange Act provides, in pertinent part, that SBSDs and MSBSPs shall keep books and records required by Commission rule open to inspection and examination by any representative of the Commission. *See* 15 U.S.C. 78o–10(f)(1).

[36] *See* paragraph (f)(1)(i) of Rule 17a–4 (defining the term ''micrographic media'').

[37] *See* SBSD/MSBSP Recordkeeping Proposing Release, 79 FR at 25219.

[38] *Id.* at 25219, n.378.

[39] *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68550. As discussed below, Rule 17a–4(f), as proposed to be amended, would retain provisions governing the use of micrographic media but move them to a new paragraph (f)(4) of the rule.

[40] *See* SBSD/MSBSP Recordkeeping Proposing Release, 79 FR at 25312.

[41] *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68550.

[42] The proposed amendments to Rule 17a–4(f) would replace the current introductory text that reads ''(f) The records required to be maintained and preserved pursuant to §§ 240.17a–3 and 240.17a–4 may be immediately produced or reproduced on ''micrographic media'' (as defined in this section) or by means of ''electronic storage

Continued

B. Definition of Electronic Recordkeeping System

Paragraphs (f)(1)(i) and (ii) of Rule 17a–4 currently define the terms ''micrographic media'' and ''electronic storage media,'' respectively. Paragraph (e)(1) of Rule 18a–6 defines the term ''electronic storage system.'' Paragraph (f)(1)(ii) of Rule 17a–4 defines the term ''electronic storage media'' as, in pertinent part, any digital storage medium or system that meets the requirements of the rule. Paragraph (e)(1) of Rule 18a–6 defines the term ''electronic storage system'' as, in pertinent part, any digital storage system that meets the requirements of the rule. As discussed above, the Commission is proposing to use the term ''electronic recordkeeping system'' in Rules 17a–4(f) and 18a–6(e). Consequently, the Commission is proposing to define the term ''electronic recordkeeping system'' in both rules as ''a system that preserves records in a digital format and that requires a computer to access the records.''[43] The Commission preliminarily believes this definition better describes a system that produces and preserves records electronically.[44] For these reasons, the proposed amendments to Rules 17a–4(f) and 18a–6(e) would replace the definitions of ''electronic storage media'' and ''electronic storage system'' in those rules, respectively, with this definition of ''electronic recordkeeping system.''

C. Elimination of Notice and Representation Requirements From Rule 17a–4(f)

Paragraph (f)(2)(i) of Rule 17a–4 requires a broker-dealer to notify its DEA prior to employing electronic storage media, including a 90-day notice if the broker-dealer intends to employ electronic storage media other than optical disk technology. Paragraph (f)(2)(i) also requires a representation from the broker-dealer or the storage medium vendor or another third party with appropriate expertise that the selected electronic storage medium meets the conditions set forth in paragraph (f)(2)(ii), which are discussed below.

The Commission is proposing to eliminate these notification and representation requirements from Rule 17a–4(f). The Commission preliminarily believes they are no longer necessary. They were adopted at a time when the use of electronic recordkeeping systems by broker-dealers to meet the record preservation requirements of Rule 17a–4 was a relatively new phenomenon.[45] The requirements alerted the broker-dealer's DEA of the firm's intent to use electronic storage media to meet the record preservation requirements of Rule 17a–4. Given that the Commission and broker-dealer DEAs now have over 25 years of experience with broker-dealers using electronic recordkeeping systems, these requirements may no longer serve a useful purpose. As noted above, the Commission did not include analogous requirements in Rule 18a–6(e).

D. Requirements for Electronic Recordkeeping Systems

Paragraphs (f)(2)(ii)(A) through (D) of Rule 17a–4 set forth technical requirements for electronic storage media if used by a broker-dealer to meet the record preservation requirements of Rule 17a–4. Similarly, paragraphs (e)(2)(i) through (iii) of Rule 18a–6 set forth technical requirements for an electronic storage system if used by an SBS Entity to meet the record preservation requirements of Rule 18a–6. As discussed below, the Commission is proposing amendments to these requirements.[46]

As a preliminary matter, the requirements for electronic recordkeeping systems in Rule 17a–4(f) would apply to all broker-dealers. However, the Commission is proposing to limit the application of the requirements for electronic recordkeeping systems in paragraph (e)(2) of Rule 18a–6 to nonbank SBS Entities, that is, SBS Entities *without a prudential regulator.* SBS Entities *with a prudential regulator* (''bank SBS Entities'') would therefore not be subject to the requirements of paragraph (e)(2) of Rule 18a–6, as proposed to be amended.[47] Unlike nonbank SBS Entities, bank SBS Entities are subject to oversight and supervision by the banking agencies with respect to record preservation. This oversight and supervision may now or in the future include regulations or guidance with respect to requirements for electronic recordkeeping systems that differ from the proposed requirements for electronic recordkeeping systems

media'' (as defined in this section) that meet the conditions set forth in this section and be maintained and preserved for the required time in that form'' with text that reads ''(f) The records required to be maintained and preserved pursuant to §§ 240.17a–3 and 240.17a–4 may be immediately produced or reproduced by means of an electronic recordkeeping system or by means of micrographic media subject to the conditions set forth in this paragraph and be maintained and preserved for the required time in that form.'' The proposed amendments to Rule 18a–6(e) would replace the current introductory text that reads ''(e) The records required to be maintained and preserved pursuant to §§ 240.18a–5 and 240.18a–6 may be immediately produced or reproduced by means of an electronic storage system (as defined in this paragraph (e)) that meets the conditions set forth in this paragraph (e) and be maintained and preserved for the required time in that form'' with text that reads ''(e) The records required to be maintained and preserved pursuant to §§ 240.18a–5 and 240.18a–6 may be immediately produced or reproduced by means of an electronic recordkeeping system subject to the conditions set forth in this paragraph and be maintained and preserved for the required time in that form.''

[43] *See* paragraph (f)(1)(ii) of Rule 17a–4 and paragraph (e)(1) of Rule 18a–6, as proposed to be amended.

[44] *See* 36 CFR 1220.18 (regulation of the U.S. National Archives and Records Administration defining ''electronic record,'' in pertinent part, as ''any information that is recorded in a form that only a computer can process'' and defining ''recordkeeping system'' as a ''a manual or electronic system that captures, organizes, and categorizes records to facilitate their preservation, retrieval, use, and disposition'').

[45] As discussed above, Rule 17a–4(f) was adopted in 1997.

[46] In addition to the proposed amendments discussed below, the Commission is proposing to simplify the introductory text of paragraphs (f)(2) and (e)(2) of Rules 17a–4 and 18a–6, respectively. In particular, the introductory text of paragraph (f)(2) of Rule 17a–4 (which provides that ''If electronic storage media is used by a member, broker, or dealer, it must comply with the following requirements:'') and paragraph (f)(2)(ii) of Rule 17a–4 (which provides that ''The electronic storage media must:'') would be simplified to a single introductory text for paragraph (f)(2) providing that ''An electronic recordkeeping system must:''). The introductory text of paragraph (e)(2) of Rule 18a–6 (providing that ''If an electronic storage system is used by a security-based swap dealer or major security-based swap participant, it must:'') would be modified to provide that ''An electronic recordkeeping system of a security-based swap dealer or major security-based swap participant without a prudential regulator must:''. The amendments to paragraph (f)(2) of Rule 17a–4 would result in the following numbering changes: (1) The new audit-trail requirement would be set forth in paragraph (f)(2)(i)(A) of Rule 17a–4, as proposed to be amended; (2) the existing WORM requirement of paragraph (f)(2)(ii)(A) of Rule 17a–4 would be set forth in paragraph (f)(2)(i)(B) of Rule 17a–4, as proposed to be amended; (3) the amended requirement of paragraph (f)(2)(ii)(B) of Rule 17a–4 would be set forth in paragraph (f)(2)(ii) of Rule 17a–4, as proposed to be amended; (4) the amended requirement of paragraph (f)(2)(ii)(C) of Rule 17a–4 would be set forth in paragraph (f)(2)(iii) of Rule 17a–4, as proposed to be amended; and (5) the amended requirement of paragraph (f)(2)(ii)(D) of Rule 17a–4 would be set forth in paragraph (f)(2)(iv) of Rule 17a–4, as proposed to be amended. The amendments to paragraph (e)(2) of Rule 18a–6 would result in the following numbering changes: (1) The new audit-trail and WORM alternative requirements would be set forth in paragraphs (e)(2)(i)(A) and (B), respectively, of Rule 18a–6, as proposed to be amended; (2) the amended requirement of paragraph (e)(2)(i) of Rule 18a–6 would be set forth in paragraph (e)(2)(ii) of Rule 18a–6, as proposed to be amended; (3) the amended requirement of paragraph (e)(2)(ii) of Rule 18a–6 would be set forth in paragraph (e)(2)(iii) of Rule 18a–6, as proposed to be amended; and (4) the amended requirement of paragraph (e)(2)(iii) of Rule 18a–6 would be set forth in paragraph (e)(2)(iv) of Rule 18a–6, as proposed to be amended.

[47] *See* the introductory text to paragraph (e)(2) of Rule 18a–6, as proposed to be amended (limiting the paragraph's requirements to an SBS Entity without a prudential regulator).

discussed below.[48] In particular, the proposal to amend the requirements for electronic recordkeeping systems in paragraph (e)(2) of Rule 18a–6 to add the audit-trail and WORM alternative requirements could impose requirements that conflict with regulations or guidance of the prudential regulators. Further, the recordkeeping requirements of Rules 18a–5 and 18a–6 applicable to bank SBS Entities are more limited in scope because: (1) The Commission's authority under Section 15F(f)(1)(B)(i) of the Exchange Act is tied to activities related to the conduct of the firm's business as an SBS Entity; (2) bank SBS Entities are subject to recordkeeping requirements applicable to banks with respect to their banking activities; and (3) the prudential regulators—rather than the Commission—are responsible for capital, margin, and other prudential requirements applicable to bank SBS Entities.[49] For these reasons, the Commission preliminarily believes that it would be appropriate to not impose the requirements for electronic recordkeeping systems in paragraph (e)(2) of Rule 18a–6, as proposed to be amended, on bank SBS Entities, but continue to impose them, as proposed to be amended, on nonbank SBS Entities.

Paragraph (f)(2)(ii)(A) of Rule 17a–4 sets forth the WORM requirement. The Commission is proposing to amend Rule 17a–4(f) to add an audit-trail alternative to the WORM requirement for broker-dealers.[50] In addition, the Commission is proposing to amend Rule 18a–6(e) to require that the electronic recordkeeping systems of nonbank SBS Entities must meet either the audit-trail requirement or the WORM requirement.[51] Unlike bank SBS Entities, the Commission is responsible for promulgating capital and margin requirements for nonbank SBS Entities and overseeing their compliance with those requirements.[52] Given this broader regulatory responsibility over nonbank SBS Entities, the Commission preliminarily believes it would be appropriate to amend the existing requirements for electronic recordkeeping systems in Rule 18a–6(e) to add the requirement that the systems must meet either the audit-trail or WORM requirement. As discussed below, a WORM-compliant electronic recordkeeping system may be preferable for certain types of records. Moreover, including this alternative in the proposed amendments to Rule 18a–6(e) would provide nonbank SBS Entities the same two alternatives that broker-dealers would have under the proposed amendments to Rule 17a–4(f).

Under the proposed amendments to Rule 17a–4(f), broker-dealers would have an option to employ electronic recordkeeping systems that meet the audit-trail requirement as an alternative to the existing WORM requirement (which requirement would be retained in the rule). Under the proposed amendments to Rule 18a–6(e), nonbank SBS Entities would need to employ electronic recordkeeping systems that meet either the proposed audit-trail requirement or the proposed WORM requirement. Broker-dealers and nonbank SBS Entities would have the flexibility to preserve all of their electronic records either by (1) consistently using an electronic recordkeeping system that meets *either* the audit-trail requirement *or* the WORM requirement or (2) preserving some electronic records using an electronic recordkeeping system that meets the audit-trail requirement and preserving other electronic records using an electronic recordkeeping system that meets the WORM requirement.[53] In the case of both rules, the object of the proposal is to require broker-dealers and nonbank SBS Entities to preserve electronic records in a manner that permits original records to be re-created if altered, over-written, or erased, or that prevents original records from being altered, over-written, or erased. The objective is to require these registrants to maintain and preserve electronic records in a manner that protects the authenticity and reliability of original records.

The audit-trail alternative would be designed to address concerns that the WORM requirement causes some firms to deploy an electronic recordkeeping system that serves no purpose other than to hold records in a manner that meets the Commission's regulatory requirements for electronic recordkeeping systems.[54] In particular, following the publication of the Rule 17a–4(f) Interpretation, third-party vendors developed software-based solutions designed to meet the WORM requirement of Rule 17a–4(f). Some broker-dealers use these electronic storage solutions to meet the WORM requirement. However, the records stored on these electronic recordkeeping systems are often retained in that particular format solely for the purpose of meeting the WORM requirement (*i.e.,* they are not the records and associated electronic recordkeeping systems the firms use for business purposes). Broker-dealers have explained to Commission staff that the electronic recordkeeping systems used for business purposes are dynamic and updated constantly (*e.g.,* with each new transaction or position) and easily accessible for retrieving records; whereas the WORM-compliant electronic recordkeeping systems are more akin to static ''snapshots'' of the records at a point in time and less accessible.[55] As a result, some broker-dealers currently use WORM-compliant electronic recordkeeping systems solely to meet the requirements of Rule 17a–4(f). Broker-dealers retrieve records from their business-based electronic recordkeeping systems for their own purposes. In addition, the Commission understands that firms generally retrieve and produce records from their business-based electronic recordkeeping systems rather than from their WORM-compliant electronic recordkeeping systems in response to requests from securities regulators because these records are easier to retrieve. Commission staff typically do not specifically request that records be produced from the WORM-compliant

[48] Unlike Rules 17a–3 and 17a–4 which consolidate broker-dealer recordkeeping requirements, the recordkeeping requirements for banks are diffuse. *See, e.g.,* 31 CFR 1020.410 (recordkeeping requirements under the Bank Secrecy Act regarding funds transfers equal to or greater than $3,000); 12 CFR 9.8 (recordkeeping requirements regarding fiduciary accounts); 12 CFR 12.3 (recordkeeping requirements for securities transactions); 12 CFR 25.42 (recordkeeping requirements for small business and farm loans, including requirement to maintain the information in machine readable form).

[49] *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68552.

[50] *See* paragraph (f)(2)(i)(A) of Rule 17a–4, as proposed to be amended. As discussed above, the existing WORM requirement of Rule 17a–4 would be set forth in paragraph (f)(2)(i)(B) of Rule 17a–4, as proposed to be amended.

[51] *See* paragraph (e)(2)(i)(B) of Rule 18a–6, as proposed to be amended.

[52] *See* 15 U.S.C. 78o–10(e)(1)(B). *See also Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers,* Exchange Act Release No. 86175 (Jun. 21, 2019), 84 FR 43872 (Aug. 22, 2019) (''SBSD/MSBSP Capital, Margin, and Segregation Adopting Release'') (Commission release adopting capital and margin requirements for nonbank SBS Entities).

[53] As discussed in more detail below, broker-dealers and nonbank SBS Entities could for business reasons elect to use two recordkeeping systems if the proposals are adopted: One that complies with the audit-trail requirement and one that complies with the WORM requirement.

[54] *See* Rule 17a–4(f) Rulemaking Petition at 4 (''Today, WORM systems are costly, outmoded, and inefficient storage containers used exclusively to meet the rule's requirements.'').

[55] *See* Rule 17a–4(f) Rulemaking Petition at 4 (''Data stored in WORM is essentially a static snapshot of a record that is locked and secured from any manipulation or deletion, as opposed to a complete system that could be used to stand up a production system during or following a disaster event.'').

recordkeeping system.[56] The exception would be a case where alteration is suspected. In that case, the staff would request records from the WORM-compliant electronic recordkeeping system.

For these reasons, the Commission is proposing to amend Rule 17a–4(f) to provide an audit-trail alternative to the WORM requirement. In addition, the Commission is proposing to require nonbank SBS Entities to use electronic recordkeeping systems that meet either the audit-trail or WORM requirement. Under the audit-trail alternative, the electronic recordkeeping system would need to preserve the records for the duration of their applicable retention periods in a manner that maintains a complete time-stamped audit trail that includes: (1) All modifications to and deletions of a record or any part thereof; (2) the date and time of operator entries and actions that create, modify, or delete the record; (3) the individual(s) creating, modifying, or deleting the record; and (4) any other information needed to maintain an audit trail of each distinct record in a way that maintains security, signatures, and data to ensure the authenticity and reliability of the record and will permit re-creation of the original record and interim iterations of the record.[57] The objective of the proposed audit-trail alternative is to require the electronic recordkeeping system to be configured so that an original record that is altered, over-written, or erased can be re-created for the retention period applicable to the original record. This would be an alternative to the WORM requirement, which prevents an original record from being altered, over-written, or erased for its required retention period.

It is the Commission's understanding that electronic recordkeeping systems used by certain broker-dealers and nonbank SBS Entities for business purposes can be configured to meet the audit-trail requirement. Therefore, this amendment along with the others proposed in the release are designed to facilitate the use of a single electronic recordkeeping system for business and regulatory purposes.

Under the proposed amendments, broker-dealers could potentially continue to use the electronic recordkeeping systems they currently employ to meet the WORM requirement. Similarly, nonbank SBS Entities would have the option to use electronic recordkeeping systems that meet the WORM requirement (as an alternative to the audit-trail requirement).[58] For example, WORM-compliant electronic recordkeeping systems may be appropriate for storing certain types of records such as emails (as compared to transaction and ledger account data that is updated continuously).[59] Moreover, some broker-dealers may choose to use their existing WORM-compliant electronic recordkeeping systems rather than adopt a new technology. Further, some broker-dealers may choose to retain existing electronic records on a legacy WORM-compliant electronic recordkeeping system, including software-based systems that are designed to follow the Rule 17a–4(f) Interpretation rather than transfer them to an electronic recordkeeping system that would meet the proposed audit-trail requirement. However, these firms could decide to preserve new records on an electronic recordkeeping system that would meet the proposed audit-trail requirement.

Paragraph (f)(2)(ii)(B) of Rule 17a–4 requires electronic storage media used by a broker-dealer to verify automatically the quality and accuracy of the storage media recording process. Similarly, paragraph (e)(2)(i) of Rule 18a–6 requires an electronic storage system used by an SBS Entity to verify automatically the quality and accuracy of the electronic storage system recording process. The Commission is proposing to amend the requirements set forth in these two paragraphs. The amendments would require that the electronic recordkeeping system used by a broker-dealer or nonbank SBS Entity must verify automatically the completeness and accuracy of the processes for storing and retaining records electronically.[60] The proposed new text is intended to specify that the requirement is designed to ensure that when an original record is added to the electronic recordkeeping system it is completely and accurately captured in the system.[61]

Paragraph (f)(2)(ii)(C) of Rule 17a–4 requires electronic storage media used by a broker-dealer to serialize the original and, if applicable, duplicate units of storage media, and time-date for the required period of retention the information placed on such electronic storage media. Paragraph (e)(2)(ii) of Rule 18a–6 requires an electronic storage system used by an SBS Entity, *if applicable,* to serialize the original and duplicate units of the storage media, and time-date for the required period of retention the information placed in such electronic storage system. Consequently, Rule 18a–6(e) imposes the requirement on an SBS Entity only if serializing and time-dating storage *media* is applicable. The Commission explained this difference between Rule 17a–4(f) and Rule 18a–6(e) by stating that serialization and time-dating is required when a firm uses optical disks to meet the WORM requirement.[62] As discussed above, the Commission is proposing amendments to Rules 17a–4(f) and 18a–6(e) that would provide firms with the option of using electronic recordkeeping systems that meet either the audit-trail requirement or the WORM requirement. Moreover, as discussed above, the Rule 17a–4(f) Interpretation, which is extant, clarifies that Rule 17a–4(f) does not mandate the use of optical disk to meet the WORM requirement.[63] Under the proposed amendments to Rules 17a–4(f)

[56] *See also* Rule 17a–4(f) Rulemaking Petition at 5 (''[O]ur members report that regulators (including SEC and FINRA examiners and enforcement staff) do not typically ask for production of records from WORM storage because the information or data is not readily sortable or searchable. Regulators instead request customized extracts or views of data collected from active storage systems where the record was originally created, that has not yet been transferred to a WORM system.'').

[57] *See, e.g.,* 21 CFR 11.10 (regulation of the U.S. Food and Drug Administration setting forth requirements for persons who used closed systems to create, modify, maintain, or transmit electronic records and requiring, among other things, the use of time-stamped audit trails to independently record the date and time of operator entries and actions that create, modify, or delete electronic records and that record changes shall not obscure previously recorded information).

[58] The Commission would interpret the WORM requirement as set forth in the text of paragraph (e)(2)(i)(B) of Rule 18a–6, as proposed to be amended, consistently with how the WORM requirement as set forth in the text of paragraph (f)(2)(ii)(A) of Rule 17a–4 was interpreted by the Commission in 2019 and 2003. *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68568; Rule 17a–4(f) Interpretation, 68 FR 25281.

[59] *See* Rule 17a–4(f) Rulemaking Petition at 4 (''Although storing electronic communications data—like email and instant messaging, or common unstructured file types such as PDF—in WORM format has become standardized, dynamic content generated by complex trading and risk systems, emerging communications platforms, as well as records created by aggregating information from various systems, cannot be easily stored in WORM format.'').

[60] *See* paragraph (f)(2)(ii) of Rule 17a–4 and paragraph (e)(2)(ii) of Rule 18a–6, as proposed to be amended.

[61] In this regard, the proposed text would replace the text in Rules 17a–4(f) and 18a–6(e) that reads ''Verify automatically the quality and accuracy of the electronic storage system recording process'' with the phrase ''Verify automatically the completeness and accuracy of the processes for storing and retaining records electronically.'' *See* paragraph (f)(2)(ii) of Rule 17a–4 and paragraph (e)(2)(ii) of Rule 18a–6, as proposed to be amended.

[62] *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68568.

[63] *See* Rule 17a–4(f) Interpretation. The Commission would interpret the rule text in Rule 18a–6(e), as proposed to be amended, consistently with the Rule 17a–4(f) Interpretation of the WORM requirement and the 2019 interpretation of the WORM requirement. *See* Rule 17a–4(f) Interpretation, 68 FR 25281; SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68568.

and 18a–6(e), the serialization and time-stamping requirements would apply only if the firm uses optical disks as the storage media to meet the WORM requirement. For this reason, the Commission is proposing to amend Rule 17a–4(f) to provide that the requirement is triggered *if applicable.*[64]

Paragraph (f)(2)(ii)(D) of Rule 17a–4 requires electronic storage media used by a broker-dealer to have the capacity to readily download indexes and records preserved on the electronic storage media to any medium acceptable under Rule 17a–4 as required by the Commission or the self-regulatory organizations (''SROs'') of which the broker-dealer is a member. Paragraph (e)(2)(iii) of Rule 18a–6 requires an electronic storage system used by an SBS Entity to have the capacity to readily download into a readable format indexes and records preserved in the electronic storage system. Indexes organize records and are a means for locating specific records within a recordkeeping system. However, electronic recordkeeping systems may use other means to organize and locate records.

The Commission is proposing to amend the text of these two requirements to incorporate the information that would be stored under the proposed audit-trail requirement and to specify that the electronic recordkeeping system must have the capacity to readily download and transfer copies of a record and its audit trail (if applicable) in both a human readable format and in a reasonably usable electronic format.[65] A human readable format would be a format that can be naturally read by an individual. A reasonably usable electronic format would be a format that is common and compatible with commonly used systems for accessing and reading electronic records. This proposed requirement is designed to address an electronic recordkeeping system that stores records in a proprietary file format that cannot be accessed or read by commonly used systems. In this case, producing the records in their native file format would be meaningless since they could not be accessed or read by securities regulators.[66] Moreover, depending on the nature and volume of the requested records, producing them in a human readable format may hinder or delay an examination or investigation because it would take more time to search the records for relevant information; whereas electronic records can be searched and sorted using a computer. Conversely, in some cases, it may be more efficient to produce a record in a human readable format; for example, if an examiner is on site and requests a specific record. For these reasons, the proposed amendments would require that the electronic recordkeeping system have the capacity to readily download and transfer copies of a record and its audit trail (if applicable) in both a human readable format and in a reasonably usable electronic format.

Further, rather than refer to the capacity to download *indexes,* the proposed requirements would require the capacity to download and transfer information needed to locate specific electronic records. In particular, the proposed amendments would require the electronic recordkeeping system to have the capacity to readily download and transfer copies of a record and its audit trail (if applicable) in both a human readable format and in a reasonably usable electronic format *and to download and transfer the information needed to locate the electronic record.*[67] The requirement to download and transfer audit trails would apply only if the firm's electronic recordkeeping system uses the audit-trail alternative. The more general reference to ''information needed to locate the electronic record'' would be designed to incorporate whatever means a particular electronic recordkeeping systems uses to organize the records and locate a specific record (*e.g.,* indexes or data fields).

E. Requirements for Broker-Dealers and SBS Entities Using Electronic Recordkeeping Systems

Paragraph (f)(3) of Rule 17a–4 and paragraph (e)(3) of Rule 18a–6 impose obligations on broker-dealers and SBS Entities, respectively, related to their use of electronic recordkeeping systems. In general, these requirements are designed to ensure that the staffs of the Commission and other relevant securities regulators can access and examine the records. As discussed below, the Commission is proposing amendments to these requirements. Under the proposed amendments, prudentially regulated SBS Entities would no longer be subject to the requirements of paragraph (e)(2) of Rule 18a–6. Prudentially regulated SBS Entities would, however, continue to be subject to the requirements of paragraph (e)(3) of the rule. Paragraph (e)(3) of Rule 18a–6 does not impose technical requirements on the electronic recordkeeping system. Instead, it specifies the requirements for the SBS Entity in connection with its use of an electronic recordkeeping system. As noted above, these requirements generally are designed to ensure that the staffs of the Commission and other relevant regulators can access and examine the records. For these reasons, the Commission preliminarily believes they should continue to apply to bank SBS Entities.

The introductory text of paragraph (f)(3) of Rule 17a–4 provides that if the broker-dealer uses micrographic media or electronic storage media, it must comply with requirements set forth in the paragraph, which are discussed below. Similarly, the introductory text of paragraph (e)(3) of Rule 18a–6 provides that, if an SBS Entity uses an electronic storage system, it must comply with the requirements set forth in the paragraph, which are also discussed below. The Commission is

[64] *See* paragraph (f)(2)(iii) of Rule 17a–4 (f) as proposed to be amended. The Commission is proposing amendments to the serialization and time-stamping requirement of paragraph (e)(2) of Rule 18a–6 to further clarify that it is tied to the use of optical disks to meet the WORM requirement. In particular, the phrase ''placed in such electronic storage system'' would be replaced with the phrase ''placed on such electronic storage media.'' *See* paragraph (e)(2)(iii) of Rule 18a–6, as proposed to be amended.

[65] As discussed in section II.G. of this release, the Commission also is proposing to amend paragraph (j) of Rule 17a–4 and paragraph (g) of Rule 18a–6 to require that an electronic record be produced in a reasonably usable electronic format.

[66] If the native file format used by the firm is compatible with commonly used systems for accessing and reading electronic records, it could be produced in that format.

[67] *See* paragraph (f)(2)(iv) of Rule 17a–4 and paragraph (e)(2)(iv) of Rule 18a–6, as proposed to be amended. The current text of Rule 17a–4(f) sometimes prescribes requirements that refer to the staffs of Commission and SROs of which the broker-dealer is a member. *See* paragraphs (f)(2)(ii)(D), (f)(3)((i), (f)(3)(iv)(A), (f)(3)(v)((A), and (f)(3)(vi) of Rule 17a–4. In other cases, the current text refers to the staffs of Commission, SROs of which the broker-dealer is a member, *and* state securities regulators having jurisdiction over the broker-dealer. *See* paragraphs (f)(3)(ii) and (vii) of Rule 17a–4. The Commission is proposing to consistently reference the staffs of the Commission, SROs of which the broker-dealer is a member, and state securities regulators having jurisdiction over the broker-dealer. *See* paragraphs (f)(2)(iv), (f)(3)(i), (f)(3)(ii), (f)(3)(v)(B), (f)(3)(vi), (f)(3)(vii), (f)(4)(i), (f)(4)(ii), and (f)(iv)(A) of Rule 17a–4, as proposed to be amended. The current text of Rule 18a–6(e) sometimes prescribes requirements that refer to the staff of the Commission. *See* paragraphs (e)(3)(i), (e)(3)(iv)(A), (e)(3)(v)(A), and (e)(3)(vi) of Rule 18a–6. The rule does not refer to the staffs of SROs of which the SBS Entity is a member because SBS Entities will not be members of an SRO. However, SBS Entities may be subject to the jurisdiction of state securities regulators. Consequently, the Commission is proposing to add references to the staffs of state securities regulators having jurisdiction over the SBS Entity when there is a reference to the staff of the Commission. *See* paragraphs (e)(2)(iv), (e)(3)(i), (e)(3)(ii), (e)(3)(v)(B), (e)(3)(vi), and (e)(3)(vii) of Rule 18a–6, as proposed to be amended.

proposing to simplify the introductory text of both paragraphs.[68]

Paragraph (f)(3)(i) of Rule 17a–4 requires a broker-dealer to at all times have available, for examination by Commission or SRO staff, facilities for the immediate, easily readable projection or production of micrographic media or electronic storage media images and for the production of easily readable images. Similarly, paragraph (e)(3)(i) of Rule 18a–6 requires an SBS Entity to at all times have available for examination by Commission staff facilities for the immediate, easily readable projection or production of records or images maintained on an electronic storage system and for the production of easily readable copies of those records or images.

The Commission is proposing amendments to paragraph (f)(3)(i) of Rule 17a–4 that would delete references to micrographic media and replace terms that are tied to micrographic media.[69] In addition, the proposed amendments to paragraphs (f)(3)(i) of Rule 17a–4 and (e)(3)(i) of Rule 18a–6 are intended to replace terms that are tied to optical disk technology.[70] The Commission's objective is to set forth new requirements that would require broker-dealers and SBS Entities to have facilities available to produce records to the staffs of the Commission, SROs, and state securities regulators, as applicable, and to read records stored on an *electronic recordkeeping system*.[71]

Paragraph (f)(3)(ii) of Rule 17a–4 requires a broker-dealer to be ready at all times to provide, and immediately provide, any facsimile enlargement that the staff of the Commission, an SRO, or state securities regulator may request. Similarly, paragraph (e)(3)(ii) of Rule 18a–6 requires that an SBS Entity be ready at all times to immediately provide in a readable format any record or index stored on the electronic storage system that the staff of the Commission requests.

The Commission is proposing amendments to both of these paragraphs to require the broker-dealer and the SBS Entity to be ready at all times to provide records stored on an electronic recordkeeping system. In particular, the current text of both paragraphs would be replaced with new text requiring the broker-dealer or SBS Entity to be ready at all times to provide immediately any record or information needed to locate records stored by means of the electronic recordkeeping system that the staffs of the Commission, SROs, and state securities regulators, as applicable, may request.[72]

Paragraph (f)(3)(iii) of Rule 17a–4 requires a broker-dealer to store separately from the original, on any medium acceptable under Rule 17a–4, a duplicate copy of a record for the requisite time period. Similarly, paragraph (e)(3)(iii) of Rule 18a–6 requires that an SBS Entity store separately from the original a duplicate copy of a record stored on the electronic storage system for the requisite time period. These current provisions require broker-dealers and SBS Entities to maintain a second copy of each record.

The Commission is proposing amendments to both of these paragraphs to require the broker-dealer and the SBS Entity to have a backup set of records when records are preserved on an electronic recordkeeping system.[73] Under the proposal, the broker-dealer or SBS Entity would need to have a second electronic recordkeeping system that preserves a second set of records that can be accessed and examined if the primary electronic recordkeeping system storing the primary set of records is disrupted, malfunctions, or otherwise becomes inaccessible. The second electronic recordkeeping system would serve as a redundant source from which to retrieve records if records cannot be retrieved from the primary recordkeeping system. In addition to facilitating examinations, the backup electronic recordkeeping system would promote the business continuity of the broker-dealer or SBS Entity in the event the primary electronic recordkeeping system is disrupted. This would benefit the firm and protect investors and other securities market participants. The second electronic recordkeeping system would need to meet the requirements of Rules 17a–4(f) and 18a–6(e), except that it would not need a backup recordkeeping system.[74] The records stored on the backup electronic recordkeeping system would need to be preserved in accordance with record preservation requirements of Rules 17a–4 or 18a–6, as applicable. Among other requirements, this would mean that the second set of records would need to be preserved for their required retention periods.

Paragraph (f)(3)(iv) of Rule 17a–4 requires a broker-dealer to organize and index accurately all information maintained on both original and any duplicate storage media. Paragraph (f)(3)(iv)(A) requires a broker-dealer to have the indexes available at all times for examination by the staffs of the Commission or an SRO. Paragraph (f)(3)(iv)(B) requires that each index be duplicated and the duplicate copies be stored separately from the original copy of the index. Finally, paragraph (f)(3)(iv)(C) requires that the original and duplicate indexes be preserved for the time required for the indexed record. Similarly, paragraph (e)(3)(iv) of Rule 18a–6 requires an SBS Entity to organize and index accurately all information maintained on both original and any duplicate storage system. Paragraph (e)(3)(iv)(A) requires an SBS Entity to have the indexes available at

[68] *See* introductory text of paragraph (f)(3) of Rule 17a–4 and paragraph (e)(3) of Rule 18a–6, as proposed to be amended (providing, respectively, that a broker-dealer or SBS Entity ''using an electronic recordkeeping system must:''). In addition, the introductory text of paragraph (f)(3) of Rule 17a–4, as proposed to be amended, would not reference ''micrographic media,'' instead, the existing requirements for using micrographic media would be set forth in new paragraph (f)(4) of Rule 17a–4.

[69] While paragraph (f)(3)(i) of Rule 17a–4, as proposed to be amended, would no longer reference micrographic media, a broker-dealer would continue to be able to use micrographic media to preserve records under the requirements set forth in new paragraph (f)(4) of Rule 17a–4.

[70] In particular, the amendments to Rule 17a–4 would replace the phrase ''electronic storage media images'' and the term ''images'' with the term ''record'' and the amendments Rules 17a–4 and 18a–6 would remove the term ''projection.'' The amendments to Rule 18a–6 would remove the term ''images.''

[71] *See* paragraph (f)(3)(i) of Rule 17a–4, as proposed to be amended (providing that a broker-dealer must ''[a]t all times have available, for examination by the staffs of the Commission, the self-regulatory organizations of which the member, broker, or dealer is a member, or any State securities regulator having jurisdiction over the member, broker or dealer facilities for immediate production of records preserved by means of the electronic recordkeeping system and for producing copies of those records'') and paragraph (e)(3)(i) of Rule 18a–6, as proposed to be amended (providing that an SBS Entity must ''[a]t all times have available, for examination by the staffs of the Commission or any State regulator having jurisdiction over the security-based swap dealer or major security-based swap participant, facilities for immediate production of records preserved by means of the electronic recordkeeping system and for producing copies of those records'').

[72] *See* paragraph (f)(3)(ii) of Rule 17a–4 and paragraph (e)(3)(ii) of Rule 18a–6, as proposed to be amended.

[73] *See* paragraph (f)(3)(iii) of Rule 17a–4, as proposed to be amended (providing that a broker-dealer must ''[m]aintain a backup electronic recordkeeping system that meets the other requirements of this paragraph (f) and that retains the records required to be maintained and preserved pursuant to §§ 240.17a–3 and 240.17a–4 in accordance with this section'') and paragraph (e)(3)(iii) of Rule 18a–6, as proposed to be amended (providing that an SBS Entity must ''[m]aintain a backup electronic recordkeeping system that meets the other requirements of this paragraph (e) and that retains the records required to be maintained and preserved pursuant to §§ 240.18a–5 and 240.18a–6 in accordance with this section'').

[74] Accordingly, to address this proposed amendment, the text of paragraph (f)(3)(iii) of Rule 17a–4, as proposed to be amended, and paragraph (e)(3)(iii) of Rule 18a–6, as proposed to be amended, refer to the ''other'' requirements of Rules 17a–4(f) and 18a–6(e), respectively.

all times for examination by the staff of the Commission. Paragraph (e)(3)(iv)(B) requires that each index be duplicated and the duplicate copies be stored separately from the original copy of the index. Finally, paragraph (e)(3)(iv)(C) requires that the original and duplicate indexes be preserved for the time required for the indexed record.

As discussed above, some electronic recordkeeping systems may use means other than indexes to organize and locate records stored on the systems. Further, the references to indexes in Rule 17a–4(f), in part, reflect the widespread use of optical disks to store records electronically when the rule was adopted in 1997. Consequently, the Commission is proposing to amend these paragraphs of Rules 17a–4(f) and 18a–6(e) to impose obligations on broker-dealers and SBS Entities to organize and maintain information necessary to locate records stored on their electronic recordkeeping systems without mandating the use of indexes. Under the amendments, a broker-dealer or SBS Entity using an electronic recordkeeping system would need to organize and maintain information necessary to locate records maintained by the electronic recordkeeping system.[75]

Rule 17a–4(f)(3)(v) requires that the broker-dealer have in place an audit system providing for accountability regarding inputting of records required to be maintained and preserved pursuant to Rules 17a–3 and 17a–4 to electronic storage media and inputting of any changes made to every original and duplicate record maintained and preserved on electronic storage media. Paragraph (f)(3)(v)(A) requires a broker-dealer to have the results of the audit system available at all times for examination by the staffs of the Commission or an SRO. Finally, paragraph (f)(3)(v)(B) requires that the results of the audit be preserved for the time required for the audited records. Similarly, Rule 18a–6(e)(3)(v) requires that the SBS Entity have in place an audit system providing for accountability regarding inputting of records required to be maintained and preserved pursuant to Rules 18a–5 and 18a–6 to the electronic storage system and inputting of any changes made to every original and duplicate record maintained and preserved on the electronic storage system. Paragraph (e)(3)(v)(A) requires an SBS Entity to have the results of the audit system available at all times for examination by the staff of the Commission. Finally, Paragraph (e)(3)(v)(B) requires that the results of the audit be preserved for the time required for the audited records.

The Commission is proposing amendments to these paragraphs of Rules 17a–4 and 18a–6 that are designed to better clarify the obligations of the broker-dealer or SBS Entity. In particular, the current rules require an ''audit system'' that provides ''accountability'' regarding the inputting of records and changes to records to the electronic storage media (in the case of Rule 17a–4) or electronic storage system (in the case of Rule 18a–6).[76] The proposed amendments would establish specific elements of information relating to electronic records for which the broker-dealer would be required to establish an auditable system of controls. In particular, the Commission is proposing to replace the existing requirement with a requirement that the broker-dealer or SBS Entity have in place an auditable system of controls that records, among other things: (1) Each input, alteration, or deletion of a record; (2) the names of individuals inputting, altering, or deleting a record; and (3) the date and time such individuals input, altered, or deleted the record.[77] As used in the proposed text, the phrase ''auditable system of controls'' would mean a system of controls that is documented and can be audited by internal or external examiners to determine whether the controls are operating as would be required by the rule. The objective of these proposed requirements is to identify a uniform set of information relating to electronic records for which the broker-dealer or SBS Entity would have responsibility and that could be used to examine whether the system is operating in conformance with the requirements of the proposed rule (*e.g.,* if the electronic recordkeeping system is using the audit-trail requirement, that it is preserving records in a manner that allows the original record to be re-created if overwritten, erased, or otherwise altered).

The remaining amendments to these paragraphs would be designed to incorporate the concept of a system of controls that tracks this information. In this regard, the broker-dealer or SBS Entity would need to be able to produce a record of the results of the audit of the system of controls for examination by the staffs of the Commission, SROs, and state securities regulators, as applicable.[78] This would mean the firm would need to be able to produce a record of: (1) Each input, alteration, or deletion of a record; (2) the names of individuals inputting, altering, or deleting a record; and (3) the date and time such individuals input, altered, or deleted the record. In addition, the broker-dealer or SBS Entity would need to preserve the record of the results of the audit of the system of controls for the retention period required for the associated records.[79] This would mean the firm would need to preserve the information discussed above for the required retention period of the record.

Paragraph (f)(3)(vi) of Rule 17a–4 requires a broker-dealer to maintain, keep current, and provide promptly upon request by the staffs of the Commission or an SRO all information necessary to access records and indexes stored on the electronic storage media; or place in escrow and keep current a copy of the physical and logical file format of the electronic storage media, the field format of all different information types written on the electronic storage media and the source code, together with the appropriate documentation and information necessary to access records and indexes. Similarly, paragraph (e)(3)(vi) of Rule 18a–6 requires an SBS Entity to maintain, keep current, and provide promptly upon request by the staff of the Commission all information necessary to access records and indexes stored in the electronic storage system; or place in escrow and keep current a copy of the physical and logical file format of the electronic storage system, the field format of all different information types written on the electronic storage system and the source code, together with the appropriate documentation and information necessary to access records and indexes.

The Commission is proposing to eliminate the escrow account option from these paragraphs for two reasons. First, this option is premised upon the use of electronic storage media such as optical disk technology. Second, it could pose cybersecurity risk to have this information held by a third party in escrow. The Commission is proposing to retain the requirement that the broker-dealer or SBS Entity maintain, keep current, and provide promptly upon request by the Commission, SROs, and state securities regulators, as applicable,

[75] *See* paragraph (f)(3)(iv) of Rule 17a–4 and paragraph (e)(3)(iv) of Rule 18a–6, as proposed to be amended.

[76] *See* paragraph (f)(3)(v) of Rule 17a–4 and paragraph (e)(3)(v) of Rule 18a–6.

[77] *See* paragraph (f)(3)(v)(A) of Rule 17a–4 and paragraph (e)(3)(v)(A) of Rule 18a–6, as proposed to be amended.

[78] *See* paragraph (f)(3)(v)(B) of Rule 17a–4 and paragraph (e)(3)(v)(B) of Rule 18a–6, as proposed to be amended.

[79] *See* paragraph (f)(3)(v)(C) of Rule 17a–4 and paragraph (e)(3)(v)(C) of Rule 18a–6, as proposed to be amended.

all information necessary to access and locate records preserved by means of the electronic recordkeeping system.[80]

Paragraph (f)(3)(vii) of Rule 17a–4 provides that, for a broker-dealer exclusively using electronic storage media for some or all of its record preservation, at least one third party, who has access to and the ability to download information from the broker-dealer's electronic storage media to any acceptable medium under Rule 17a–4, must file with the DEA for the broker-dealer certain undertakings. The required text of the undertakings are set forth in the rule. They require the third party to undertake: (1) To furnish promptly to the Commission, the broker-dealer's SRO(s), and state securities regulators having jurisdiction over the broker-dealer (collectively, the ''regulators''), upon reasonable request, such information as is deemed necessary by the regulators to download information kept on the broker-dealer's electronic storage media to any medium acceptable under Rule 17a–4; and (2) to take reasonable steps to provide access to information contained on the broker-dealer's electronic storage media, including, as appropriate, arrangements for the downloading of any record required to be maintained and preserved by the broker-dealer pursuant to Rules 17a–3 and 17a–4 in a format acceptable to the regulators. The rule further provides that these arrangements must provide specifically that in the event of a failure on the part of a broker-dealer to download the record into a readable format and after reasonable notice to the broker-dealer, upon being provided with the appropriate electronic storage medium, the third party will undertake to do so, as the regulators may request.

The Commission proposed similar requirements for Rule 18a–6(e).[81] When adopting the rule, the Commission noted that commenters stated that the requirement ''was outdated in light of the changed technological environment'' and that providing a third party access to electronic recordkeeping systems and client information ''needlessly exposes firms to data leakage and cybersecurity threats.''[82] The Commission stated that any change to the broker-dealer electronic storage provisions should be addressed in a separate regulatory initiative where the Commission intends to consider electronic storage media issues in a broader context, including with respect to other market participants.[83] For these reasons, the Commission did not include these third-party access and undertakings requirements in Rule 18a–6(e).

The Commission preliminarily believes it is appropriate to eliminate the *third-party* access and undertakings requirements for the reasons discussed above. The Commission also preliminarily believes that the access and undertakings requirements may continue to serve a useful purpose. Electronic records may be held in a highly secure manner to address cybersecurity risks. For example, the records may be encrypted and access to them likely will require passwords and other forms of authentication. Therefore, producing them may require the cooperation of an individual who has the requisite knowledge to access the electronic recordkeeping system and retrieve the records stored on it. The access and undertakings requirements would be designed to provide a backup method for regulators to access records of a broker-dealer when the firm is either unable or unwilling to furnish records that the Commission and other securities regulators are entitled to examine pursuant to the Exchange Act and rules thereunder.[84] For example, there may be situations, such as when a broker-dealer is failing and customer assets are at risk, when prompt access to the records is critical to protecting investors. In this case, relying on access and undertakings requirements may result in the records being produced more promptly than relying solely on other remedies for the firm's failure to produce the records.[85]

For these reasons, the Commission is proposing to amend Rule 17a–4(f) to require at all times that a senior officer of the broker-dealer, who has independent access to and the ability to provide the records, execute the undertakings.[86] This would mean that

[80] *See* paragraph (f)(3)(vi) of Rule 17a–4 and paragraph (e)(3)(vi) of Rule 18a–6, as proposed to be amended. For the reasons discussed above, the proposed rule text does not refer to indexes.

[81] *See* SBSD/MSBSP Recordkeeping Proposing Release, 79 FR at 25313.

[82] *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68569.

[83] *Id.*

[84] Paragraph (i) of Rule 17a4 has a similar undertaking requirement. *See* 17 CFR 240.17a–4(i). In particular, it provides, in pertinent part, that if the records required to be maintained and preserved pursuant to the provisions of Rules 17a–3 and 17a–4 are prepared or maintained by a third-party, the third party must file with the Commission a written undertaking in form acceptable to the Commission, signed by a duly authorized person. *Id.* The rule further provides that the undertaking must include the following provision: ''[w]ith respect to any books and records maintained or preserved on behalf of [BD], the undersigned hereby undertakes to permit examination of such books and records at any time or from time to time during business hours by representatives or designees of the Securities and Exchange Commission, and to promptly furnish to said Commission or its designee true, correct, complete and current hard copy of any or all or any part of such books and records.'' *Id. See also Recordkeeping by Brokers and Dealers,* Exchange Act Release No. 13962 (Sept. 15, 1977), 42 FR 47551, 47552 (Sept. 21, 1977) (Paragraph (i) of Rule 17a–4 was adopted ''to assure the accessibility of broker-dealer records in situations where, for example, a service bureau refuses to surrender the records due to nonpayment of fees.'').

[85] The proposed access and undertakings requirements would not require actions that contravene any provision of otherwise applicable law or actions beyond reasonable steps.

[86] *See* paragraph (f)(3)(vii) of Rule 17a–4, as proposed to be amended. In addition to this amendment and the amendments discussed below, the Commission is proposing to amend the text of the access and undertakings requirements in the following ways: (1) The introductory text of paragraph (f)(3)(vii) would be modified to make a senior officer obligated to provide access to the records and the undertakings, and to conform to the proposed introductory text to paragraph (f)(3) by replacing the phrase ''For every member, broker or dealer exclusively using electronic storage media for some or all of its record preservation under this section, at least one third party (the undersigned), who has access to and the ability to download information from the member's, broker's or dealer's electronic storage media to any acceptable medium under this section, must file with the designated examining authority for the member, broker or dealer the following undertakings with respect to such records:'' with the phrase ''Have at all times a senior officer of the member, broker, or dealer (hereinafter, the ''undersigned''), who has independent access to and the ability to provide records maintained and preserved on the electronic recordkeeping system, file with the designated examining authority for the member, broker or dealer the following undertakings with respect to such records:''; (2) throughout the text of the undertaking references to the member, broker, or dealer would be replaced with bracketed references to insert the name of the member, broker, or dealer; (3) the first sentence of the undertakings would be modified to conform to proposed changes to Rule 17a–4(f) discussed above and below by replacing the last phrase in the sentence that reads ''to download information kept on the member's, broker's or dealer's electronic storage media to any medium acceptable under § 240.17a–4'' with the phrase ''and to download copies of a record and its audit trail (if applicable) preserved by means of an electronic recordkeeping system of [Name of the Member, Broker, or Dealer] into both a human readable format and a reasonably usable electronic format in the event of a failure on the part of [Name of the Member, Broker, or Dealer] to download a requested record or its audit trail (if applicable);'' (4) the second sentence of the undertakings would be modified to conform to proposed changes to Rule 17a–4(f) discussed above by replacing the first phrase of the sentence that reads ''Furthermore, the undersigned hereby undertakes to take reasonable steps to provide access to information contained on the member's, broker's or dealer's electronic storage media, including, as appropriate, arrangements for the downloading of any record'' with the phrase ''Furthermore, the undersigned hereby undertakes to take reasonable steps to provide access to the information preserved by means of an electronic recordkeeping system of [Name of the Member, Broker, or Dealer], including, as appropriate, downloading any record;'' and (5) the third sentence of the undertakings would be modified to conform to proposed changes to Rule 17a–4(f) discussed above by replacing it with the following sentence ''Specifically, the undersigned will take reasonable steps that, in the event of a failure on the part of [Name of the Member, Broker, or Dealer] to download the record into a human readable

the broker-dealer must at all times have at least one senior officer who has independent access to and the ability to provide the records to the regulators, and that officer would need to execute the required undertakings. Independent access would mean the senior officer has the knowledge, credentials, and information necessary to access and provide the records without having to rely on other individuals at the firm. Therefore, under the proposed rule, if the senior officer that executed the undertaking is unable or will no longer serve in that capacity at the firm, a different senior officer would have immediately to execute and deliver the undertaking. The objective is to have a senior officer at all times who can access and provide the records to the Commission and other securities regulators provide the undertaking. The Commission preliminarily believes this approach would address cybersecurity and trade secret concerns about requiring a third party to fulfill these responsibilities and, at the same time, provide the Commission and other securities regulators with a means to obtain records if the broker-dealer refuses to produce them in the normal course.

In this regard, the Commission is proposing to modify the first undertaking so that it is triggered if the broker-dealer fails to provide records and, if applicable, associated audit trails stored on the electronic recordkeeping system. As proposed, the senior officer would need to undertake to furnish promptly to the regulators, upon reasonable request, such information as is deemed necessary by the regulators, to download copies of a record and its audit trail (if applicable) kept by means of an electronic recordkeeping system by the broker-dealer into both a human readable format and a reasonably usable electronic format in the event of a failure on the part of the broker-dealer to download a requested record or its audit trail (if applicable). This modification would be intended to limit the senior officer's obligations to circumstances where employees or other officers of the broker-dealer are either unwilling or unable to access and download a requested record or its audit trail, when applicable. In the normal course, the Commission expects broker-dealers would produce the records to the regulators without the need of the senior's officer's intervention.

The proposed amendments to Rule 18a–6(e) would similarly require a senior officer of the SBS Entity, who has independent access to and the ability to provide the records, to execute undertakings consistent with the undertakings that would be required pursuant to Rule 17a–4(f), as proposed to be amended.[87] However, the undertakings would need to be filed with the Commission (rather than a DEA) because SBS Entities do not have a DEA.

F. Requirements for Broker-Dealers Using Micrographic Media To Preserve Records

As discussed above, the Commission believes most broker-dealers do not use micrographic media to preserve their records. However, because some broker-dealers may use this technology, the proposed amendments to Rule 17a–4(f) would preserve this recordkeeping option for broker-dealers.[88] The current requirements for broker-dealers using micrographic media are set forth in paragraphs (f)(3)(i) through (iv) of Rule 17a–4, which also set forth requirements for broker-dealers using electronic storage media. As discussed above, paragraph (f)(3) of Rule 17a–4 would be amended to set forth requirements solely for broker-dealers using electronic recordkeeping systems. Moreover, the current provisions of that paragraph would be modified to specifically address electronic recordkeeping systems. Consequently, they would not address the unique characteristics of micrographic media. For these reasons, the Commission is proposing to move the requirements for broker-dealers using micrographic media to new paragraph (f)(4) of Rule 17a–4.

G. Requirement To Produce Electronic Records in a Reasonably Usable Electronic Format

The Commission is also proposing to amend Rule 17a–4(j) to require that a broker-dealer must furnish any record and its audit trail (if applicable) preserved electronically pursuant to Rule 17a–4(f) in a reasonably usable electronic format, if requested by a representative of the Commission.[89] As discussed above, a reasonably usable electronic format would be a format that is common and compatible with commonly used systems for accessing and reading electronic records. The Commission similarly is proposing to amend Rule 18a–6(g) to require SBS Entities to furnish any record preserved electronically pursuant to Rule 18a–6(e) in a reasonably usable electronic format, if requested by a representative of the Commission.[90]

III. Request for Comment

The Commission is requesting comments from all members of the public on all aspects of the proposed amendments to Rules 17a–4 and 18a–6. Commenters are requested to provide empirical data in support of any arguments or analyses. With respect to any comments, the Commission notes that they are of the greatest assistance to its rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to the Commission's proposals where appropriate.

In addition to this general request for comment, the Commission is requesting comment on the following specific aspects of the proposals:

1. Is the proposal to replace the term ''electronic storage media'' in Rule 17a–4(f) and the term ''electronic storage media'' in Rule 18a–6(e) with the term ''electronic recordkeeping system'' appropriate?[91] If so, explain why. If not, explain why not. Is there a more appropriate term? If so, identify it and explain why it would be more appropriate.

2. Is the definition of ''electronic recordkeeping system'' in Rules 17a–4(f) and 18a–6(e), as proposed to be amended, appropriate?[92] If so, explain why. If not, explain why not. Is there a more accurate definition? If so, provide it and explain why it would be more accurate.

3. Is there a reason to retain the notification (including the 90-day notification) and representation requirements with respect to employing an electronic recordkeeping system in

format or a reasonably usable electronic format and after reasonable notice to [Name of the Member, Broker, or Dealer], the undersigned will download the record into a human readable format or a reasonably usable electronic format at the request of the staff of the staffs of the Commission, any self-regulatory organization of which [Name of the Member, Broker, or Dealer] is a member, or any State securities regulator having jurisdiction over [Name of the Member, Broker, or Dealer].''

[87] *See* paragraph (e)(3)(vii) of Rule 18a–6, as proposed to be amended.

[88] *See* paragraph (f)(4) of Rule 17a–4, as proposed to be amended.

[89] *See* paragraph (j) of Rule 17a–4, as proposed to be amended. Paragraph (j) of Rule 17a–4 requires, among other things, that a broker-dealer promptly furnish to a representative of the Commission ''legible'' copies of records. Consequently, the rule already requires the broker-dealer to produce human readable copies of records.

[90] Paragraph (g) of Rule 18a–6 requires, among other things, that an SBS Entity promptly furnish to a representative of the Commission ''legible'' copies of records. Consequently, the rule already requires the broker-dealer to produce human readable copies of records.

[91] *See* section II.A. of the release (discussing these proposed amendments).

[92] *See* section II.B. of the release (discussing these proposed amendments).

Rule 17a–4(f)? [93] If so, explain why. If not, explain why not. If the requirements should be retained, should analogous requirements be added to Rule 18a–6(e)? If so, explain why. If not, explain why not.

4. Is the proposal to limit the requirements for electronic recordkeeping systems (including the audit-trail and WORM requirements) in paragraph (e)(2) of Rule 18a–6 to nonbank SBS Entities appropriate? [94] If so, explain why. If not, explain why not. Would these requirements conflict with requirements and guidance of the U.S. prudential regulators governing the use of electronic recordkeeping systems by bank SBS Entities? If so, please identify the requirements and guidance of the prudential regulators that would conflict with the proposed requirements of paragraph (e)(2) of Rule 18a–6 and explain how they would conflict with those proposed requirements. Would it be appropriate to apply certain of the requirements of paragraph (e)(2) of Rule 18a–6 to bank SBS Entities? For example, would it be appropriate to apply the requirements other than the audit-trail and WORM requirements? If so, explain why. If not, explain why not.

5. Would the proposed rule text setting forth the audit-trail requirement achieve the Commission's objective of imposing an obligation that the electronic recordkeeping system be configured to permit the re-creation of an original record if it is altered, over-written, or erased? [95] If so, explain why. If not, explain why not and suggest alternative rule text that would achieve this objective.

6. Would the proposed rule text requiring that the electronic recordkeeping system verify automatically the quality and accuracy of the electronic storage system storage and retention process achieve the Commission's objective that the electronic recordkeeping system be configured to ensure that when an original record is added to the electronic recordkeeping system it is completely and accurately captured in the system? [96] If so, explain why. If not, explain why not and suggest alternative rule text that would achieve this objective.

7. Is the proposed rule text requiring that the electronic recordkeeping system serialize the original and duplicate units of the storage media, and time-date for the required period of retention the information placed on such electronic storage media, if applicable, appropriate? [97] If so, explain why. If not, explain why not. Does this requirement as it exists today only apply to electronic recordkeeping systems that use optical disk technology? If so, explain why. If not, identify other electronic recordkeeping systems for which serializing original and duplicate units of the storage media, and time-dating for the required period of retention the information placed on the electronic storage media is appropriate and done under current practices.

8. Is the proposed rule text requiring that the electronic recordkeeping system have the capacity to readily download and transfer copies of a record and its audit trail (if applicable) in both a human readable format and a reasonably usable electronic format appropriate? [98] If so, explain why. If not, explain why not and suggest alternative rule text. What types of electronic record formats should be considered reasonably usable? Do broker-dealers and SBS Entities use unique (*i.e.,* proprietary) electronic formats? If so, can those electronic formats be converted into electronic formats that are reasonably usable?

9. Is the proposed rule text requiring that the electronic recordkeeping system have the capacity to readily download and transfer the information needed to locate the electronic record sufficiently clear? [99] If so, explain why. If not, explain why not. For example, what type of information is necessary to locate a specific record maintained and preserved on an electronic recordkeeping system? Are indexes used? If so, how? Are data fields used? If so, how? Should the rule be more specific in identifying the type of information necessary to locate a specific record maintained and preserved on an electronic recordkeeping system? If so, explain how and suggest alternative rule text.

10. Is the proposed rule text requiring the broker-dealer or SBS Entity to at all times have available, for examination by the regulators, facilities for immediate production of records preserved by means of the electronic recordkeeping system and for producing copies of those records appropriate? [100] If so, explain why. If not, explain why not and suggest alternative rule text. What type of facilities would be needed to meet this requirement?

11. Is the proposed rule text requiring the broker-dealer or SBS Entity to be ready at all times to provide immediately any record or information needed to locate records stored by means of the electronic recordkeeping system that the regulators may request appropriate? [101] If so, explain why. If not, explain why not and suggest alternative rule text.

12. Is the proposed rule text requiring the broker-dealer or SBS Entity to maintain a backup electronic recordkeeping system appropriate and necessary? [102] If so, explain why. If not, explain why not. For example, do broker-dealers maintain a backup electronic recordkeeping system with respect to the electronic records they preserve for business purposes? Are their other measures that broker-dealers take with respect to preserving their business-purpose electronic records that are designed to maintain access to the records if the electronic recordkeeping systems fails? If so, please identify and describe them and suggest how they could be incorporated into a final rule.

13. Is the proposed rule text requiring the broker-dealer or SBS Entity to organize and maintain information necessary to locate records maintained by the electronic recordkeeping system appropriate? [103] If so, explain why. If not, explain why not and suggest alternative rule text.

14. Is the proposed rule text requiring a broker-dealer or SBS Entity using an electronic recordkeeping system to have in place an auditable system of controls that records, among other things: The names of persons inputting, altering, or deleting a record; and the date and time such persons input, altered, or deleted the record appropriate? [104] For example, is this the type of information that could be used to examine whether the system is operating in conformance with the requirements of the proposed rule (*e.g.,* if the electronic recordkeeping system is adhering to the audit-trail requirement, that it is preserving records in a manner that allows the original record to be re-created if overwritten, erased, or otherwise altered)? If so, explain why. If not, explain why not and suggest alternative rule text. For example, is

[93] *See* section II.C. of the release (discussing these proposed amendments).

[94] *See* section II.D. of the release (discussing these proposed amendments).

[95] *See* section II.D. of the release (discussing these proposed amendments).

[96] *See* section II.D. of the release (discussing these proposed amendments).

[97] *See* section II.D. of the release (discussing these proposed amendments).

[98] *See* section II.D. of the release (discussing these proposed amendments).

[99] *See* section II.D. of the release (discussing these proposed amendments).

[100] *See* section II.E. of the release (discussing these proposed amendments).

[101] *See* section II.E. of the release (discussing these proposed amendments).

[102] *See* section II.E. of the release (discussing these proposed amendments).

[103] *See* section II.E. of the release (discussing these proposed amendments).

[104] *See* section II.E. of the release (discussing these proposed amendments).

there other information that would be necessary to achieve the objective of the requirement? If so, please identify it. Should the Commission add a requirement for a periodic audit to confirm that the auditable system of controls is working as appropriate? If so, should the required audit be internal or external?

15. Is the proposal to eliminate the requirement that a broker-dealer engage a third party with access to the firm's electronic records who undertakes to provide them to the Commission and other securities regulators appropriate? [105] If so, explain why. If not, explain why not. Further, is the proposal to modify this requirement so that a senior officer of the broker-dealer must have access to the records and undertake to provide them to the Commission appropriate? If so, explain why. If not, explain why not. Should the Commission require that a second senior officer at all times have independent access to and the ability to provide the records and to execute the undertakings? If so, explain why. If not, explain why not. For example, would this increase insider cybersecurity risk compared to the proposed approach? Would switching from a third party to a senior officer reduce cybersecurity risk compared with the current third-party requirement? If so, explain why. If not, explain why not. Would switching to a senior officer provide the Commission and other securities regulators with adequate means to obtain records if the broker-dealer refuses to produce them in the normal course? If so, please explain. If not, explain why not.

16. What type of senior officer could fulfill the proposed access and undertakings requirements? For example, which senior officers have access to electronic recordkeeping systems? Are there any circumstances in which the senior officer would not be an associated person? Should the Commission specify which officers or officers with specific responsibilities and reporting lines that would be appropriate to provide the senior officer undertakings? If so, please identify them and explain why it would be appropriate for them to provide the undertakings.

17. Is the proposal to eliminate the option to place in escrow and keep current a copy of the physical and logical file format of the electronic storage media, the field format of all different information types written on the electronic storage media, and the source code, together with the appropriate documentation and information necessary to access records and indexes, appropriate? If not, explain why. For example, do broker-dealers use this option?

18. Do broker-dealers or SBS Entities use micrographic media to store regulatory records? If not, should the Commission delete the option to use micrographic media in Rule 17a–4(f)? [106] If so, should the Commission add an option to use micrographic media to Rule 18a–6(e)? Are the current requirements in Rule 17a–4(f) for broker-dealers using micrographic media consistent with this technology as it exists today? If so, explain why. If not, explain why not. Should the current requirements be updated? If so, explain how.

19. Should the Commission adopt a sunset provision after which time broker-dealers would no longer be able to use micrographic media? If so, explain why or why not. If not, please describe broker-dealers' continued use of micrographic media to store records. Would any broker-dealers incur costs in moving from micrographic media to paper or electronic storage media? If so, identify and explain the costs. Moreover, do broker-dealers continue to preserve records using paper, rather than electronic storage methods, to fulfill the record preservation requirements of Rule 17a–4? If so, please provide data as to the frequency of such use.

20. Are the proposed amendments to paragraphs (j) and (g) of Rules 17a–4 and 18a–6, respectively, that would require firms to furnish a record and its audit trail (if applicable) preserved on an electronic recordkeeping system pursuant to paragraph (e) of this section in a reasonably usable electronic format, if requested by a representative of the Commission, appropriate? [107] If not, explain why.

IV. Economic Analysis

The Commission is mindful of the economic effects, including the costs and benefits, of the proposed amendments. Section 3(f) of the Exchange Act provides that whenever the Commission is engaged in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[108] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[109] Exchange Act Section 23(a)(2) also provides that the Commission shall not adopt any rule which would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The analysis below addresses the likely economic effects of the proposed amendments, including the anticipated and estimated benefits and costs of the amendments and their likely effects on efficiency, competition, and capital formation. The Commission also discusses the potential economic effects of certain alternatives to the approaches taken in this proposal. Many of the benefits and costs discussed below are difficult to quantify. For example, the Commission cannot quantify the number of entities that may already have electronic recordkeeping systems compliant with the proposed requirements; the extent to which some broker-dealers and SBS Entities may need to upgrade existing electronic recordkeeping systems to meet the proposed audit-trail requirement and costs thereof; or the degree to which broker-dealers and SBS Entities may currently pass along recordkeeping costs to customers and counterparties. While the Commission has attempted to quantify economic effects where possible, much of the discussion of economic effects is qualitative in nature.

A. Baseline

To assess the economic effects of the proposed amendments, the Commission is using as the baseline the broker-dealer and security-based swap markets as they exist at the time of this release, including applicable rules the Commission has already adopted, but excluding rules the Commission has proposed but not yet finalized.

With respect to broker-dealers, the regulatory baseline includes Rules 17a–4(f) and (j). In addition, as discussed above, the Commission has also issued interpretations of Rule 17a–4(f) for broker-dealers.[110] With respect to SBS

[105] *See* section II.E. of the release (discussing these proposed amendments).

[106] *See* section II.F. of the release (discussing these proposed amendments).

[107] *See* section II.G. of the release (discussing these proposed amendments).

[108] *See* 15 U.S.C. 78c(f).

[109] *See* 15 U.S.C. 78w(a)(2).

[110] *See* Section II.D discussing Rule 17a–4(f) Interpretation. *See SBSD/MSBSP Recordkeeping Adopting Release,* 84 FR at 68568. As discussed above, the Commission would interpret the WORM requirement as set forth in the text of paragraph (e)(2)(i)(B) of Rule 18a–6, as proposed to be amended, consistently with how the WORM

Continued

Entities, the regulatory baseline includes the statutory provisions pursuant to the Dodd-Frank Act and rules adopted by the Commission, compliance with which is required. This includes rules adopted by the Commission in the following adopting releases: The intermediary definitions release; [111] cross-border release; [112] security-based swap entity registration release; [113] U.S. activity release; [114] business conduct release; [115] trade acknowledgment release; [116] capital, margin, and segregation release; [117] and the recordkeeping and reporting release adopting Rules 18a–6(e) and (g).[118]

The following sections discuss available data about the security-based swap market, affected SBS Entities, dual registrants, other security-based swap market participants, participant domiciles, and broker dealer activity.

1. Broker-Dealers

The market for broker-dealer services encompasses a relatively small set of large and medium sized broker-dealers and thousands of smaller broker-dealers competing for niche or regional segments of the market.[119] The market for broker-dealer services includes many different markets for a variety of services related to the securities business, including (1) managing orders for customers and routing them to various trading venues; (2) providing advice to customers that is in connection with and reasonably related to their primary business of effecting securities transactions; (3) holding customers' funds and securities; (4) handling clearance and settlement of trades; (5) intermediating between customers and carrying/clearing brokers; (6) dealing in corporate debt and equities, government bonds, and municipal bonds, among other securities; (7) privately placing securities; and (8) effecting transactions in mutual funds that involve transferring funds directly to the issuer. Some broker-dealers may specialize in just one narrowly defined service, while others may provide a wide variety of services.

Based on an analysis of FOCUS filings as of December 2020, there were approximately 3,551 registered broker-dealers with over 186 million customer accounts.[120] In total, these broker-dealers have over $5 trillion in total assets as reported on Form X–17A–5.[121] More than two-thirds of all broker-dealer assets and more than one-third of all customer accounts are held by the 19 largest broker-dealers, as shown in Table 1.[122] Of the broker-dealers registered with the Commission as of December 2020, 502 broker-dealers were dually registered as investment advisers.[123]

TABLE 1—REGISTERED BROKER-DEALERS AS OF DECEMBER 2020

Size of broker-dealer (total assets)	Total number of BDs	Number of dually registered BDs *	Cumulative total assets ($ bln)	Cumulative number of customer accounts
>$50 billion	19	10	3,450	67,178,360
$1 billion to $50 billion	122	24	1,519	107,003,611
$500 million to $1 billion	25	5	17	639,425
$100 million to $500 million	129	31	27	932,529
$10 million to $100 million	507	98	18	9,771,667
$1 million to $10 million	1,047	194	3.7	383,646
<$1 million	1,702	140	0.5	13,481
Total	3,551	502	5,036	185,922,719

* For purposes of this table, a dually registered broker-dealer is registered with either the Commission or a state as an investment adviser and a broker-dealer.

The Commission preliminarily estimates that 45 broker-dealers may be dually registered with the CFTC as futures commission merchants as of December 31, 2020.[124]

In addition to the above estimates of affected broker-dealers, over-the-counter (''OTC'') derivatives dealers will also be

requirement as set forth in the text of paragraph (f)(2)(ii)(A) of Rule 17a–4 was interpreted by the Commission in 2019 and 2003.

[111] *See Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,''* Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012).

[112] *See Application of ''Security-Based Swap Dealer'' and ''Major Security-Based Swap Participant'' Definitions to Cross-Border Security-Based Swap Activities,* Exchange Act Release No. 72372 (June 25, 2014, 79 FR 47278, 47359 (Aug. 12, 2014).

[113] *See Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants,* Exchange Act Release No. 75611 (Aug. 5, 2015), 80 FR 48964, 48989 (Aug. 14, 2015).

[114] *See Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception,* Exchange Act Release No. 77104 (Feb. 10, 2016), 81 FR 8598 (Feb. 19, 2016).

[115] *See Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants,* Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR 29960, 30081 (May 13, 2019).

[116] *See Trade Acknowledgment and Verification of Security-Based Swap Transactions,* Exchange Act Release No. 78011 (June 8, 2016), 81 FR 39808, 30143–44 (June 17, 2016).

[117] *See* SBSD/MSBSP Capital, Margin, and Segregation Adopting Release, 84 FR 43872.

[118] *See* SBSD/MSBSP Recordkeeping Proposing Release, 84 FR 68550.

[119] *See Regulation Best Interest Adopting Release,* 84 FR at 33406. For simplification, the Commission presents this analysis as if the market for broker-dealer services encompasses one broad market with multiple segments, even though, in terms of competition, it could also be discussed in terms of numerous interrelated markets.

[120] The data is obtained from FOCUS filings as of December 2020. There may be a double-counting of customer accounts among, in particular, the larger broker-dealers as they may report introducing broker-dealer accounts as well in their role as clearing broker-dealers. Customer Accounts includes both broker-dealer and investment adviser accounts for dual-registrants.

[121] Assets are estimated by Total Assets (allowable and non-allowable) from Part II of the FOCUS filings (Form X–17A–5 Part II and Part IIA, *available at https://www.sec.gov/files/formx-17a-5_2.pdf*) and correspond to balance sheet total assets for the broker-dealer. The Commission does not have an estimate of the total amount of customer assets for broker-dealers because that information is not included in FOCUS filings. The Commission estimates broker-dealer size from the total balance sheet assets as described above.

[122] Approximately $4.97 trillion of total assets of broker-dealers (98.7%) are at broker-dealers with total assets in excess of $1 billion.

[123] This estimate includes the number of broker-dealers who are also registered as state investment advisers.

[124] Using FOCUS Report data as of December 31, 2020, there are 45 broker-dealers that report commodity futures account activity in ''Part II: Customer's Regulated Commodity Futures Accounts.''

affected by the proposed recordkeeping amendments. The Commission estimates that 5 registered OTC derivatives dealers will be impacted by the proposed amendments to Rule 17a–4.

2. Security-Based Swap Markets: Activity and Participants

i. Available Data From the Security-Based Swap Market

The Commission's understanding of the market is informed, in part, by available data on security-based swap transactions, though the Commission acknowledges that limitations in the data limit the extent to which it is possible to quantitatively characterize the market.[125] Since this data does not cover the entire market, the Commission has analyzed market activity using a sample of transactions that includes only certain segments of the market. The Commission believes, however, that the data underlying this analysis provides reasonably comprehensive information regarding single-name credit default swap (''CDS'') transactions and the composition of the participants in the single-name CDS market.

The Commission's analysis of the current state of the security-based swap market is based on data obtained from the Depositary Trust & Clearing Corporation (''DTCC'') Derivatives Repository Limited Trade Information Warehouse (''TIW''), especially data regarding the activity of market participants in the single-name CDS market during the period from 2008 to 2021.[126] Although the definition of security-based swaps is not limited to single-name CDS,[127] the Commission believes that the single-name CDS data is sufficiently representative of the market to inform our analysis of the current security-based swap market.

According to data published by the Bank for International Settlements (''BIS''), the global notional amount outstanding in single-name CDS was approximately $3.5 trillion,[128] in multi-name index CDS was approximately $4.5 trillion, and in multi-name, non-index CDS was approximately $347 billion.[129] The total gross market value outstanding in single-name CDS was approximately $77 billion, and in multi-name CDS instruments was approximately $125 billion.[130] The global notional amount outstanding in equity forwards and swaps as of December 2020 was $3.6 trillion, with total gross market value of $321 billion.[131]

ii. Affected SBS Entities

Final SBS Entity registration rules have been adopted and compliance was required as of November 1, 2021.[132] As of November 9, 2021, there are 41 entities registered with the Commission as SBSDs, and no entities have registered as MSBSPs.[133]

Firms that act as dealers play a central role in the security-based swap market. Based on an analysis of 2020 single-name CDS data in TIW, accounts of dealers intermediated transactions with a gross notional amount of approximately $1.99 trillion, with approximately 55 percent of the gross notional intermediated by the top five dealer accounts.[134]

iii. Other Markets and Dual Registrants

The numerous financial markets are integrated, often attracting the same market participants that trade across corporate bond, swap, and security-based swap markets, among others. For example, persons who will register as SBS Entities are likely also to be engaged in swap activity. In part, this overlap reflects the relationship between single-name CDS contracts, which are security-based swaps, and index CDS contracts, which may be swaps or security-based swaps. A single-name CDS contract covers default events for a single reference entity or reference security. Index CDS contracts and related products make payouts that are contingent on the default of index components and allow participants in these instruments to gain exposure to the credit risk of the basket of reference entities that comprise the index, which is a function of the credit risk of the index components. A default event for a reference entity that is an index component will result in payoffs on both single-name CDS written on the reference entity and index CDS written on indices that contain the reference entity. Because of this relationship between the payoffs of single-name CDS and index CDS products, prices of these products depend upon one another,[135] creating hedging opportunities across these markets.

These hedging opportunities mean that participants that are active in one market are likely to be active in the other. Commission staff analysis of approximately 4,149 TIW accounts that participated in the market for single-name CDS in 2020 revealed that approximately 3,096 of those accounts, or 75 percent, also participated in the market for index CDS. Of the accounts that participated in both markets, data regarding transactions in 2020 suggests that, conditional on an account transacting in notional volume of index CDS in the top third of accounts, the

[125] The Commission also relies on qualitative information regarding market structure and evolving market practices provided by commenters and the knowledge and expertise of Commission staff.

[126] In prior releases, the Commission has examined data for other time periods. For example, in the business conduct standards adopting release, the Commission presented an analysis of TIW data for November 2006 through December 2014. While the exact numbers of various groups of transacting agents and account holders in that analysis differ from the figures reported in this section (for a longer time period), the Commission does not observe significant structural differences in market participation. *Compare* 81 FR at 30102 (Tables 1 and 2), *with* Tables 1 and 2 below.

[127] While other repositories may collect data on transactions in total return swaps on equity and debt, the Commission does not currently have access to such data for these products (or other products that are security-based swaps). Additionally, the Commission explains below that data related to single-name CDS provides reasonably comprehensive information for the purpose of this analysis.

[128] The global notional amount outstanding represents the total face amount used to calculate payments under outstanding contracts. The gross market value is the cost of replacing all open contracts at current market prices.

[129] *See* BIS, *Semi-annual OTC derivatives statistics at December 2020,* Table D5.2, *available at https://stats.bis.org/statx/srs/table/d5.2* (accessed Aug. 18, 2021).

[130] *See id.*

[131] These totals include swaps and security-based swaps, as well as products that are excluded from the definition of ''swap,'' such as certain equity forwards. *See OTC, equity-linked derivatives statistics,* Table D5.1, *available at https://stats.bis.org/statx/srs/table/d5.1* (accessed Aug. 18, 2021). For the purposes of this analysis, the Commission assumes that multi-name index CDS are not narrow-based index CDS and therefore, do not fall within the *security-based swap* definition. See 15 U.S.C. 78c(a)(68)(A); *see also Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,* 77 FR 48208. The Commission also assumes that all instruments reported as equity forwards and swaps are security-based swaps, potentially resulting in underestimation of the proportion of the security-based swap market represented by single-name CDS. Therefore, when measured on the basis of gross notional outstanding single-name CDS contracts appear to constitute roughly 49% of the security-based swap market. Although the BIS data reflects the global OTC derivatives market, and not just the U.S. market, the Commission has no reason to believe that these ratios differ significantly in the U.S. market.

[132] *See Key Dates for Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants,* available at: *https://www.sec.gov/page/key-dates-registration-security-based-swap-dealers-and-major-security-based-swap-participants.*

[133] *See* section V.C. of this release (discussing the number of SBS Entities that would be subject to the proposed rules).

[134] The Commission staff analysis of TIW transaction records indicates that approximately 99% of single-name CDS price-forming transactions in 2020 involved an ISDA-recognized dealer.

[135] ''Correlation'' typically refers to linear relationships between variables; ''dependence'' captures a broader set of relationships that may be more appropriate for certain swaps and security-based swaps. *See, e.g.,* George Casella & Roger L. Berger, Statistical Inference 171 (2nd ed. 2002).

probability of the same account landing in the top third of accounts in terms of single-name CDS notional volume is approximately 61 percent; by contrast, the probability of the same account landing in the bottom third of accounts in terms of single-name CDS notional volume is only 11 percent.

Of the 25 SBSDs subject to Rule 18a–6(e), 24 are dually registered with the CFTC as swap dealers and are therefore subject to CFTC requirements for entities registered with the CFTC as swap.[136] Additionally, there are six SBSDs that are already or will be subject to Rule 17a–4. Further, of 41 entities registered as SBSDs, 26 have a prudential regulator.

3. Recordkeeping Practices of Market Participants

Notwithstanding the Commission's 2003 and 2019 interpretations of the WORM requirement (*i.e.,* that it can be met with software solutions) described above,[137] the Commission understands that some affected broker-dealers maintain electronic recordkeeping systems used daily for business purposes and separate electronic recordkeeping systems used to meet the WORM requirement. The Commission does not have data regarding the number of affected broker-dealers that maintain separate electronic recordkeeping systems for these purposes or data sufficient for the Commission to evaluate the likelihood that affected broker-dealers maintain separate electronic recordkeeping systems for business purposes that do or do not satisfy the WORM requirement. As a result, the Commission cannot estimate the frequency with which separate electronic recordkeeping systems are maintained for these purposes.

The Commission understands that third-party vendors developed software-based solutions designed to meet the WORM requirement of Rule 17a–4(f).[138] However, affected broker-dealers do not commonly use such record systems for business purposes: Broker-dealers have explained to Commission staff that the electronic recordkeeping systems used for business purposes are dynamic, updated constantly (*e.g.,* with each new transaction or position), and easily accessible for retrieving records, whereas WORM databases are more akin to static ''snapshots'' of the records at a point in time and are less accessible for business purposes. As discussed in more detail above, the Commission preliminarily believes that affected broker-dealers generally deploy an electronic recordkeeping system that serves no purpose other than to hold records in a manner that meets the Commission's regulatory requirements for electronic recordkeeping systems.[139] The Commission also believes that some affected SBS Entities currently have systems complying with the electronic recordkeeping requirements under Rule 18a–6 as it presently stands, which does not include a WORM or audit-trail requirement.[140]

As discussed above, a number of affected entities are dually registered with the CFTC as swap dealers. Under the CFTC's electronic recordkeeping rule, affected entities must configure their recordkeeping systems and have policies and procedures governing those systems that are designed to prevent records from being altered or erased.

B. Benefits of the Proposed Amendments

The proposed amendments are intended to modernize the SBS Entity and broker-dealer recordkeeping rules given technological changes over the last two decades. The Commission preliminarily believes that by specifying that nonbank SBS Entities [141] and broker-dealers may satisfy their electronic recordkeeping obligations through the WORM requirement or an audit-trail alternative, the proposed amendments may result in nonbank SBS Entities or broker-dealers updating electronic recordkeeping systems in ways that would lower compliance costs. For example, nonbank SBS Entities or broker-dealers may, among other things, reduce or eliminate duplicative compliance systems in circumstances where they currently maintain separate electronic recordkeeping systems primarily due to, as applicable, the WORM requirement or Rule 18a–6(e)'s electronic storage system requirements. The Commission expects that these reductions would primarily be realized by broker-dealers that may, for example, choose to adopt a single recordkeeping system that complies with the audit-trail requirement—for business *and* regulatory purposes. Below, the Commission estimates the reduction in initial and ongoing costs and burdens related to these proposals.[142]

These aggregate cost savings may be reduced by three factors. First, some affected entities may have already streamlined their regulatory electronic recordkeeping systems with systems used for business records consistent with the Commission interpretations described above. Second, some affected entities may elect to upgrade existing business recordkeeping systems to accommodate the proposed audit-trail alternative. The affected entities that choose to undertake such upgrades may do so if aggregate savings from eliminating redundant electronic recordkeeping systems outweigh the costs of buildout for existing systems. The Commission expects that these costs would primarily be realized by broker-dealers. However, potential buildout costs may decrease the cost savings from the proposal. Third, because the proposal would not require broker-dealers to make changes to recordkeeping systems that are currently compliant with the WORM requirement, they may choose not to make any changes to recordkeeping systems. Such broker-dealers may, for example, choose to continue maintaining separate recordkeeping systems for business purposes and for regulatory purposes.

The proposal may also benefit customers and counterparties of broker-dealers and nonbank SBS Entities. Specifically, to the extent that broker-

[136] *See* section VI.F. of this release (discussing the CFTC's electronic recordkeeping rules). *See also* section V.C. of this release (discussing the number of SBSDs that would be subject to the proposed rules).

[137] *See* sections I.B.1. and II.D. of this release (discussing the interpretations and broker-dealers' response to them).

[138] *See, e.g.,* Global Relay, *Global Relay Archive,* available at: *https://www.globalrelay.com/gr-services/archive;* Amazon, *Protecting data with Amazon S3 Object lock,* available at: *https://aws.amazon.com/blogs/storage/protecting-data-with-amazon-s3-object-lock/; Cohasset Associates, Compliance Assessment: Amazon Web Services (AWS) Simple Storage Service (S3),* available at: *https://d1.awsstatic.com/r2018/b/S3-Object-Lock/Amazon-S3-Compliance-Assessment.pdf;* Microsoft, Securities and Exchange Commission (SEC) Rule 17a–4(f) United States, available at: *https://docs.microsoft.com/en-us/compliance/regulatory/offering-sec-17a-4.*

[139] *See* section II.D of this release (discussing broker-dealers' use of WORM compliant electronic recordkeeping systems).

[140] As noted above in section II.D. of this release, it is the Commission's understanding that electronic recordkeeping systems used by nonbank SBS Entities as well as by broker-dealers for business purposes can be configured to meet the audit-trail requirement.

[141] With respect to SBS Entities, the proposal would limit the electronic recordkeeping requirements to SBS Entities that do not have a prudential regulator in order to avoid subjecting bank SBS Entities to potentially differing requirements with respect to electronic record preservation. As discussed above, 26 SBS Entities have a prudential regulator (*i.e.,* are bank SBS Entities). The exclusion of bank SBS Entities from the scope of the proposed electronic recordkeeping system requirements would reduce aggregate benefits and costs related to modifying electronic recordkeeping systems to conform to the proposed amendment to paragraph (e)(2) of Rule 18a–6.

[142] *See* section V.D. of this release (discussing increases and decreases in costs and burdens relating to proposals for purposes of the Paperwork Reduction Act).

dealers and nonbank SBS Entities currently pass on part or all of their recordkeeping costs to their customers and counterparties, some of the above cost savings may flow through to customers and counterparties of broker-dealers and nonbank SBS Entities in the form of lower costs or greater availability of services. The extent to which cost savings are passed along to customers and counterparties will depend on several factors, including the price elasticity of the demand for broker-dealer and nonbank SBS Entity services, the substitutability of broker-dealers and nonbank SBS Entities, concentration in the broker-dealer and nonbank SBS Entity industries due to economies of scale, heterogeneity of broker-dealer and nonbank SBS Entity services, and market segmentation, among others.

The proposal may also enhance Commission oversight of nonbank SBS Entities and broker-dealers. To the degree that the proposal may lead broker-dealers and nonbank SBS Entities to move to a single recordkeeping system for both business and regulatory purposes, and if affected entities direct compliance cost savings to investments in system improvements and maintenance, the reliability and efficiency of recordkeeping systems may increase. Moreover, the Commission preliminarily believes that the proposed audit-trail and WORM alternatives will provide flexibility for broker-dealers and nonbank SBS Entities, while still maintaining the essential ability of the Commission to access the entities' records in the course of examinations or other activities.

The Commission preliminarily believes that some of the proposed amendments may provide compliance efficiencies. For example, the proposed amendments related to the verification of completeness and accuracy of the processes for retaining records electronically may introduce time efficiencies in achieving compliance when an original record is added to the electronic recordkeeping system. Similarly, proposed amendments to provide additional specificity to the obligations relating to the auditable system of controls required by paragraph (f)(3)(v) and Rule 17a–4 and Rule paragraph (e)(3)(v) of Rule 18a–6 may introduce time and compliance efficiencies by lowering burdens on compliance professionals' time. Further, the Commission preliminarily believes that the elimination of the notification and representation requirements from Rule 17a–4(f) would alleviate some burden currently imposed on broker-dealers, as discussed below.[143]

In addition, the proposed elimination of the *third-party* access and undertakings requirements may benefit affected entities by reducing cybersecurity and trade-secret risks attendant to requiring a third party to fulfill these responsibilities. Similarly, the proposed elimination of the escrow account option may reduce cybersecurity risk attendant to having this information held by a third party in escrow.[144]

Certain of the proposed amendments may also incrementally improve regulatory oversight. For example, proposed amendments related to the ability to download and transfer records in human readable and reasonably usable electronic formats may facilitate more efficient Commission oversight as they would reduce the time costs of staff review of individual records as well as searching and sorting electronic records. Further, the proposed amendments requiring that a senior officer provide required undertakings may provide the Commission with a means to obtain records if an affected entity refuses to produce them in the normal course, which may enhance the efficiency of Commission examinations and oversight.

C. Costs of the Proposed Amendments

The proposed amendments are intended to modernize the Commission's recordkeeping requirements and to reduce recordkeeping duplication by affected entities. However, as referenced above, the Commission recognizes that some broker-dealers and nonbank SBS Entities may bear costs from having to alter electronic recordkeeping systems currently used. Nonbank SBS Entities may, for example, need to alter electronic storage systems to comply with either the audit-trail or WORM requirement. In addition, broker-dealers may need to build new or alter existing electronic recordkeeping systems to the extent they would like to meet the audit-trail requirement. As noted below,[145] based upon information provided to the Commission by the securities industry, the Commission estimates that the initial cost to build and implement a WORM-compliant electronic recordkeeping system for a large broker-dealer is $10 million, with an additional cost of $1.2 million annually to maintain the system,[146] and the Commission believes that the SBS Entities that would be affected by the proposed rule amendments are of large sizes comparable to the universe of broker-dealers that the rulemaking petitioners used to derive those estimates. In addition, based on feedback from the securities industry, the Commission believes that the initial cost to build and implement an electronic recordkeeping system that meets the audit-trail requirements and the ongoing cost to maintain the system would be substantially lower than the analogous costs that would be incurred with respect to a WORM-compliant system.[147] In particular, the Commission estimates that the initial cost to build and implement an electronic recordkeeping system that meets the audit-trail requirement for a large broker-dealer or SBS Entity without a prudential regulator and that is not a broker-dealer is $1,000,000, with an additional cost of $120,000 annually to maintain the system.

There are 802 broker-dealers with assets greater than $10 million and four SBSDs that would be subject to paragraph (e)(2) of Rule 18a–6. The Commission anticipates that eliminating the application of paragraph (e)(2) of Rule 18a–6 to the 21 SBSDs that have a prudential regulator and are subject to Rule 18a–6 would result in a decrease of 100 hours per firm on an annual basis, or 2,100 hours per year for all firms affected by the proposed amendment, for an ongoing cost savings of $663,000 per year for all affected firms.[148]

The Commission does not believe any broker-dealers or SBSDs will elect to build a WORM-compliant electronic recordkeeping system. Moreover, the Commission estimates that most of these firms have electronic recordkeeping

[143] *See* section V.D. of this release (discussing increases and decreases in costs and burdens relating to proposals for purposes of the Paperwork Reduction Act).

[144] The Commission does not expect significant benefits or costs associated with certain other amendments contemplated in the proposal that the Commission believes are technical in nature. These amendments include simplification of the introductory text of paragraph (f)(3) of Rule 17a–4 and paragraph (e)(3) of Rule 18a–6; amendments to paragraphs (f)(3)(i) of Rule 17a–4 and (e)(3)(i) of Rule 18a–6 to replace terms tied to micrographic media and optical disk technology; amendments to better clarify paragraph (f)(3)(ii) of Rule 17a–4 and paragraph (e)(3)(ii) of Rule 18a–6; and amendments moving the requirements for broker-dealers using micrographic media to new paragraph (f)(4) of Rule 17a–4.

[145] *See* section V.D. of this release (discussing decreases and increases in costs and burdens relating to proposals for purposes of the Paperwork Reduction Act).

[146] *See* 17a–4(f) Rulemaking Petition Addendum at 4–5.

[147] *See e.g.* Rule 17a–4(f) Rulemaking Petition at 6–7.

[148] 2,100 hours × $316 per hour (at the compliance manager rate) = $663,000.

systems that could meet the audit-trail requirement or that could be configured to meet that requirement without the need to build a new system. The Commission estimates that 20 of these firms would elect to build a new electronic recordkeeping system to meet the audit-trail requirement for an initial one-time industry cost burden of $20,000,000 and an annual cost burden of $2,400,000.

The Commission estimates that the cost for the 2,749 broker-dealers with $10,000,000 or less in total assets to build and maintain an electronic recordkeeping system that meets the proposed audit-trail requirement would be significantly less than the $1,000,000 initial and $120,000 annual costs estimated for the 802 larger broker-dealers and four SBSDs that would be subject to paragraph (e)(2) of Rule 18a–6. Consequently, the Commission estimates that the initial cost to build and implement an electronic recordkeeping system that meets the audit-trail requirement for these smaller broker-dealers is $100,000, with an additional cost of $12,000 annually to maintain the system. The Commission estimates that most of the 2,749 broker-dealers with $10,000,000 or less in total assets will continue to preserve records in the manner they do today: Using a WORM-compliant system, using micrographic media, or maintaining paper records. The Commission estimates that 80 of these firms would elect to build a new electronic recordkeeping system to meet the audit-trail requirement for an initial one-time industry cost burden of $8,000,000 and an annual cost burden of $960,000.

The Commission believes that broker-dealers and SBS Entities would incur an initial burden and ongoing annual burden in establishing a backup electronic recordkeeping system. The Commission believes these burdens and costs would be substantially less than the burdens and costs of the primary electronic recordkeeping systems because of the benefit of economies of scale for the backup system whereby common technology and personnel could be used for both systems. The Commission estimates that the costs and burdens for the 802 larger broker-dealers and four SBSDs that would be subject to paragraph (e)(2) of Rule 18a–6 would be $250,000 in initial burdens and costs and $30,000 in annual burdens and costs. Further, the Commission expects that the broker-dealers and SBS Entities that have electronic recordkeeping systems that could meet the audit-trail requirement or that could be configured to meet that requirement without the need to build a new system also maintain backup recordkeeping systems for business continuity purposes. Therefore, the initial and annual costs would be incurred by the 20 firms that elect to build a new electronic recordkeeping system that meets the proposed audit-trail requirements. Consequently, the Commission estimates that the industry-wide costs and burdens for these firms would be $5,000,000 in initial costs and burdens and $600,000 in annual costs and burdens.

The Commission estimates that the costs and burdens incurred by the 80 smaller broker-dealers that would build electronic recordkeeping systems to meet the audit-trail requirement and, therefore, need to build a backup recordkeeping system, would be substantially less than the costs and burdens incurred by the larger broker-dealers. The Commission estimates that these firms would incur an initial costs and burdens of $25,000 and ongoing annual costs and burdens of $3,000. Therefore, the Commission estimates that the industry-wide costs and burdens for these firms would be $2,000,000 in initial costs and burdens and $240,000 in ongoing annual costs and burdens.

The Commission recognizes that the proposal would not harmonize with the parallel recordkeeping rule for CFTC registrants (*e.g.,* futures commission merchants and swap dealers). In contrast, the proposal would impose a bright line audit-trail or WORM requirement. To the degree that such requirements may not satisfy CFTC requirements, a lack of harmonization in the recordkeeping requirement for registrants may give rise to compliance inefficiencies for broker dealers and SBS Entities that are dually registered with the CFTC.

Certain other aspects of the proposed amendments may also impose costs on affected entities. Specifically, the proposed amendments related to human readable and reasonably usable electronic file formats may impose compliance costs related to the required updates to recordkeeping systems.[149] Proposed amendments to third-party access and undertakings requirements may also impose additional time demands on senior officers, though these costs may be at least partially offset for broker-dealers by savings attendant to removing the requirement for third-party access. To the extent that these proposed requirements increase the scope of senior officer duties and increase potential liability on the part of senior officers, senior officers may demand higher compensation and liability insurance, which may result in an increase to senior officer recruitment and retention costs. Further, amendments requiring broker-dealers and SBS Entities to have a backup set of records when records are preserved on an electronic recordkeeping system may impose additional costs related to making updates to compliance systems, as compared to the current rules' requirements to store separately from originals a duplicate copy of a record.[150]

D. Reasonable Alternatives

The Commission has considered a number of alternatives. For example, the Commission has considered harmonizing the recordkeeping rules for SBS Entities with the CFTC's principles-based approach applicable to Swap Entities, but retaining the proposed audit-trail requirement for broker-dealers. As another alternative, the Commission considered harmonizing recordkeeping rules for both broker-dealers and SBS Entities with the CFTC's principles-based approach. These alternatives could enhance the cost savings from the proposal as affected entities may not need to modify their business recordkeeping systems to meet the proposed electronic recordkeeping system requirements, particularly with respect to nonbank SBS Entities that would need to use electronic recordkeeping systems that meet the WORM or audit-trail requirement. In addition, these alternatives could facilitate transactions across integrated swap and security-based swap markets. The Commission believes that its proposed rule amendments establishing electronic recordkeeping requirements for SBS Entities should provide greater protection to the original records created and preserved by SBS Entities, thereby giving regulators more reliable and secure access to those records. Unlike the CFTC's 2017 amendment, the Commission's proposal retains the WORM standard as a compliance option; the standard requires electronic

[149] *See* section V.D. of this release (discussing increases and decreases in costs and burdens relating to proposals for purposes of the Paperwork Reduction Act).

[150] The Commission does not expect significant costs associated with certain other amendments contemplated in the proposal, including amendments to eliminate the notification and representation requirements from Rule 17a–4(f); amendments to eliminate the escrow account option from paragraph (f)(3)(vi) of Rule 17a–4 and paragraph (e)(3)(vi) of Rule 18a–6; and amendments to the requirements of paragraph (f)(2)(ii)(B) of Rule 17a–4 and paragraph (e)(2)(i) of Rule 18a–6 to provide additional specificity regarding the requirement that original records are completely and accurately captured.

records to be maintained exclusively in a non-rewriteable, non-erasable format. The audit-trail alternative would require that the electronic records be preserved in a manner that permits the recreation of an original record if it is altered, over-written, or erased. Moreover, the Commission believes that its proposal addresses the same concerns addressed in the CFTC proposal, namely the security and authenticity of and access to records.[151] Finally, the Commission preliminarily believes that the costs related to modification of existing business recordkeeping systems to meet the proposed electronic recordkeeping system requirements are likely to be low relative to the baseline ongoing costs of maintaining duplicative recordkeeping systems. Thus, the relative magnitude of this benefit of the alternative may be limited.

As another alternative, the Commission could require prudentially regulated SBS Entities to meet the proposed electronic recordkeeping system requirements. This alternative would expand the scope of application of the requirements, magnifying its benefits for Commission oversight as well as costs of altering existing recordkeeping systems. As a baseline matter, the Commission recognizes that prudentially regulated SBS Entities are subject to a robust system of recordkeeping requirements for different types of activities, including recordkeeping requirements under the Bank Secrecy Act regarding funds transfers equal to or greater than $3,000;[152] recordkeeping requirements regarding fiduciary accounts;[153] recordkeeping requirements for securities transactions;[154] and recordkeeping requirements for small business and farm loans, including a requirement to maintain the information in machine readable form.[155] Importantly, as discussed above, the Commission preliminarily believes that the proposed rule's requirements may conflict or overlap with the recordkeeping systems banks have implemented under regulations or guidance of the prudential regulators. The Commission preliminarily believes that requiring prudentially regulated SBS Entities to meet the proposed electronic recordkeeping system requirements (in addition to the recordkeeping requirements these entities are already subject to) would not create significant incremental benefits.

As another alternative, the Commission could have proposed eliminating the WORM alternative and requiring all broker-dealers and nonbank SBS Entities to comply with an audit-trail requirement. This alternative would require all affected entities to modernize their recordkeeping systems to meet the audit-trail requirement. While this alternative could produce long-term compliance efficiencies for a greater number of affected participants, it would also require all affected entities with WORM compliant systems to upgrade their electronic recordkeeping systems. Since compliance costs may be particularly burdensome for smaller entities, the alternative could have a disproportionate effect on smaller and medium-sized broker-dealers.

Finally, the Commission could have proposed requiring that a second senior officer has independent access to and the ability to provide the records and to execute the undertakings at all times. To the degree that relying on a single senior officer may present risks that the senior officer is unable or unwilling to obtain records, this alternative could increase the probability that the Commission would be able to access records. Thus, relative to the proposal, the alternative may further enhance the efficiency of Commission examinations and oversight. However, this alternative may impose additional time demands on a second senior officer in each affected entity. To the extent that the alternative would increase the scope of duties and increase potential liability on the part of a greater number of senior officers of affected entities, more senior officers may demand higher compensation and liability insurance, which may result in a greater increase to senior officer recruitment and retention costs relative to the proposal. Requiring a second individual to have the authority to grant access to the records may potentially increase cybersecurity risks compared to the proposed approach, although it would likely still represent less risk than the baseline third-party approach.

E. Effects on Efficiency, Competition, and Capital Formation

The primary effect of the proposed amendments on efficiency would stem from increased efficiency of broker-dealer and SBS Entity recordkeeping. Permitting either the audit-trail or WORM (introduced in the optical disk era) alternative is intended to allow broker-dealers and SBS Entities to modernize the records and systems such entities maintain for regulatory purposes. The Commission anticipates that most of the affected entities would respond to such a requirement by eliminating duplicative recordkeeping for regulatory and business purposes, giving rise to cost efficiencies discussed above. The proposal would not alter the amount, type, or manner of disclosures available to investors or the Commission, nor would it change broker-dealer or SBS Entity business models or activities. Thus, the Commission does not anticipate the proposal to impact informational or allocative efficiency.

The proposed amendments are not expected to significantly impact competition between bank and nonbank SBS Entities. As described above, the proposal would impose electronic recordkeeping system requirements (including the audit-trail alternative) on nonbank SBS Entities, but not on bank SBS Entities. Transitioning regulatory recordkeeping systems from hardware solutions (such as optical disks) meeting the WORM requirement to electronic records compliant with the audit-trail requirement may require costly modifications to existing recordkeeping systems of broker-dealers and nonbank SBS Entities may need to modify existing electronic recordkeeping systems to meet either the WORM or audit-trail requirement; bank SBS Entities would not bear such costs.

To the extent that the proposal results in cost savings for broker-dealers and SBS Entities estimated above, affected entities may be able to allocate newly available capital into capital forming activities. However, it is not clear that affected entities would direct cost savings to expanding their financial intermediation business and given the magnitude of the cost savings estimated above, the capital formation effects of the proposal are likely limited. Therefore, the proposal is also not expected to have significant effects on capital formation.

F. Request for Comment

The Commission requests comment on all aspects of the economic analysis of the proposed amendments. To the extent possible, the Commission requests that commenters provide supporting data and analysis with respect to the benefits, costs, and effects on competition, efficiency, and capital formation of adopting the proposed amendments or any reasonable alternatives. In particular, the Commission asks commenters to consider the following questions:

1. What additional qualitative or quantitative information should the Commission consider as part of the

[151] *Compare* Rule 17a–5(f)(3), as proposed to be amended and Rule 18a–6(e)(3), as proposed to be amended, *with* CFTC Section 1.31(d)(2).

[152] *See, e.g.,* 31 CFR 1020.410.

[153] *See* 12 CFR 9.8.

[154] *See* 12 CFR 12.3.

[155] *See* 12 CFR 25.42.

baseline for its economic analysis of these amendments? How many broker-dealers are maintaining separate recordkeeping systems for business and regulatory purposes? How many broker-dealers and SBS Entities affected by the proposed amendments have electronic recordkeeping systems that would meet the proposed audit-trail requirement?

2. Has the Commission accurately characterized the costs and benefits of proposed amendments? If not, why not? Should any of the costs or benefits be modified? What, if any, other costs or benefits should the Commission take into account? If possible, please offer ways of estimating these costs and benefits. What additional considerations can the Commission use to estimate the costs and benefits of the proposed amendments?

3. Has the Commission accurately characterized the effects on competition, efficiency, and capital formation arising from the proposed amendments? If not, why not?

4. Has the Commission accurately characterized the economic effects of the above alternatives? For example, has the Commission accurately characterized the economic effects of the alternative requiring prudentially regulated SBS Entities to meet the proposed electronic recordkeeping system requirements? If not, why not? Should any of the costs or benefits be modified? What, if any, other costs or benefits should the Commission take into account?

5. Are there other reasonable alternatives to the proposed amendments? What are the economic effects of any other alternatives?

6. Are there data sources or data sets that can help the Commission refine its estimates of the costs and benefits associated with the proposed amendments? If so, please identify them.

V. Paperwork Reduction Act

Certain provisions of the rule amendments proposed in this release would contain a new ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[156] The Commission is submitting the proposed rule amendments and proposed new rules to the Office of Management and Budget (''OMB'') for review and approval in accordance with the PRA and its implementing regulations.[157] 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.[158] The titles for the collections of information are:

(1) Rule 17a–4—Records to be preserved by certain brokers and dealers (OMB control number 3235–0279); and

(2) Rule 18a–6—Records to be preserved by certain security-based swap dealers and major security-based swap participants (OMB control number 3235–0751).

The burden estimates contained in this section do not include any other possible costs or economic effects beyond the burdens required to be calculated for PRA purposes.

A. Summary of Collections of Information

1. Proposed Amendments to Rules 17a–4(f) and 18a–6(e)

Rule 17a–4 sets forth record preservation requirements applicable to broker-dealers, including broker-dealers also registered as SBSDs or MSBSPs.[159] Rule 18a–6 sets forth record preservation requirements applicable to SBS Entities that are not dually registered as broker-dealers.[160] The Commission is proposing to amend Rules 17a–4(f)[161] and 18a–6(e),[162] which prescribe requirements for broker-dealers and SBS Entities, respectively, that elect to preserve records electronically to comply with the record preservation requirements of Rules 17a–4 and 18a–6, respectively.

The proposed amendments to Rule 17a–4(f) would add the audit-trail alternative to the current WORM requirement.[163] The amendments to Rule 18a–6(e) would add a requirement that electronic recordkeeping systems used by nonbank SBS Entities to comply with the record preservation requirements of Rule 18a–6 must meet either the audit-trail or WORM requirement.[164]

Rule 17a–4(f) currently requires a broker-dealer to store separately from the original, on any medium acceptable under Rule 17a–4, a duplicate copy of a record for the requisite time period. Similarly, Rule 18a–6(e) currently requires that an SBS Entity store separately from the original a duplicate copy of a record stored on the electronic storage system for the requisite time period. These current provisions require broker-dealers and SBS Entities to maintain a second copy of a record. The Commission is proposing amendments to both of these paragraphs to require the broker-dealer and the SBS Entity to have a backup set of records when records are preserved on an electronic recordkeeping system.[165] Under the proposal, the broker-dealer or SBS Entity would need to have a second electronic recordkeeping system.

Rule 17a–4(f) currently requires that, for every broker-dealer exclusively using electronic storage media for some or all of its record preservation, at least one third party, who has access to and the ability to download information from the broker-dealer's electronic storage media to any acceptable medium under Rule 17a–4, must file with the DEA for the broker-dealer certain undertakings that the third party will provide access to the broker-dealer's electronic records and provide them to the Commission and other securities regulators if requested. The proposed amendments to Rule 17a–4(f) would eliminate the third-party access and undertakings requirements and replace them with a requirement that a senior officer of the broker-dealer have the access and provide the necessary undertakings.[166] Rule 18a–6(e) currently does not have third-party access and undertakings requirements; the proposed amendments to the rule would add senior officer access and undertakings requirements analogous to that of Rule 17a–4(f), as proposed to be amended.[167]

The Commission is proposing to no longer impose the requirements for electronic recordkeeping systems in paragraph (e)(2) of Rule 18a–6, as proposed to be amended, on bank SBS Entities.[168] However, the other provisions of paragraph (e) of Rule 18a–6, as proposed to be amended, would continue to apply to all SBS Entities.

The Commission is proposing to move the requirements for broker-dealers using micrographic media to new

[156] *See* 44 U.S.C. 3501 *et seq.*

[157] *See* 44 U.S.C. 3507; 5 CFR 1320.11.

[158] *See* 5 CFR 1320.11(l).

[159] *See* 17 CFR 240.17a–4. As stated above, the term ''broker-dealer'' for the purposes of this release includes broker-dealers that are also registered as SBSDs or MSBSPs.

[160] *See* 17 CFR 240.18a–6. As stated above, the term ''SBS Entity'' for the purposes of this release refers to SBSDs and MSBSPs that are not also registered as broker-dealers.

[161] *See* Rule 17a–4(f) (setting forth the electronic record preservation requirements for broker-dealers).

[162] *See* Rule 18a–6(e) (setting forth the electronic record preservation requirements for SBS Entities).

[163] *See* section II.D. of this release (discussing these proposed amendments).

[164] As defined above, the term ''nonbank SBS Entity'' refers to an SBS Entity that does not have a prudential regulator and the term ''bank SBS Entity'' refers to an SBS Entity that has a prudential regulator.

[165] *See* section II.E. of this release (discussing these proposed amendments).

[166] *Id.*

[167] *Id.*

[168] *See* section II.D. of this release (discussing these proposed amendments).

paragraph (f)(4) of Rule 17a–4.[169] Rule 18a–6(e) does not provide for retaining records using micrographic media.

The proposed amendments to Rule 17a–4(f) would eliminate a requirement that the broker-dealer notify its DEA before employing an electronic recordkeeping system.[170] Rule 18a–6(e) currently does not have a similar DEA notification requirement.

2. Proposed Amendments to Rules 17a–4(j) and 18a–6(g)

Rule 17a–4(j) requires broker-dealers to furnish promptly to the Commission legible, true, complete, and current copies of those records of the firm that are required to be preserved under Rule 17a–4 or any other record of the firm that is subject to examination under Section 17(b) of the Exchange Act.[171] Rule 18a–6(g) requires SBS Entities to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the firm that are required to be preserved under Rule 18a–6, or any other records of the firm subject to examination or required to be made or maintained pursuant to Section 15F of the Exchange Act.[172]

The Commission is proposing to amend the prompt production of records requirements of Rules 17a–4(j) and 18a–6(g).[173] The proposed amendments to Rules 17a–4(j) and 18a–6(g) would require a broker-dealer or SBS Entity, respectively, to furnish a record and its audit trail (if applicable) preserved on an electronic recordkeeping system pursuant to Rules 17a–4(f) and 18a–6(e), respectively, in a reasonably usable electronic format, if requested by a representative of the Commission.[174]

B. Proposed Use of Information

The requirements of Rules 17a–4 and 18a–6, and the proposed amendments to these rules, are designed, among other things, to promote the prudent operation of broker-dealers and SBS Entities and to assist the Commission, SROs, and state securities regulators in conducting effective examinations.[175] The proposed amendments to Rules 17a–4(j) and 18a–(g) are designed to facilitate examinations and other regulatory reviews by making them more efficient. Taken as a whole, the collections of information under the proposed amendments to Rules 17a–4(f), 18a–6(e), 17a–4(j), and 18a–6(g) would promote the prudent operation of broker-dealers and SBS Entities and facilitate the examinations of broker-dealers and SBS Entities by the Commission, SROs, and state securities regulators.

C. Respondents

As of December 31, 2020, there were 3,551 broker-dealers registered with the Commission.[176] As of November 9, 2021, 41 SBSDs have registered with the Commission, while no MSBSPs have registered with the Commission.[177] Six of the SBSDs are existing broker-dealers or will be broker-dealers and, therefore, are included in the 3,551 broker-dealers. Nine of the SBSDs are applying substituted compliance with respect to the requirements of Rule 18a–6(e).[178] One SBSD is using the alternative compliance mechanism of Exchange Act Rule 18a–10 and, therefore, is complying with the CFTC's recordkeeping rules.[179] This leaves 25 SBSDs that are subject to Rule 18a–6(e) and, therefore, would be subject to the proposed amendments to that rule. Twenty-one of these SBSDs have a prudential regulator. This leaves four SBSDs that would be subject to paragraph (e)(2) of Rule 18a–6. Finally, 24 of the 25 SBSDs subject to Rule 18a–6(e) are also registered with the CFTC as swap dealers.

The following table summarizes the estimated number of respondents that would be subject to the amendments to Rule 17a–4(f) and the number of SBSDs that would be subject to the amendments to Rule 18a–6(e) and paragraph (e)(2) of Rule 18a–6.

Type of registrant	Number
Broker-dealers (including SBSDs dually registered as broker-dealers)	3,551
SBSDs that would be subject to Rule 18a–6(e) as proposed to be amended	25
SBSDs that would be subject to Rule 18a–6(e)(2) as proposed to be amended	4

Based upon the recent experience of the staff, the Commission estimates that approximately 95% of the broker-dealers, including broker-dealers that will be dually registered as SBS Entities, (*i.e.,* 3,373 broker-dealers) use electronic recordkeeping systems; all of these firms are expected to continue to use electronic recordkeeping systems pursuant to the requirements of Rule 17a–4(f), as proposed to be amended. The Commission believes that all SBSDs that are subject to Rule 18a–6(e) (25 SBSDs) use electronic recordkeeping systems pursuant to the requirements of Rule 18a–6(e) and would continue to do so under the proposed amendments.

D. Total Initial and Annual Reporting Burdens

1. Proposed Amendments to Rules 17a–4(f) and 18a–6(e)

Rules 17a–4(f) and 18a–6(e) currently impose collection of information requirements that result in initial and annual time burdens for broker-dealers and SBSDs. The proposed amendments to these rules would both add to and decrease the current time burden estimates as explained below.

The proposed amendments to Rule 17a–4(f) would provide an audit-trail alternative to the current WORM requirement for electronic recordkeeping systems used by broker-dealers to meet the record preservation requirements of Rule 17a–4.[180] Consequently, broker-dealers could continue to meet the requirements of the rule by using a WORM-compliant electronic recordkeeping system they employ today. The amendments to Rule 18a–6(e) would add a requirement that electronic recordkeeping systems used by nonbank SBSDs to comply with the record preservation requirements of Rule 18a–6 must meet either the audit-trail or WORM requirement.[181]

The Commission believes that few, if any, broker-dealers or nonbank SBSDs that use electronic recordkeeping systems are not currently compliant with the rules, as proposed to be amended, either because they currently

[169] *See* section II.F. of this release (discussing these proposed amendments).

[170] *See* section II.C. of this release (discussing these proposed amendments).

[171] *See* Rule 17a–4(j) (setting forth the prompt production of records requirements for broker-dealers); 15 U.S.C. 78q(b).

[172] *See* Rule 18a–6(g) (setting forth the prompt production of records requirements for SBS Entities); 15 U.S.C. 78o–10(f).

[173] *See* section II.G. of this release (discussing these proposed amendments).

[174] *See* Rule 17a–4(j) and Rule 18a–6(g), as proposed to be amended.

[175] *See, e.g., Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934,* Exchange Act Release No. 44992 (Oct. 26, 2001), 66 FR 55818 (Nov. 2, 2001) (''The Commission has required that broker-dealers create and maintain certain records so that, among other things, the Commission, [SROs], and State Securities Regulators . . . may conduct effective examinations of broker-dealers'' (footnote omitted)).

[176] This estimate is derived from broker-dealer FOCUS filings as of December 31, 2020, as described in greater detail in the economic baseline, and is inclusive of five OTC derivatives dealers affected by the proposed amendments.

[177] *See List of Registered Security-Based Swap Dealers and Major Security-Based Swap Participants,* available at: *https://www.sec.gov/tm/List-of-SBS-Dealers-and-Major-SBS-Participants.*

[178] *See Substituted Compliance Notices,* available at: *https://www.sec.gov/tm/Substituted-compliance-Notices.*

[179] *See* 17 CFR 240.18a–10.

[180] *See* section II.D. of this release (discussing these proposed amendments).

[181] *Id.*

use an electronic recordkeeping system that meets the WORM requirement or that could meet the proposed audit-trail requirement. Indeed, the Commission believes that some broker-dealers and nonbank SBSDs are using a modern, audit-trail compliant electronic recordkeeping system for their own business purposes while simultaneously maintaining a WORM-compliant system solely for the purpose of complying with the requirements of Rule 17a–4(f).

A broker-dealer that does not preserve records electronically would incur initial costs to build an electronic recordkeeping system that meets either the WORM requirement or the audit-trail requirement or would have the initial burden of hiring a vendor to provide the service. A broker-dealer that preserves records electronically using a WORM-compliant electronic recordkeeping system would have an initial burden to build an electronic recordkeeping system that meets the audit-trail requirement, if it elects to use that alternative. An SBSD would have an initial burden build an electronic recordkeeping system that meets either the WORM requirement or the audit-trail requirement or would have the initial burden of hiring a vendor to provide the service. Similarly, on an ongoing basis, the broker-dealer or SBSD would be required to expend financial or human resources to maintain their recordkeeping systems to comply with the proposed audit-trail or WORM requirements.

Based upon information provided to the Commission by the securities industry, the Commission estimates that the initial cost to build and implement a WORM-compliant electronic recordkeeping system for a large broker-dealer is $10 million, with an additional cost of $1.2 million annually to maintain the system.[182] Based on feedback from the securities industry, the Commission believes that the initial cost to build and implement an electronic recordkeeping system that meets the audit-trail requirements and the ongoing cost to maintain the system would be substantially lower than the analogous costs that would be incurred with respect to a WORM-compliant system.[183] Consequently, the Commission estimates that the initial cost to build and implement an electronic recordkeeping system that meets the audit-trail requirement for a large broker-dealer is $1,000,000, with an additional cost of $120,000 annually to maintain the system. There are 802 broker-dealers with assets greater than $10 million and there are four SBSDs that would be subject to paragraph (e)(2) of Rule 18a–6. The Commission does not believe any of these firms will elect to build a WORM-compliant electronic recordkeeping system. Moreover, the Commission estimates that most of these firms have electronic recordkeeping systems that could meet the audit-trail requirement or that could be configured to meet that requirement without the need to build a new system. The Commission estimates that 20 of these firms would elect to build a new electronic recordkeeping system to meet the audit-trail requirement for an initial one-time industry cost burden of $20,000,000 and an annual cost burden of $2,400,000.

The Commission estimates that the cost for the 2,749 broker-dealers with $10,000,000 or less in total assets to build and maintain an electronic recordkeeping system that meets the proposed audit-trail requirement would be significantly less than the $1,000,000 initial and $120,000 annual costs estimated for the 802 larger broker-dealers and the four SBSDs that would be subject to paragraph (e)(2) of Rule 18a–6. Consequently, the Commission estimates that the initial cost to build and implement an electronic recordkeeping system that meets the audit-trail requirement for these smaller broker-dealers is $100,000, with an additional cost of $12,000 annually to maintain the system. The Commission estimates that most of the 2,749 broker-dealers with $10,000,000 or less in total assets will continue to preserve records in the manner they do today: Using a WORM-compliant system, using micrographic media, or maintaining paper records. The Commission estimates that 80 of these firms would elect to build a new electronic recordkeeping system to meet the audit-trail requirement for an initial one-time industry cost burden of $8,000,000 and an annual cost burden of $960,000.

The Commission believes that broker-dealers and SBSDs would incur an initial burden and ongoing annual burden in establishing a backup electronic recordkeeping system. The Commission believes these burdens and costs would be substantially less than the burdens and costs of the primary electronic recordkeeping systems because of the benefit of economies of scale for the backup system whereby common technology and personnel could be used for both systems. The Commission estimates that the costs and burdens for the 802 larger broker-dealers and the four SBSDs that would be subject to paragraph (e)(2) of Rule 18a–6 would be $250,000 in initial burdens and costs and $30,000 in annual burdens and costs. Further, the Commission expects that the broker-dealers and SBSDs that have electronic recordkeeping systems that could meet the audit-trail requirement or that could be configured to meet that requirement without the need to build a new system also maintain backup recordkeeping systems for business continuity purposes. Therefore, the initial and annual costs would be incurred by the 20 firms that elect to build a new electronic recordkeeping system that meets that proposed audit-trail requirement. Consequently, the Commission estimates that the industry-wide costs and burdens for these firms would be $5,000,000 in initial costs and burdens and $600,000 in annual costs and burdens.

The Commission estimates that the costs and burdens incurred by the 80 smaller broker-dealers that would build electronic recordkeeping systems to meet the audit-trail requirement and, therefore, need to build a backup recordkeeping system, would be substantially less than the costs and burdens incurred by the larger broker-dealers. The Commission estimates that these firms would incur an initial costs and burdens of $25,000 and ongoing annual costs and burdens of $3,000. Therefore, the Commission estimates that the industry-wide costs and burdens for these firms would be $2,000,000 in initial costs and burdens and $240,000 in ongoing annual costs and burdens.

The proposed amendments to Rule 17a–4(f) would eliminate the third-party access and undertakings requirements and replace them with a requirement that a senior officer of the broker-dealer have the access and provide the necessary undertakings. Based on the Commission's most recent information submitted to the OMB in connection with the renewal of Rule 17a–4, this would result in an estimated elimination of an annual cost of less than $5,000 that the broker-dealer must incur in paying a third party to agree to perform this service. Rule 18a–6(e) does not contain a third-party undertakings requirement; however, the proposed amendments to the rule would add senior officer access and undertakings requirements analogous to that of Rule 17a–4(f), as proposed to be amended.[184]

[182] *See* Rule 17a–4(f) Rulemaking Petition Addendum at 4–5.

[183] *See e.g.* Rule 17a–4(f) Rulemaking Petition at 6–7.

[184] As noted above, paragraph (f) of Rule 18a–6 currently includes a requirement that if the records required to be maintained and preserved by the SBS Entity (whether electronic or otherwise) are prepared or maintained by a third party on behalf of the SBS Entity, the third party must file

The Commission believes that the change, in the case of broker-dealers, from a third party to a senior officer requirement and, in the case of SBSDs, the addition of a senior officer requirement, would result in a one-time initial burden of one hour per firm, for a total of 3,373 hours for an initial cost of $1,676,381 under Rule 17a–4(f) and 25 hours for an initial cost of $12,425 for SBSDs under Rule 18a–6(e).[185] The Commission also believes that the senior officer requirement would add an annual burden of one hour per firm, for a total of 3,373 hours for broker-dealers collectively [186] for a total ongoing cost of $1,676,381, and 25 hours for a total ongoing cost of $12,425 for SBSDs collectively.[187]

The proposed amendments would move existing requirements for broker-dealers using micrographic media from paragraph (f)(3)(i) of Rule 17a–4 to proposed new paragraph (f)(4) of Rule 17a–4, but do not change the substantive requirements. The proposed amendments do not propose a micrographic media alternative for SBS Entities for the reasons described above. The Commission does not believe the proposed amendments relating to micrographic media would have any impact on the burden experienced by broker-dealers.

The Commission anticipates that eliminating the application of paragraph (e)(2) of Rule 18a–6 to the 21 SBSDs that have a prudential regulator and are subject to Rule 18a–6 would result in a decrease of 100 hours per firm on an annual basis, or 2,100 hours per year for all firms affected by the proposed amendment, for an ongoing cost savings of $663,000 per year for all affected firms.[188]

Finally, based upon information provided to the Commission from FINRA staff, the Commission believes that the elimination of the DEA notification requirement would decrease the industry-wide burden of compliance by one hour per broker-dealer submitting the notice to its DEA, or approximately 433 hours per year, for an ongoing cost savings of $136,828 [189] per year for the industry.

2. Proposed Amendments to Rules 17a–4(j) and 18a–6(g)

The proposed amendments to Rules 17a–4(j) and 18a–6(g) would require a broker-dealer or SBS Entity, respectively, to furnish a record and its audit trail (if applicable) preserved on an electronic recordkeeping system pursuant to Rules 17a–4(f) and 18a–6(g), respectively, in a reasonably usable electronic format, if requested by a representative of the Commission. The Commission does not believe that these proposed amendments will change the initial or annual hourly burden for broker-dealers or SBS Entities. The Commission solicits comment on what the estimated initial and annual burden is for broker-dealers and SBS Entities to comply with current versions Rule 17a–4(j) and Rule 18a–6(g) and for those firms to comply with those rules, as proposed to be amended.

E. Collection of Information Is Mandatory

The collections of information pursuant to the proposed amendments are mandatory, as applicable, for broker-dealers and SBS Entities.

F. Confidentiality of Responses to Collection of Information

A broker-dealer or SBS Entity requested by the Commission to produce records retained electronically pursuant to the requirements of Rules 17a–4 or 18a–6 can request confidential treatment of the information.[190] If such confidential treatment request is made, the Commission anticipates that it will keep the information confidential subject to applicable law.[191]

G. Retention Period for Recordkeeping Requirements

Rule 17a–4, as proposed to be amended, specifies the required retention periods for records required to be made and preserved by a broker-dealer, whether electronically or otherwise.[192] Rule 18a–6, as proposed to be amended, specifies the required retention periods for records required to be made and preserved by an SBS Entity, whether electronically or otherwise.[193] Many of the required records must be retained for three years; certain other records must be retained for longer periods.[194]

H. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment on the proposed collections of information in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy of the Commission's estimates of the burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and
- Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File Number S7–19–21. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7–19–21 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE, Washington, DC 20549–2736. As OMB is required to make a decision

undertakings with the Commission. *See* paragraph (f) of Rule 18a–6.

[185] Throughout this section, to monetize the internal costs the Commission staff used data from the SIFMA publications, Management and Professional Earnings in the Securities Industry—2013, and Office Salaries in the Securities Industry—2013, modified by the Commission staff to account for an 1800 hour work-year and multiplied by 5.35 (professionals) or 2.93 (office) to account for bonuses, firm size, employee benefits and overhead. These figures have been adjusted for inflation through the end of 2020 using data published by the Bureau of Labor Statistics.

One-time initial cost for broker-dealers: 3,373 hours × $497 per hour (at the controller hourly rate) = $1,676,381. One time initial cost for SBSDs: 25 hours × $497 per hour (at the controller hourly rate) = $12,425.

[186] The Commission believes that while the existing third-party requirement is an external burden, the proposed senior officer requirement would be an internal burden required to be accounted for in this section.

[187] Ongoing cost for broker-dealers: 3,373 hours × $497 per hour (at the controller hourly rate) = $1,676,381. Ongoing cost for SBSDs: 25 hours × $497 per hour (at the controller hourly rate) = $12,425.

[188] 2,100 hours × $316 per hour (at the compliance manager rate) = $663,000.

[189] 433 hours × $316 per hour (at the compliance manager rate) = $136,828.

[190] *See* 17 CFR 200.83. Information regarding requests for confidential treatment of information submitted to the Commission is available on the Commission's website at *http://www.sec.gov/foia/howfo2.htm#privacy.*

[191] *See, e.g.,* 5 U.S.C. 552 *et seq.;* 15 U.S.C. 78x (governing the public availability of information obtained by the Commission).

[192] *See* Rule 17a–4, as proposed to be amended.

[193] *See* Rule 18a–6, as proposed to be amended.

[194] *See* Rules 17a–4 and 18a–6, as proposed to be amended.

concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VI. Initial Regulatory Flexibility Act Analysis

A. Reasons for, and Objectives of, the Proposed Action

The proposed amendments to Rules 17a–4 and 18a–6 are designed to modernize the electronic recordkeeping requirements for broker-dealers and SBS Entities, and to align the requirements in those rules more closely to the current electronic recordkeeping practices of broker-dealers and SBS Entities. As discussed in greater detail above, the amendments to Rule 17a–4 would provide an audit-trail alternative to the current requirement that broker-dealer electronic records be preserved exclusively in a non-rewriteable, non-erasable format. The audit-trail alternative would require that the electronic records be preserved in a manner that permits the recreation of an original record if it is altered, over-written, or erased. Rule 18a–6, which applies to SBS Entities, currently does not have a requirement to preserve electronic records: (1) In a manner that permits the recreation of an original record if it is altered, over-written or erased; or (2) exclusively in a non-rewriteable, non-erasable format. The amendments to Rule 18a–6 would require an SBS Entity without a prudential regulator that preserves records electronically to meet one of these two requirements. The Commission believes that the amendments will save many broker-dealers and SBS Entities from the burden of maintaining two sets of parallel records: one for business purposes, preserved in a manner that would fulfill the audit-trail alternative requirements that the Commission is proposing, and another set of records that is preserved in a non-rewritable, non-erasable method in order to comply with the current requirements of 17a–4(f).

The proposed amendments also would eliminate the third-party access and undertakings requirements and replace them with a requirement that a senior officer of the broker-dealer provide the access and undertakings. The Commission preliminarily believes that the existing third-party access and undertakings requirements are outdated in light of the changed technological environment and that providing a third party access to electronic recordkeeping systems and customer information needlessly exposes firms to data leakage and cybersecurity threats. The Commission preliminarily believes replacing the third-party access and undertakings requirements with a requirement that a senior officer provide access and the undertakings would address cybersecurity and trade-secret concerns about requiring a third party to fulfill this responsibility.

In addition, the amendments would add a requirement to Rule 17a–4(j) and 18a–6(g) that a broker-dealer or SBS Entity, respectively, furnish a record and its audit trail (if applicable) preserved on an electronic recordkeeping system pursuant Rules 17a–4(f) and 18a–6(g), respectively, in a reasonably usable electronic format, if requested by a representative of the Commission. The Commission believes that the production of records in a reasonably usable electronic format would facilitate examinations and other regulatory reviews by making them more efficient.

The amendments to Rule 17a–4 also would eliminate a requirement that the broker-dealer notify its DEA before employing an electronic recordkeeping system. The Commission preliminarily believes this requirement is no longer necessary because the rule was adopted at a time when the use of electronic recordkeeping systems by broker-dealers to meet the record preservation requirements of Rule 17a–4 was a relatively new phenomenon, and the staff of DEAs, including FINRA, now have substantial experience and familiarity with the topic.

Finally, the amendments to both rules would remove or replace text to make them more technology neutral and to improve readability.

B. Legal Basis

Pursuant to Exchange Act Section 17, 15 U.S.C. 78q the Commission is proposing to revise § 240.17a–4(f) and (j) and § 240.18a–6(e) and (g) of title 17 of the Code of Federal Regulations.

C. Small Entities Subject to the Proposed Rules

As discussed above, the Commission estimates that approximately 3,551 broker-dealers and 25 SBSDs that are not broker-dealers would be subject to the new electronic recordkeeping requirements as a result of the amendments to Rules 17a–4(f) and (j) and to Rules 18a–6(e) and (g), respectively. For purposes of this Regulatory Flexibility Act (''RFA'') analysis, the Commission refers to broker-dealers that might be deemed small entities under the RFA as ''small entities.''

Based on FOCUS Report data, the Commission estimates that as of June 30, 2021, approximately 1,439 of those broker-dealers might be deemed small entities for purposes of this analysis. Based upon the Commission's prior RFA certification that adoption of Rule 18a–6 would not have a significant economic impact on a substantial number of small entities for the purposes of the RFA,[195] the Commission believes that no small entities will be affected by the proposed amendments to Rule 18a–6.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The RFA requires a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed amendments to Rules 17a–4(f) and (j) and Rules 18a–6(e) and (g), including an estimate of the classes of small entities that would be subject to the requirements and the type of professional skill necessary to prepare required reports and records. Following is a discussion of the associated costs and burdens of compliance with the proposed amendments, as incurred by small entities.[196]

The Commission does not believe that the compliance costs of the proposed amendments would be significant. The Commission believes that the proposed audit-trail alternative to preserving electronic records would be consistent with existing broker-dealer practices. Broker-dealers have explained to the Commission that the electronic recordkeeping systems used for business purposes are dynamic and updated constantly (*e.g.,* with each new transaction or position) and easily accessible for retrieving records. The Commission believes that these contemporary electronic recordkeeping business systems, in many cases, can be configured to meet the audit-trail requirement in Rule 17a–4(f), as proposed to be amended. Moreover, small broker-dealers could continue to preserve records on electronic recordkeeping systems that meet the WORM requirement.

The proposed replacement of the required third-party access and undertakings requirements in Rule 17a–4(f) with a requirement that a senior officer of the broker-dealer have the access and make the required undertakings should reduce the burden

[195] *See* SBSD/MSBSP Recordkeeping Adopting Release, 84 FR at 68645.

[196] *See* section V.D.1, above (describing costs for smaller broker-dealers, which could include broker-dealers that are small entities).

on small broker-dealers because they will be able to use an internal resource at no marginal cost rather than an external source to comply with the requirement.

The proposed amendments to Rule 17a–4(j) that would require a broker-dealer to furnish a record and its audit trail (if applicable) preserved on an electronic recordkeeping system pursuant Rule 17a–4(f) in a reasonably usable electronic format, if requested by a representative of the Commission, should not impose a burden on small entities.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission does not believe that the proposed amendments impacting smaller entities that are broker-dealers would duplicate, overlap, or conflict with other Federal Rules.

F. Significant Alternatives

The RFA directs the Commission to consider significant alternatives that would accomplish its stated objective, while minimizing any significant economic impact on small entities. The Commission considered the following alternatives for small entities in relation to our proposal: (1) Exempting broker-dealers that are small entities from the proposed requirements, to account for resources available to small entities; (2) establishing different requirements, including frequency, to account for resources available to small entities; (3) clarifying, consolidating, or simplifying the compliance requirements under the proposal for small entities; and (4) using performance rather than design standards.

The Commission considered exempting broker-dealers that are small entities from the proposal and considered establishing different requirements for these firms.[197] However, the Commission elected not to do so for a number of reasons, including: (1) The option for small entities to keep their records in paper or micrographic media, rather than electronically; (2) the importance of establishing requirements for reliable and secure electronic recordkeeping systems for broker-dealers; (3) the availability of multiple third-party vendors to provide the electronic recordkeeping services; and (4) the ability of small entities to continue to use existing WORM-compliant electronic recordkeeping systems.

In this vein, the Commission considered proposing the elimination of the WORM alternative and requiring all broker-dealers and nonbank SBS Entities to comply with an audit-trail requirement. This alternative would require all affected entities to modernize their recordkeeping systems to meet the audit-trail requirement. While this alternative could produce long-term compliance efficiencies for a greater number of affected participants, it would also require all affected entities with WORM-compliant systems to upgrade their electronic recordkeeping systems. The Commission elected not to propose this alternative given its preliminary belief that the accompanying compliance costs could be particularly burdensome for smaller entities and that the alternative could have a disproportionate effect on smaller and medium-sized broker-dealers.[198]

1. The Commission also considered simplifying compliance by proposing performance rather than design standards similar to the approach taken by the CFTC. The CFTC amended the electronic recordkeeping requirements by replacing prescriptive requirements for electronic recordkeeping systems with a principles-based approach.[199] The Commission believes that its proposed rule amendments, establishing electronic recordkeeping requirements for broker-dealers should provide greater protection to the original records created and preserved by broker-dealers, thereby giving regulators more reliable and secure access to those records. Unlike the CFTC's rules, the Commission's proposal retains the WORM standard, which requires electronic records to be maintained exclusively in a non-rewriteable, non-erasable format. The audit-trail alternative would require that the electronic records be preserved in a manner that permits the recreation of an original record if it is altered, over-written, or erased. Moreover, the Commission believes that its proposal addresses the same concerns addressed in the CFTC proposal, namely the security and authenticity of and access to records.[200] For these reasons, the Commission determined not to propose principles-based rules.

G. Request for Comment

The Commission encourages the submission of comments with respect to any aspect of this initial RFA analysis. In particular, the Commission requests comment regarding:

1. Whether there are more efficient or less burdensome ways for the Commission to modernize the electronic recordkeeping requirements for registrants compared to what the Commission has proposed;

2. The number of small entities that may be affected by the proposed rule amendments; and

3. Whether there are any Federal rules that duplicate, overlap, or conflict with the proposed amendments.

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA,'')[201] the Commission must advise the OMB as to whether the proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effect on competition, investment or innovation.

If a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review.

The Commission requests comment on the potential impact of the amendments to Rules 17a–5(f) and (j) and Rules 18a–6(e) and (g) on:

1. The U.S. economy on an annual basis,

2. Any potential increase in costs or prices for consumers or individual industries, and

3. Any potential effect on competition, investment, or innovation.

Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

VIII. Statutory Authority

The Commission is revising Rules 17a–4 and 18a–6 under the Exchange Act (17 CFR 240.17a–4 and 17 CFR 240.18a–6) pursuant to the authority conferred by the Exchange Act, including Sections 15F and 17.

[197] As stated above, the Commission does not believe any SBS Entities qualify as ''small entities'' for the purposes of the RFA.

[198] *See* section IV.D. of this release (analyzing the potential costs of alternatives to the rule amendments the Commission is proposing).

[199] *See* CFTC Electronic Recordkeeping Release, 82 FR at 24480.

[200] *Compare* Rule 17a–4(f), as proposed to be amended, and Rule 18a–6(e), as proposed to be amended, *with* CFTC Section 1.31(d)(2).

[201] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

List of Subjects in 17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

Text of Rule Amendments

For the reasons set out in the preamble, the Commission is proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.17a–4 also issued under secs. 2, 17, 23(a), 48 Stat. 897, as amended; 15 U.S.C. 78a, 78d–1, 78d–2; sec. 14, Pub. L. 94–29, 89 Stat. 137 (15 U.S.C. 78a); sec. 18, Pub. L. 94–29, 89 Stat. 155 (15 U.S.C. 78w);

* * * * *

■ 2. Amend § 240.17a–4 by revising paragraphs (f) and (j) to read as follows:

§ 240.17a–4 Records to be preserved by certain exchange members, brokers and dealers.

* * * * *

(f) The records required to be maintained and preserved pursuant to §§ 240.17a–3 and 240.17a–4 may be immediately produced or reproduced by means of an electronic recordkeeping system or by means of micrographic media subject to the conditions set forth in this paragraph and be maintained and preserved for the required time in that form.

(1) For purposes of this paragraph,

(i) The term *micrographic media* means microfilm or microfiche, or any similar medium; and

(ii) The term *electronic recordkeeping system* means a system that preserves records in a digital format and that requires a computer to access the records.

(2) An electronic recordkeeping system must:

(i)(A) Preserve the records for the duration of their applicable retention periods in a manner that maintains a complete time-stamped audit trail that includes:

(*1*) All modifications to and deletions of a record or any part thereof;

(*2*) The date and time of operator entries and actions that create, modify, or delete the record;

(*3*) The individual(s) creating, modifying, or deleting the record; and

(*4*) Any other information needed to maintain an audit trail of each distinct record in a way that maintains security, signatures, and data to ensure the authenticity and reliability of the record and will permit re-creation of the original record and interim iterations of the record; or

(B) Preserve the records exclusively in a non-rewriteable, non-erasable format;

(ii) Verify automatically the completeness and accuracy of the processes for storing and retaining records electronically;

(iii) If applicable, serialize the original and duplicate units of the storage media, and time-date for the required period of retention the information placed on such electronic storage media; and

(iv) Have the capacity to readily download and transfer copies of a record and its audit trail (if applicable) in both a human readable format and in a reasonably usable electronic format and to readily download and transfer the information needed to locate the electronic record, as required by the staffs of the Commission, the self-regulatory organizations of which the member, broker, or dealer is a member, or any State securities regulator having jurisdiction over the member, broker or dealer.

(3) A member, broker, or dealer using an electronic recordkeeping system must:

(i) At all times have available, for examination by the staffs of the Commission, the self-regulatory organizations of which the member, broker, or dealer is a member, or any State securities regulator having jurisdiction over the member, broker or dealer facilities for immediate production of records preserved by means of the electronic recordkeeping system and for producing copies of those records;

(ii) Be ready at all times to provide, and immediately provide, any record or information needed to locate records stored by means of the electronic recordkeeping system that the staffs of the Commission, the self-regulatory organizations of which the member, broker, or dealer is a member, or any State securities regulator having jurisdiction over the member, broker or dealer may request;

(iii) Maintain a backup electronic recordkeeping system that meets the other requirements of this paragraph (f) and that retains the records required to be maintained and preserved pursuant to §§ 240.17a–3 and 240.17a–4 in accordance with this section;

(iv) Organize and maintain information necessary to locate records maintained by the electronic recordkeeping system;

(v)(A) Have in place an auditable system of controls that records, among other things: (*1*) Each input, alteration, or deletion of a record;

(*2*) The names of individuals inputting, altering, or deleting a record; and

(*3*) The date and time such individuals input, altered, or deleted the record;

(B) At all times be able to produce a record of the results of the audit of the system of controls for examination by the staffs of the Commission, the self-regulatory organizations of which the member, broker, or dealer is a member, or any State securities regulator having jurisdiction over the member, broker or dealer; and

(C) Preserve the record of the results of the audit of the system of controls for the retention period required for the associated records;

(vi) Maintain, keep current, and provide promptly upon request by the staffs of the Commission, the self-regulatory organizations of which the member, broker, or dealer is a member, or any State securities regulator having jurisdiction over the member, broker or dealer all information necessary to access and locate records preserved by means of the electronic recordkeeping system; and

(vii) Have at all times a senior officer of the member, broker, or dealer (hereinafter, the ''undersigned''), who has independent access to and the ability to provide records maintained and preserved on the electronic recordkeeping system, file with the designated examining authority for the member, broker or dealer the following undertakings with respect to such records:

The undersigned hereby undertakes to furnish promptly to the U.S. Securities and Exchange Commission (''Commission''), its designees or representatives, any self-regulatory organization of which [Name of the Member, Broker, or Dealer] is a member, or any State securities regulator having jurisdiction over [Name of the Member, Broker, or Dealer], upon reasonable request, such information as is deemed necessary by the staff of the Commission, any self-regulatory organization of which [Name of the Member, Broker, or Dealer] is a member, or any State securities regulator having jurisdiction over [Name of the Member, Broker, or Dealer], and to download copies of

a record and its audit trail (if applicable) preserved by means of an electronic recordkeeping system of [Name of the Member, Broker, or Dealer] into both a human readable format and a reasonably usable electronic format in the event of a failure on the part of [Name of the Member, Broker, or Dealer] to download a requested record or its audit trail (if applicable).

Furthermore, the undersigned hereby undertakes to take reasonable steps to provide access to the information preserved by means of an electronic recordkeeping system of [Name of the Member, Broker, or Dealer], including, as appropriate, downloading any record required to be maintained and preserved by [Name of the Member, Broker, or Dealer] pursuant to §§ 240.17a–3 and 240.17a–4 in a format acceptable to the staff of the Commission, any self-regulatory organization of which [Name of the Member, Broker, or Dealer] is a member, or any State securities regulator having jurisdiction over [Name of the Member, Broker, or Dealer]. Specifically, the undersigned will take reasonable steps that, in the event of a failure on the part of [Name of the Member, Broker, or Dealer] to download the record into a human readable format or a reasonably usable electronic format and after reasonable notice to [Name of the Member, Broker, or Dealer], the undersigned will download the record into a human readable format or a reasonably usable electronic format at the request of the staff of the staffs of the Commission, any self-regulatory organization of which [Name of the Member, Broker, or Dealer] is a member, or any State securities regulator having jurisdiction over [Name of the Member, Broker, or Dealer].

(4) A broker-dealer using a micrographic media system must:

(i) At all times have available, for examination by the staffs of the Commission, self-regulatory organizations of which it is a member, and any State securities regulator having jurisdiction over the member, broker or dealer, facilities for immediate, easily readable projection or production of micrographic media and for producing easily readable images;

(ii) Be ready at all times to provide, and immediately provide, any facsimile enlargement which the staffs of the Commission, any self-regulatory organization of which it is a member, or any State securities regulator having jurisdiction over the member, broker or dealer may request;

(iii) Store, separately from the original, a duplicate copy of the record stored on any medium acceptable under § 240.17a–4 for the time required; and

(iv) Organize and index accurately all information maintained on both original and duplicate storage media.

(A) At all times, a member, broker, or dealer must be able to have such indexes available for examination by the staffs of the Commission, the self-regulatory organizations of which the broker or dealer is a member, and any State securities regulator having jurisdiction over the member, broker or dealer.

(B) Each index must be duplicated and the duplicate copies must be stored separately from the original copy of each index.

(C) Original and duplicate indexes must be preserved for the time required for the indexed records.

* * * * *

(j) Every member, broker and dealer subject to this section must furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the member, broker or dealer that are required to be preserved under this section, or any other records of the member, broker or dealer subject to examination under section 17(b) of the Act (15 U.S.C. 78*q*(b)) that are requested by the representative of the Commission. The member, broker, or dealer must furnish a record and its audit trail (if applicable) preserved on an electronic recordkeeping system pursuant to paragraph (f) of this section in a reasonably usable electronic format, if requested by a representative of the Commission.

* * * * *

■ 3. Amend § 240.18a–6 by revising paragraphs (e) and (g) to read as follows:

§ 240.18a–6 Records to be preserved by certain security-based swap dealers and major security-based swap participants.

* * * * *

(e) The records required to be maintained and preserved pursuant to §§ 240.18a–5 and 240.18a–6 may be immediately produced or reproduced by means of an electronic recordkeeping system subject to the conditions set forth in this paragraph and be maintained and preserved for the required time in that form.

(1) For purposes of this paragraph, the term *electronic recordkeeping system* means a system that preserves records in a digital format and that requires a computer to access the records.

(2) An electronic recordkeeping system of a security-based swap dealer or major security-based swap participant without a prudential regulator must:

(i)(A) Preserve the records for the duration of their applicable retention periods in a manner that maintains a complete time-stamped audit trail that includes:

(*1*) All modifications to and deletions of a record or any part thereof;

(*2*) The date and time of operator entries and actions that create, modify, or delete the record;

(*3*) The individual(s) creating, modifying, or deleting the record; and

(*4*) Any other information needed to maintain an audit trail of each distinct record in a way that maintains security, signatures, and data to ensure the authenticity and reliability of the record and will permit re-creation of the original record and interim iterations of the record; or

(B) Preserve the records exclusively in a non-rewriteable, non-erasable format;

(ii) Verify automatically the completeness and accuracy of the processes for storing and retaining records electronically;

(iii) If applicable, serialize the original and duplicate units of the storage media, and time-date for the required period of retention the information placed on such electronic storage media; and

(iv) Have the capacity to readily download and transfer copies of a record and its audit trail (if applicable) in both a human readable format and in a reasonably usable electronic format and to readily download and transfer the information needed to locate the electronic record, as required by the staffs of the Commission, or any State regulator having jurisdiction over the security-based swap dealer or major security-based swap participant.

(3) A security-based swap dealer or major security-based swap participant using an electronic recordkeeping system must:

(i) At all times have available, for examination by the staffs of the Commission or any State regulator having jurisdiction over the security-based swap dealer or major security-based swap participant, facilities for immediate production of records preserved by means of the electronic recordkeeping system and for producing copies of those records;

(ii) Be ready at all times to provide, and immediately provide, any record or information needed to locate records stored by means of the electronic recordkeeping system that the staffs of the Commission or any State regulator having jurisdiction over the security-based swap dealer or major security-based swap participant may request;

(iii) Maintain a backup electronic recordkeeping system that meets the other requirements of this paragraph (e), as applicable, and that retains the records required to be maintained and preserved pursuant to §§ 240.18a–5 and 240.18a–6 in accordance with this section;

(iv) Organize and maintain information necessary to locate records maintained by the electronic recordkeeping system; and

(v)(A) Have in place an auditable system of controls that records, among other things: (*1*) Each input, alteration, or deletion of a record;

(*2*) The names of individuals inputting, altering, or deleting a record; and

(*3*) The date and time such individuals input, altered, or deleted the record;

(B) At all times be able to produce a record of the results of the audit of the system of controls for examination by the staffs of the Commission or any State regulator having jurisdiction over the security-based swap dealer or major security-based swap participant; and

(C) Preserve the record of the results of the audit of the system of controls for the retention period required for the associated records;

(vi) Maintain, keep current, and provide promptly upon request by the staffs of the Commission or any State regulator having jurisdiction over the security-based swap dealer or major security-based swap participant all information necessary to access and locate records preserved by means of the electronic recordkeeping system; and

(vii) Have at all times a senior officer of the security-based swap dealer or major security-based swap participant (hereinafter, the ''undersigned''), who has independent access to and the ability to provide records maintained and preserved on the electronic recordkeeping system, file with the Commission the following undertakings with respect to such records:

The undersigned hereby undertakes to furnish promptly to the U.S. Securities and Exchange Commission (''Commission'') and its designees or representatives, or any State securities regulator having jurisdiction over [Name of the Security-Based Swap Dealer or Major Security-Based Swap Participant], upon reasonable request, such information as is deemed necessary by the staff of the Commission or any State regulator having jurisdiction over [Name of the Security-Based Swap Dealer or Major Security-Based Swap Participant], to download copies of a record and its audit trail (if applicable) preserved by means of an electronic recordkeeping system of [Name of the Security-Based Swap Dealer or Major Security-Based Swap Participant] into both a human readable format and a reasonably usable electronic format in the event of a failure on the part of [Name of the Security-Based Swap Dealer or Major Security-Based Swap Participant] to download a requested record or its audit trail (if applicable).

Furthermore, the undersigned hereby undertakes to take reasonable steps to provide access to the information preserved by means of an electronic recordkeeping system of [Name of the Security-Based Swap Dealer or Major Security-Based Swap Participant], including, as appropriate, downloading any record required to be maintained and preserved by [Name of the Security-Based Swap Dealer or Major Security-Based Swap Participant] pursuant to §§ 240.18a–5 and 240.18a–6 in a format acceptable to the staff of the Commission or any State regulator having jurisdiction over [Name of the Security-Based Swap Dealer or Major Security-Based Swap Participant]. Specifically, the undersigned will take reasonable steps that, in the event of a failure on the part of [Name of the Security-Based Swap Dealer or Major Security-Based Swap Participant] to download the record into a human readable format or a reasonably usable electronic format and after reasonable notice to [Name of the Security-Based Swap Dealer or Major Security-Based Swap Participant], the undersigned will download the record into a human readable format or a reasonably usable electronic format at the request of the staff of the Commission or any State regulator having jurisdiction [Name of the Security-Based Swap Dealer or Major Security-Based Swap Participant].

* * * * *

(g) Every security-based swap dealer and major security-based swap participant subject to this section must furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the security-based swap dealer or major security-based swap participant that are required to be preserved under this section, or any other records of the security-based swap dealer or major security-based swap participant subject to examination or required to be made or maintained pursuant to section 15F of the Act that are requested by a representative of the Commission. The security-based swap dealer and major security-based swap participant must furnish a record and its audit trail (if applicable) preserved on an electronic recordkeeping system pursuant to paragraph (e) of this section in a reasonably usable electronic format, if requested by a representative of the Commission.

* * * * *

By the Commission.

Dated: November 18, 2021.

Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–25840 Filed 11–30–21; 8:45 am]

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Part III

Securities and Exchange Commission

17 CFR Part 240

Universal Proxy; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–93596; IC–34419; File No. S7–24–16]

RIN 3235–AL84

Universal Proxy

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is amending the Federal proxy rules to enhance the ability of shareholders to elect directors though the proxy process in a manner consistent with their ability to vote in person at a shareholder meeting. Specifically, the Commission is requiring the use of a universal proxy card in all non-exempt solicitations involving director election contests, except those involving registered investment companies and business development companies. To facilitate the use of a universal proxy card, the Commission is also amending the Federal proxy rules to establish certain notice, minimum solicitation, filing, formatting and presentation requirements, along with other related rule changes consistent with the adoption of a universal proxy requirement. In addition, the Commission is adopting new disclosure requirements relating to voting standards and further requiring certain voting options for all director elections, whether or not contested.

DATES:

Effective date: The rules are effective January 31, 2022.

Compliance dates: See Section II.K.

FOR FURTHER INFORMATION CONTACT: Christina Chalk, Senior Special Counsel, or David M. Plattner, Special Counsel, in the Office of Mergers and Acquisitions, at (202) 551–3440, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to 17 CFR 240.14a–2 (''Rule 14a–2''), 17 CFR 240.14a–3 (''Rule 14a–3''), 17 CFR 240.14a–4 (''Rule 14a–4''), 17 CFR 240.14a–5 (''Rule 14a–5''), 17 CFR 240.14a–6 (''Rule 14a–6''), and 17 CFR 240.14a–101 (''Schedule 14A''), and new rule 17 CFR 240.14a–19 (''Rule 14a–19''), each under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.*] (''Exchange Act'').[1]

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I. Introduction

A. Background

State statutes require corporations to hold an annual meeting of shareholders for the purpose of electing directors.[2] A shareholder's ability to participate in the election of directors is a fundamental right under state corporate law,[3] and the process by which directors are elected is a fundamental aspect of corporate governance that is central to maintaining the accountability of directors to shareholders. Today, few shareholders

[1] Unless otherwise noted, when we refer to the Exchange Act, or any paragraph of the Exchange Act, we are referring to 15 U.S.C. 78a of the United States Code, at which the Exchange Act is codified, and when we refer to rules under the Exchange Act, or any paragraph of these rules, we are referring to title 17, part 240 of the Code of Federal Regulations [17 CFR part 240], in which these rules are published.

[2] *See, e.g.,* Model Bus. Corp. Act section 7.01 (2016); Cal. Corp. Code section 600(b); Del. Code. Ann. tit. 8, section 211(b); N.Y. Bus. Corp. Law section 602.

[3] *See Preston* v. *Allison,* 650 A.2d 646, 649 (Del. 1994); *see also Blasius Indus., Inc.* v. *Atlas Corp.,* 564 A.2d 651, 659 (Del. Ch. 1988) (''The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.'').

of public companies with a class of securities registered under the Exchange Act attend a registrant's meeting to vote in person.[4] Instead, the primary means for shareholders to become informed about matters to be decided on at a meeting and to vote on the election of directors and other matters is through the proxy process.

When a shareholder votes by proxy, the shareholder executes a written directive instructing the entity to whom the proxy is granted how to vote on that shareholder's behalf at the meeting. Although state law typically authorizes the use of proxies to vote shares without requiring in-person attendance at a shareholder meeting,[5] registrants and other parties soliciting proxy authority must comply with the Federal proxy rules.[6] Regulation of the proxy process has been a core function of the Commission since its inception.[7] Further, protecting the ability of shareholders to vote, including their right to elect directors through the proxy process, has been the focus of numerous Commission rulemakings and other efforts over the years.[8]

As described in greater detail in Section I.B of the Proposing Release (81 FR 79122, Nov. 10, 2016), the current proxy rules do not allow shareholders voting by proxy in a contested election[9] to replicate the vote they could cast if they voted in person at a shareholder meeting. Shareholders voting in person at a meeting may select among all of the duly nominated[10] director candidates proposed for election by any party in an election contest and vote for any combination of those candidates. Shareholders voting by proxy, however, do not have this same flexibility. The interplay between state and Federal law means that shareholders voting by proxy generally are unable to choose a mix of dissident[11] and registrant nominees. The dissident and registrant each send a proxy card to shareholders, with the registrant's proxy card typically listing only the registrant's nominees and the dissident's proxy card typically listing only the dissident's nominees. State law provides that a later-dated proxy card invalidates an earlier-dated card.[12] Additionally, shareholders voting by proxy are limited by Federal law in their choice of nominees by Exchange Act Rule 14a–4(d)(1), the ''bona fide nominee rule,''[13] which provides that no proxy shall confer authority to vote for any person to any office for which a ''bona fide nominee is not named in the proxy statement.'' The term ''bona fide nominee'' under Rule 14a–4(d) is a nominee who has ''consented to being named in the proxy statement and to serve if elected.''[14] Thus, in an election contest, one party cannot include the other party's nominees on its proxy card without the other party's nominees' consent. In practice, such consent is rarely provided.[15] Therefore, shareholders voting by proxy in a director election contest must choose between the dissident's or registrant's proxy card. This effectively precludes such shareholders from voting by proxy for a mix of director candidates from both sides' slates in the contest.

Although the Commission attempted to address some aspects of this problem by adopting the ''short slate rule'' in 1992, shareholders voting by proxy still lack the ability to make selections based solely on their preferences for particular director candidates as they could were they voting in person at a shareholder meeting.[16] For years, shareholders and their advocates have expressed concerns arising from being unable to choose a mix of dissident and registrant nominees when voting by proxy, and support for universal proxy has grown over time.[17]

In response to the concerns outlined above, the Commission proposed rule amendments in 2016 to mandate the use of universal proxy cards in contested director elections to allow shareholders to vote by proxy in the same manner as they could do if attending a shareholder meeting (''Proposed Rules'').[18] In 2021,

[4] During the COVID–19 pandemic, many registrants have held virtual rather than in-person shareholder meetings. Because registrants holding virtual shareholder meetings conducted proxy solicitations in the same manner as they would for in-person meetings, for purposes of this release, our references to in-person meetings include virtual shareholder meetings unless otherwise indicated. Although virtual shareholder meetings have become more prevalent, it remains unclear whether virtual shareholder meetings will be used as frequently in the future. Because voting at a virtual shareholder meeting still requires attendance by a shareholder, most shareholders are likely to continue to rely on the proxy voting system to exercise their vote. This is supported by the fact that, during 2020, the vast majority of shareholders who attended virtual shareholder meetings did not vote at the meetings. Instead, to the extent they voted, they did so in advance by proxy or via voting instruction forms submitted in advance of the meetings, rather than by attending the virtual shareholder meeting and casting their votes at the meeting. Based on 1,957 virtual meetings hosted by one proxy services provider in 2020, the average number of shareholders voting at virtual meetings (rather than voting in advance by proxy) was 13 shareholders for meetings with shareholder proposals (218 cases) and 2 shareholders for meetings without shareholder proposals. *See* Broadridge, Virtual Shareholder Meetings 2020 Facts and Figures (April 2021), available at *https://www.broadridge.com/_assets/pdf/vsm-facts-and-figures-2020-brochure-april-2021.pdf.* Accordingly, the use of virtual shareholder meetings will not obviate the need for the final rules regarding universal proxy cards.

[5] *See, e.g.,* Del. Code Ann. tit. 8, section 212.

[6] 15 U.S.C. 78n(a).

[7] Section 14 of the Exchange Act authorizes the Commission to establish rules and regulations governing the solicitation of any proxy, consent or authorization in respect of any security registered pursuant to Section 12 of the Exchange Act. Registrants with reporting obligations only under Exchange Act Section 15(d) and foreign private issuers are not subject to the Federal proxy rules with respect to solicitations of their own security holders.

[8] *See, e.g., Reexamination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process, and Corporate Governance Generally,* Release No. 34–13901 (Aug. 29, 1977) [42 FR 44860 (Sept. 7, 1977)]; *Regulation of Communications Among Shareholders,* Release No. 34–30849 (June 23, 1992) [57 FR 29564 (July 2, 1992)] (''Short Slate Rule Revised Proposing Release''); and *Regulation of Communications Among Shareholders,* Release No. 34–31326 (Oct. 16, 1992) [57 FR 48276 (Oct. 22, 1992)] (''Short Slate Rule Adopting Release''); *Roundtable on Proxy Voting Mechanics* (May 24, 2007) (materials available at *https://www.sec.gov/spotlight/proxyprocess.htm*); *Proxy Voting Roundtable* (Feb. 19, 2015) (materials available at *http://www.sec.gov/spotlight/proxy-voting-roundtable.shtml*); and *Roundtable on the Proxy Process* (Nov. 15, 2018) (materials available at *https://www.sec.gov/proxy-roundtable-2018*).

[9] As used in this release, the term ''contested election'' refers to an election of directors where a registrant is soliciting proxies in support of nominees and a person or group of persons is soliciting proxies in support of director nominees other than the registrant's nominees.

[10] A duly nominated director candidate is a candidate whose nomination satisfies the requirements of any applicable state or foreign law provision and a registrant's governing documents as they relate to director nominations.

[11] The term ''dissident'' as used in this release refers to a soliciting person other than the registrant who is soliciting proxies in support of director nominees other than the registrant's nominees.

[12] *See, e.g., Standard Power & Light Corp.* v. *Inv. Assocs.,* 51 A.2d 572, 608 (Del. 1947); *Parshalle v. Roy,* 567 A.2d 19, 23 (Del. Ch. 1989). *See also* R. Franklin Balotti, et al., *Delaware Law of Corporations and Business Organizations,* section 7.20 (3d ed. 2015) (''Except in the case of irrevocable proxies, a subsequent proxy revokes a former proxy. In determining whether a proxy is subsequent, the date of execution controls.'').

[13] 17 CFR 240.14a–4(d)(1).

[14] 17 CFR 240.14a–4(d)(4).

[15] Even if a nominee consents to being named on the other party's proxy card, each party currently can decide whether to include the other's nominees for strategic or other reasons. These kinds of strategic decisions may impede shareholder voting options.

[16] 17 CFR 240.14a–4(d)(4). The short slate rule permits a dissident in certain circumstances to solicit votes for some of the registrant's nominees through the use of its proxy card where the dissident is not nominating enough director candidates to gain majority control of the board in the contest, thereby allowing shareholders using the dissident's proxy card to vote for a particular split ticket combination. However, as described in greater detail in Section I.B of the Proposing Release, shareholders voting on the dissident's proxy card are still limited to voting for those registrant nominees selected by the dissident, rather than any registrant nominee of their choice.

[17] *See* Section I.C of the Proposing Release and *infra* Section II.A.2 and II.A.3.

[18] The Proposed Rules were set forth in a release published in the **Federal Register** on November 10,

Continued

the Commission reopened the comment period for the Proposing Release to permit commenters to further analyze and comment upon the Proposed Rules in light of developments since the publication of the Proposed Rules.[19] We received many comment letters in response to the Proposing Release and the Reopening Release.[20] After taking into consideration these public comments, which were generally supportive of the rulemaking, and developments in proxy contests since the Proposing Release, we are adopting the Proposed Rules substantially as proposed, with the exception of an increase in the minimum solicitation requirement (described in detail in Section II.D below) and other minor changes.

B. Overview of Final Amendments

The new rules will require use of a ''universal proxy card'' in all non-exempt director election contests. This universal proxy card must include the names of all duly nominated director candidates presented for election by any party and for whom proxies are solicited. Requiring a universal proxy card in non-exempt director election contests is the most effective means to ensure that shareholders voting by proxy are able to elect directors in a manner consistent with their right to vote in person at a shareholder meeting.[21]

The amendments that we are adopting in this document will not apply to investment companies registered under Section 8 of the Investment Company Act of 1940 or business development companies as defined by Section 2(a)(48) of the Investment Company Act of 1940 (''BDCs,'' and together with registered investment companies, ''funds'').[22] Funds were not covered by the Proposed Rules. In light of developments since 2016, as well as the comments that we have received, we believe further consideration of the application of a universal proxy mandate to some or all funds before deciding how to proceed with respect to funds is appropriate.

II. Discussion of Final Amendments

We are adopting the Proposed Rules largely as proposed to better align the Federal proxy rules with a shareholder's ability to vote in person at a shareholder meeting. The final rules:

- Require the use of a universal proxy card by all participants in a non-exempt director election contest. The universal proxy card must include the names of both registrant and dissident nominees, along with certain other shareholder nominees included as a result of proxy access;
- Expand the determination of a ''bona fide nominee'' to include a person who consents to being named in any proxy statement for a registrant's next shareholder meeting for the election of directors;
- Require dissidents to provide registrants with notice of their intent to solicit proxies and to provide the names of their nominees no later than 60 calendar days before the anniversary of the previous year's annual meeting;
- Require registrants to notify dissidents of the names of the registrants' nominees no later than 50 calendar days before the anniversary of the previous year's annual meeting;
- Require dissidents to file their definitive proxy statement by the later of 25 calendar days before the shareholder meeting or five calendar days after the registrant files its definitive proxy statement;
- Require each side in a proxy contest to refer shareholders to the other party's proxy statement for information about the other party's nominees and refer shareholders to the Commission's website to access the other side's proxy statement free of charge;
- Require that dissidents solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting; and
- Establish presentation and formatting requirements for universal proxy cards that ensure that each party's nominees are presented in a clear, neutral manner.

We also are adopting, as proposed, changes to the form of proxy and proxy statement disclosure requirements applicable to all director elections. These amendments:

- Require proxy cards to include an ''against'' voting option in director elections, when there is a legal effect[23] to a vote against a director nominee;
- Require that the proxy card provide shareholders with the ability to ''abstain'' in a director election where a majority voting standard applies; and
- Require proxy statement disclosure about the effect of a ''withhold'' vote in an election of directors.

We discuss the final amendments in greater detail below.[24]

A. Mandatory Use of Universal Proxies in Non-Exempt Solicitations in Contested Elections

1. Proposed Rules

The Commission proposed to require the use of universal proxy cards in all non-exempt solicitations in contested director elections except those involving funds.[25] The Commission proposed that each side's proxy card in a contested director election must include the names of all nominees of both the dissident and registrant and the nominees of certain shareholders (*i.e.,* proxy access nominees). In proposing the mandatory use of universal proxy cards in these kinds of contests, the Commission was guided by the principle that shareholders should enjoy the same ability to vote on a proxy card as they would have if attending a shareholder meeting in person.

2. Comments Received

A number of commenters expressed views on whether the use of a universal proxy card should be voluntary or mandatory. Most favored the mandatory approach because it more effectively replicates the voting options available through in-person voting at a shareholder meeting.[26] Some

2016 (81 FR 79122) (Release No. 34–79164) (''Proposing Release''), and the related comment period ended on January 9, 2017.

[19] This reopening of the comment period was set out in a release published in the **Federal Register** on May 6, 2021 (86 FR 24364) (Release No. 34–91603) (''Reopening Release''). The comment period ended on June 7, 2021.

[20] Unless otherwise indicated, comment letters cited in this release are comment letters received in response to the Proposing Release and the Reopening Release, which are available at *https://www.sec.gov/comments/s7-24-16/s72416.htm.*

[21] Congress intended our proxy rules to effectuate shareholders' ability to fully and consistently exercise the ''fair corporate suffrage'' available to them under state corporate law. *See* H. R. Rep. No. 73–1383, 2d Sess., at 13 (1934). *See also Mills* v. *Elec. Auto-Lite Co.,* 396 U.S. 375, 381 (1970); *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 431 (1964).

[22] 15 U.S.C. 80a–8; 15 U.S.C. 80a–2(a)(48). BDCs are a category of closed-end investment companies that are not registered under the Investment Company Act, but are subject to certain provisions of the Investment Company Act. *See* Proposing Release at n.178.

[23] State law and the registrant's governing documents determine the voting standard for director elections, with director nominees generally elected under either a plurality voting standard or majority voting standard. They also determine whether an ''against'' voting option has a legal effect under the applicable voting standard. For example, under a plurality voting standard, a director nominee can be elected to the board with a single vote in favor of his or her election, with the ''withhold or ''against'' votes having no impact on the outcome of the election.

[24] In addition to the substantive final amendments, we are making technical amendments to: (i) Rule 14a–3 (punctuational and related minor edits); and (ii) Rule 14a–4(b) and Note 3 to Rule 14a–6(a) (removal of obsolete references to vacated Rule 14a–11).

[25] *See* proposed Rule 14a–19(e).

[26] *See* letters dated Dec. 28, 2016, Sep. 7, 2017, Nov. 8, 2018, and Jun. 2, 2021 from Council of Institutional Investors (''CII''); letters dated Jan. 4, 2017 and Jun. 7, 2021 from Ohio Public Employees Retirement System (''OPERS''); letter dated Jan. 9, 2017 from Colorado Public Employees Retirement Association (''Colorado PERA''); letter dated Jan. 9, 2017 from Trian Fund Management, L.P. (''Trian''); letter dated Jan. 9, 2017 from Ad Hoc Coalition of Institutional Investors in Closed-End Funds (''Ad

commenters favored a mandatory system to avoid logistical issues that would arise in the absence of such a system, and several commenters cited the potential for shareholder confusion arising from a voluntary approach.[27] Several commenters noted that an optional system would promote gamesmanship, and would lead to the use of a universal proxy card as a tactical strategy to benefit a particular participant in a contest.[28] Another noted that proxy contest participants would have little incentive to use a universal proxy card under an optional system.[29] One commenter advocated a mandatory system that registrants could opt out of with approval of a majority of shareholders.[30]

Several commenters favored making the use of a universal proxy card optional. One noted that this would allow the Commission to study the effect of its use before making it mandatory.[31] Another advocated that registrants be able to opt out of a universal proxy requirement through a board vote.[32] Two commenters argued that shareholders should have to demonstrate a continued and significant ownership stake in a registrant in order to trigger the use of a universal proxy card.[33]

Some commenters did not support the use of a universal proxy card. Some argued that a mandate would increase the number of proxy contests and thereby expose more registrants to costly distraction or increased influence of short-term activist investors at the expense of other investors.[34] Two of these commenters argued that the mandatory use of universal proxies would ''encourage balkanization'' of the boards of public companies by facilitating ''mix and match'' voting between nominees from different slates of director candidates, ultimately providing a disincentive for companies to go public in the United States.[35] Similarly, another commenter claimed that the ''mix and match'' voting enabled by universal proxy cards could result in suboptimal board compositions in which board members lack complementary skill sets.[36] Various commenters who opposed the adoption of a universal proxy requirement contended that there was not a compelling reason to change the existing system[37] and noted that adoption of universal proxy could have unintended consequences, such as shareholder confusion and more frequent disqualification of defective ballots.[38] Several commenters argued that a universal proxy requirement would increase the influence of proxy advisory firms.[39] One commenter opposed the proposed amendments, suggesting that the Proposed Rules ''would likely exceed the Commission's authority under the Exchange Act'' and arguing that a universal proxy requirement represents a ''substantial change'' in policy that the Commission had not justified under the Administrative Procedure Act.[40] That commenter noted that if the Commission proceeds with the rulemaking, it should adopt an optional approach rather than a mandatory one.

Another commenter supported mandated universal proxy for operating companies, but expressly opposed its use for funds, in part due to the additional protections afforded by the Investment Company Act of 1940.[41]

3. Final Amendments

We are adopting Rule 14a–19(e), as proposed, to require the mandatory use of universal proxy cards by operating companies in all non-exempt director election contests. A mandatory system better protects the shareholder voting franchise, while avoiding the confusion that could result from a voluntary universal proxy system, where one party or the other strategically uses universal proxy only when they perceive it to be to their advantage. The logistics of how votes are cast through the proxy voting system should not affect the substantive voting options of shareholders, and therefore potential outcomes of the vote. The ability of shareholders to fully exercise their right under state law to elect their preferred candidates through the proxy process represents a key reason to adopt the rule amendments. In particular, we note that under existing rules, institutional and other large shareholders can split their vote between registrant and dissident candidates—albeit with effort and expense—because they can arrange for a representative to attend the shareholder meeting and vote in person. Retail and other smaller investors, however, are unlikely to have the resources or sophistication to be able to do so.[42] The

Hoc Coalition''); letter dated Jan. 9, 2017 from CFA Institute (''CFA Institute''); letters dated Jan. 11, 2017 and Jun. 16, 2021 from Securities Industry and Financial Markets Association (''SIFMA''); letter dated Jan. 11, 2017 from State Board of Administration of Florida (''SBA–FL''); letter dated Jan. 9, 2017 from United Brotherhood of Carpenters and Joiners of America (''Carpenters''); letter dated Jan. 9, 2017 from Office of the Comptroller, State of New York (''NY Comptroller''); letter dated Jan. 9, 2017 from California State Teachers' Retirement System (''CalSTRS''); letter dated Jan. 6, 2017 from American Federation of State, County and Municipal Employees (''AFSCME''); letters dated Dec. 19, 2016 and Jun. 7, 2021 from Investment Company Institute (''ICI''); letter dated Jun. 7, 2021 from Institutional Shareholder Services Inc. (''ISS''); letter dated Jun. 4, 2021 from Elliott Investment Management L.P. (''Elliott''); letter dated Jun. 3, 2021 from Canadian Coalition for Good Governance (''CCGG''); letter dated Jun. 4, 2021 from Domini Impact Investment LLC (''Domini''); letters dated Jan. 9, 2017 and Jun. 7, 2021 from Better Markets (''BM''); letter dated Jun. 7, 2021 from Mediant, Inc. (''Mediant''); letter dated Jun. 28, 2021 from Principles for Responsible Investment (''PRI''); letter dated Jun. 7, 2021 from 41 Signatories with AUM of $309,413,549,298; letter dated Jun. 7, 2021 from Professor Scott Hirst, Boston University School of Law (''Prof. Hirst''), letter dated Jun. 15, 2021 from Matthew P. Lawlor (''M. Lawlor''); letter dated Jun. 17, 2021 from Chris Fowle (''C. Fowle''); letter dated Apr. 19, 2021 from Undisclosed Majority Shareholder in Numerous Ventures (''Anonymous 1''); letter dated Dec. 8, 2017 from Eamonn Burke (''E. Burke''). *See also* Recommendation of the SEC Investor Advisory Committee (IAC): Proxy Plumbing, dated Sep. 5, 2019, available at *https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-plumbing.pdf* (''IAC Report''). The IAC Report indicated support for the mandatory universal proxy system proposed, while noting that a minority of Committee members favored making universal proxy voluntary rather than mandatory. Previously, as discussed in the Proposing Release, in 2013, the IAC recommended that we explore revising our proxy rules to provide proxy contestants with the option to use a universal proxy card in connection with short slate director nominations. Exchange Act Section 39(g)(2) requires the Commission to ''promptly issue a public statement—(A) assessing the finding or recommendation of the [Investor Advisory] Committee; and (B) disclosing the action, if any, the Commission intends to take with respect to the finding or recommendation.'' We have carefully considered the recommendations of the IAC on the use of universal proxy cards in connection with this rulemaking.

[27] *See* letters from CalSTRS; SIFMA; ISS.

[28] *See* letters from SIFMA; CCGG.

[29] *See* letter dated Jan. 9, 2017 from Fidelity Investments (''Fidelity'').

[30] *See* letter from Prof. Hirst.

[31] *See* letter dated Jan. 4, 2017 from Davis Polk & Wardwell LLP (''Davis Polk'').

[32] *See* letter dated Jun. 7, 2021 from Sidley Austin LLP (''Sidley'').

[33] *See* letter from Sidley and letters dated Jan. 10, 2017 and Jun. 7, 2021 from Society for Corporate Governance (''Society'') (comparing universal proxy to 17 CFR 240.14a–8 (Rule 14a–8) and vacated 17 CFR 240.14a–11 (Rule 14a–11)).

[34] *See* letters dated Jan. 9, 2017 and Jun. 7, 2021 from Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (''CCMC''); letter dated Jan. 9, 2017 from Corporate Governance Coalition for Investor Value (''CGCIV''); letter dated Apr. 30, 2021 from International Bancshares Corporation (''IBC''); letters from Society. The letters from CCMC and CGCIV also objected to the mandatory use of a universal proxy on First Amendment grounds. *See* Section II.F below for additional detail.

[35] *See* letters from CCMC; CGCIV.

[36] *See* letter dated Jan. 3, 2017 from National Association of Corporate Directors (''NACD'').

[37] *See, e.g.,* letters from Davis Polk; CCMC; CGCIV.

[38] *See, e.g.,* letters from CCMC; CGCIV.

[39] *See* letters from Sidley; CCMC; CGCIV.

[40] *See* letter from Davis Polk.

[41] *See* letters from ICI.

[42] While an increase in virtual meetings and corresponding technological advances may theoretically make it easier for certain retail investors to attend and vote at meetings, most

Continued

mandatory use of universal proxy cards would address this disparity and remove this impediment to retail investors' ability to exercise their right to vote to the full extent allowed by state law.

Use of a universal proxy card should not be dependent on the potentially self-interested considerations of the contesting parties, the registrant's board of directors, or any controlling shareholders, as it would be under an optional system, or one where a registrant (through, for example, a board or shareholder vote) could opt out of a universal proxy requirement. Mandating a universal proxy is a more efficient and effective means to achieve the objective of allowing shareholders to elect their preferred candidates through the proxy process. Similarly, a universal proxy requirement should not be dependent on the size of a dissident's equity stake in a registrant or the period of time it has maintained its equity position. The purpose of requiring a universal proxy is to allow shareholders to exercise their right to vote for directors in the same manner as they could vote through in-person attendance at a shareholder meeting. Conditioning a universal proxy mandate on a minimum ownership threshold or holding period, as certain commenters advocated, would be contrary to this purpose. Conditioning a universal proxy mandate in such manner would inappropriately subject shareholders' ability to vote in director election contests through the proxy process to conditions that are not imposed upon shareholders' ability to vote if attending a shareholder meeting.

In response to commenters arguing for an optional universal proxy system, an optional system without additional accompanying rule changes would raise problems not presented by a mandatory requirement, such as issues related to how and when shareholders presented with a universal proxy card would access information about the other party's nominees in order to make an informed voting decision. Mandating a universal proxy in all non-exempt election contests is less likely to cause shareholder confusion than an optional system which would operate differently, depending on whether one or both sides elected to opt in or opt out of universal proxy. Finally, in response to the commenter who advocated an optional system to allow us to study the impact of universal proxy, we note that we already have experience with optional universal proxy. Our existing proxy rules already effectively allow optional universal proxy for registrants because a registrant can require dissident nominees to consent to being named on the registrant's proxy card as part of an advance notice bylaw provision and associated director and officer (D&O) questionnaire, a tactic used by registrants on multiple occasions.[43] This form of optional universal proxy, however, falls well short of meeting the objectives of our rulemaking. Use of this tactic creates an unfair advantage for registrants, who are then able to place dissident nominees on the registrant's proxy card without granting dissidents the same ability to place registrant nominees on the dissident's cards. Further, use of universal proxy cards and the ability of shareholders to select their preferred mix of nominees would exist at the sole discretion of the registrant and would be subject to management's self-interest.

As discussed in Section IV.C.4 below, it is unclear whether the rule changes we are adopting will increase or decrease the number of proxy contests. Similarly, it is unclear whether they will increase the influence, directly or indirectly, of dissidents, including short-term activist investors, as some commenters predicted. Under current rules, a shareholder may be forced to make an ''all or nothing'' choice between one or the other soliciting party's proxy card. However, a universal proxy card may result in increased split votes where dissidents do not gain majority control of a board of directors in one election. We view the arguments that mandatory universal proxy will lead to distraction for registrants, hamstring directors, and lead to greater ''balkanization'' of boards of directors as unpersuasive. Even with the use of universal proxy cards, registrants and dissidents will retain the same ability to advocate the election of their nominees and raise concerns about negative boardroom dynamics that they have today. Shareholders will continue to have the ability to evaluate these concerns, including potential ''balkanization'' of the board, when they make their voting decisions. The rule amendments we are adopting are intended to improve the mechanics of the proxy voting process, not influence its outcome. Further, it is not apparent that allowing shareholders to more easily base their vote on individual and collective characteristics of board candidates, rather than forcing an ''either or'' choice between dissident or registrant nominees, would negatively impact registrants or boardroom dynamics. We are also unaware of such arguments about mix and match voting being made in the context of in-person voting, where such a choice is already possible for larger shareholders and institutions who expend the effort to vote through an in-person representative. Lastly, even if the use of universal proxy will lead to greater frequency of ''split'' boards, it is unclear whether that effect will necessarily lead to detrimental changes in board dynamics, with some viewing a diversity of viewpoints among board members as a positive development.[44] The mandatory use of universal proxy cards will permit shareholders to choose their preferred mix of directors, taking into consideration both complementary skill sets and other board dynamics.

For the same reason, we do not believe the universal proxy requirement we are adopting will result in promoting the interests of special interest groups and short term activists, at the expense of shareholders generally. Even with the use of universal proxy cards, a dissident must ultimately persuade shareholders that its agenda is in their best interests in order to successfully elect its nominees. Moreover, if elected to the board of directors, such dissident nominees will be subject to the same state-law fiduciary duties to the corporation and, and by extension, all of its shareholders as all other directors, many of whom are also commonly affiliated with other entities.

Similarly, it is unclear to us how these rule amendments, which improve the mechanics of the proxy process, would increase the influence of proxy advisory firms,[45] also referred to as ''proxy voting advice businesses.'' These businesses provide voting recommendations to their clients, mainly institutional investors and investment advisers, who then may consider such recommendations as part of their decision-making process. The

shareholders (including many retail investors) hold their shares in ''street name'' and, as such, would need to obtain a legal proxy from the securities intermediaries that hold their shares (such as a broker-dealer) in advance to vote at a virtual shareholder meeting, as they would need to do to vote at the meeting in person. We therefore expect that the vast majority of retail investors will continue to vote by proxy and will continue to rely on the ability to do so.

[43] For example, both the dissident group and the registrant used universal proxy cards at EQT Corporation's 2019 Annual Meeting. *See* DEFC14A filed May 20, 2019 by dissidents and DEFC14A filed May 22, 2019 filed by EQT Corp. The registrant but not the dissident group used a universal proxy card at Sandridge Energy's 2018 Annual Meeting. *See* DEFC14A filed May 10, 2018 by Sandridge Energy, Inc. and DEFC14A filed May 11, 2018 by dissidents.

[44] *See infra* note 295 and accompanying text.

[45] Several commenters suggested that the use of universal proxies could increase the influence of proxy advisory firms. *See* letters from Sidley; CCMC; CGCIV.

client, not the proxy voting advice business, retains the legal right to vote and makes the ultimate decision on how it wishes to exercise that right in the election.[46] In addition, investment advisers and other institutional investors using these recommendations are also subject to fiduciary duties and other legal obligations with respect to their proxy voting obligations. This would not change if universal proxy cards are used. Rather, the rule amendments we are adopting simply make it easier for the shareholder to vote for the nominees that it wants, regardless of whether they are from the dissident's slate or the registrant's slate.

In response to the commenter questioning our authority to adopt a universal proxy requirement,[47] the final rules are well within the plain language of the authority granted by Congress to the Commission under Section 14(a). The fact that the Commission in the past enacted measures that did not provide for universal proxies in no way suggests that the Commission lacked the statutory authority to do so.

In our view, the suggestion that the Commission has not provided a sufficient justification for these rules is unfounded. We are adopting these rules now because they best effectuate the Commission's goal of having proxy voting mirror the choices that a shareholder has in person at a meeting. As noted above, the Commission has long understood the limitations that the proxy rules place on a shareholder's ability to select its preferred mix of registrant and dissident nominees.[48] As discussed below, the Commission adopted the short slate rule in 1992 in an attempt to address this problem. Yet, the short slate rule has not resolved the problem, with its conditions limiting the full exercise of shareholders' ability to vote for director nominees through the proxy process. Further, based on the Commission staff's experience, substantial confusion exists regarding the use of the short slate rule, including by dissidents attempting to use it.

For many years, we have received comments from shareholders and their advocates expressing strong concerns about the limitations on their rights when voting by proxy.[49] Many commenters on the Proposing Release reiterated those concerns and supported a mandatory universal proxy system to address them.[50] Since the issuance of the Proposing Release in 2016, the call for universal proxy cards has persisted.[51] Further, voluntary use of universal proxy cards in director contests has increased since 2016,[52] along with an increased presence of provisions in registrants' governing documents (such as advance notice bylaws) designed to facilitate the use of universal proxy cards including by requiring dissidents to provide consents for their nominees to be listed in the registrant's proxy materials. These provisions, however, do not typically provide dissidents with similar consents to include the registrant's nominees and, as discussed above, do not adequately address many shareholders' concerns. The concerns described above are valid and can be addressed through the universal proxy requirement we are adopting in this document. The fact that we previously took other steps to try to address some of these same concerns does not preclude us from making the changes now that will address the current voting limitations. Additionally, we have carefully considered the economic effects of the rule, including the costs and benefits to shareholders, in Section IV.C below.

We recognize that whether proxy contests become more frequent may depend in part on whether the rule amendments increase a dissident's chances of electing some or all of its nominees. We discuss the costs associated with proxy contests in Section IV.C below. However, assuming these rule amendments result in more frequent proxy contests, the ultimate decision on who is elected to the board of directors rests with shareholders. In this sense, the mere fact that a dissident mounts a proxy contest does not necessarily mean it will be successful unless shareholders are persuaded that its platform will benefit them and the registrant. Again, these decisions at the heart of corporate governance are best left to shareholders.

The additional disclosure and presentation provisions adopted in this document and described in greater detail below will help to avoid some of the concerns of those who do not favor mandatory universal proxies. For example, participants in a contested election will not be required to include information about the opposing side's nominees in their own proxy statement. Rather, each side's proxy statement must direct shareholders to the opposing side's proxy statement for information about that participant's nominees.[53] Each universal proxy card will be subject to the formatting and presentation requirements in the revised rules we adopt in this document. These requirements are intended to ensure that each side's nominees are grouped together and clearly identified as such, and presented in a fair and impartial manner.[54] In addition, each universal proxy card must disclose the treatment of proxy cards containing over-votes and under-votes.[55] These disclosure and presentation mandates in our rule amendments are intended to avoid shareholder confusion that could result in an increase in defective ballots and shareholder disenfranchisement. As shareholders become more familiar with universal proxy cards in director election contests, any initial confusion will likely abate.[56] While we are mindful of the arguments that mandated universal proxy could have unintended consequences with respect to the mechanics of voting, the safeguards described above are intended to reduce that possibility.

B. Dissident's Notice of Intent To Solicit Proxies in Support of Nominees Other Than the Registrant's Nominees

1. Proposed Rules

The Commission proposed to require the dissident to provide notice to the registrant of the names of the dissident's nominees no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date.[57] The proposed notice had to include a statement that the dissident intends to solicit the specified percentage of the voting power of the shares entitled to vote.[58]

[46] To the extent a proxy voting advice business has an interest in the director contest, such as a material relationship with the dissident or registrant, the Federal proxy rules require the proxy voting advice business to disclose this conflict of interest, which may mitigate concerns about the objectivity of the advice.

[47] *See* letter from Davis Polk.

[48] *See, e.g.,* Short Slate Rule Revised Proposing Release and Short Slate Rule Adopting Release.

[49] *See* Section I.C of the Proposing Release.

[50] *See, e.g.,* letters from CII; OPERS; Trian, CalSTRS; Elliott; Domini; PRI.

[51] *See, e.g.,* IAC Report; letter dated Aug. 6, 2020 from Universal Proxy Working Group (''UPWG'').

[52] *See supra* note 43 and accompanying text.

[53] *See* newly-adopted Item 7(f) of Schedule 14A.

[54] *See* Rule 14a–19(e).

[55] *See* Rule 14a–19(e)(7). By ''under-votes,'' we mean instances in which a shareholder returns a proxy card in a director election contest but does not exercise a vote with respect to all of the board seats up for election at the relevant shareholder meeting.

[56] Current proxy rules relating to split-ticket voting in a director election contest may also be confusing to shareholders. Rule 14a–4(d)(4) permits a dissident to ''round out'' the slate of nominees listed on its proxy card under specified circumstances. However, Rule 14a–4(d)(4)(ii) prevents a dissident from directly naming a director nominee whom the dissident supports. (*See* Section II.I below.) The staff has observed confusing descriptions in proxy statements and proxy cards as a result of this rule. We believe that shareholder confusion will decrease, not increase, as a result of the amendments we are adopting.

[57] *See* proposed Rule 14a–19(a) and (b).

[58] *See* proposed Rule 14a–19(b)(3).

2. Comments Received

Several commenters discussed the requirement that dissidents provide the registrant with the names of its nominees no later than 60 calendar days prior to the anniversary of the prior year's annual meeting date.

Many commenters supported the requirement as proposed.[59] Two commenters expressed concern that such requirement could have a chilling effect on any ongoing settlement discussions between the parties.[60] To avoid this, one commenter suggested adopting an exception that would temporarily exempt the dissident from the proposed notice requirement while settlement discussions between the parties are taking place.[61]

Other commenters expressed concern that the proposed deadline would compel the board of directors to vet nominees on an accelerated timeframe, to the detriment of shareholders at large, where a registrant's advance notice bylaw provision required dissidents to provide notice of their nominees before the 60-day period mandated in our proposed rules.[62] One commenter expressed concern that where a registrant has an advance notice deadline that falls after the dissident's 60 calendar day notice deadline (*e.g.,* an advance notice deadline of 45 days prior to the anniversary of the prior year's meeting), the proposed notice requirement would give the registrant an unfair advantage in preparing for an activist campaign, since the dissident would have to reveal the identities of its nominees before it would be required to do so under the registrant's own governing documents.[63] This commenter suggested adopting an exception to the proposed notice requirement applicable to registrants that have advance notice bylaw provisions, such that the dissident's notice deadline would be the later of the currently proposed deadline or the registrant's own advance notice deadline.[64]

Several commenters supported allowing dissidents to launch a contest after the 60 calendar day deadline, as they could under existing rules, without the ability to use a universal proxy card.[65] Finally, one commenter suggested that the dissident's notice be made publicly available.[66]

3. Final Amendments

We are adopting, as proposed, the requirement that a dissident provide the registrant with the names of the nominees for whom it intends to solicit proxies no later than 60 calendar days before the anniversary of the previous year's annual meeting date.[67] If the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, Rule 14a–19(b)(1), as adopted, requires that the dissident provide notice by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant. Rule 14a–19 requires a dissident to indicate its intent to comply with the minimum solicitation threshold in the adopted rules by including in its notice a statement that it intends to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors.[68] Rule 14a–19 does not require a dissident to provide this notice to the registrant if the information required in the notice has already been provided in a preliminary or definitive proxy statement filed by the dissident by the deadline imposed by the rule. Rule 14a–19 also does not require a dissident to file the notice with the Commission or otherwise make the notice publicly available.

In our view, the Rule 14a–19(b) notice requirement is necessary to provide a definitive date by which the parties in a contested election will know that use of universal proxies has been triggered and to provide the parties with a definitive date by which they will have the names of all nominees to compile a universal proxy card. The 60-day deadline provides a definitive date far enough in advance of the meeting to give the parties sufficient time to prepare a proxy statement and form of proxy in accordance with the universal proxy requirements.[69] In addition, 60 calendar days before the anniversary of the previous year's annual meeting date does not represent a significant additional burden for most dissidents. The deadline that we are adopting for the notice is 30 calendar days later than the deadline found in most advance notice bylaws, which typically require notice to be delivered no earlier than 120 days and no later than 90 days prior to the first anniversary of the prior year's annual meeting.[70] Based on a review of the filings for the 101 contested elections initiated from 2017–2020, we estimate that dissidents provided some form of notice of their intent to nominate candidates for election to the board of directors 60 or more calendar days prior to the first anniversary of the prior year's annual meeting in 90% of the contests.[71]

A dissident's obligation to comply with the notice requirement is in addition to its obligation to comply with any applicable advance notice provision in the registrant's governing documents. Rule 14a–19's notice requirement is a minimum period that does not override or supersede a longer period established in the registrant's governing documents.[72] In most cases, Rule 14a–

[59] *See* letters from CII; Colorado PERA; CalSTRS; CFA Institute; SBA–FL; Carpenters; NY Comptroller; AFSCME.

[60] *See* letters dated Jan. 9, 2017 and Jun. 7, 2021 from Olshan Frome Wolosky LLP (''Olshan''); Society.

[61] *See* letters from Olshan.

[62] *See* letters from CCMC; CGCIV; Society; IBC; Sidley.

[63] *See* letters from Olshan.

[64] *See* letters from Olshan.

[65] *See* letters from CII; SBA–FL; Carpenters; NY Comptroller; CalSTRS; Colorado PERA; AFSCME.

[66] *See* letter from Fidelity (arguing that such practice could serve as a means for investors who engage in securities lending to identify a potential contest before the record date for a meeting, thereby providing them with the ability to recall loaned shares).

[67] The rule also mandates that a dissident promptly notify the registrant if any change occurs with respect to its intent to solicit proxies in support of its director nominees. *See* Rule 14a–19(c).

[68] *See* Rule 14a–19(b)(3). *See also, infra* Section II.D for a discussion of the minimum solicitation requirement.

[69] For many registrants, the record date for determining shareholders entitled to notice of the meeting cannot be more than 60 days before the date of such meeting. *See, e.g.,* Del. Code Ann. tit. 8, section 213. Thus, as a practical matter, registrants very rarely file their definitive proxy statement prior to such date.

[70] *See* Sullivan & Cromwell LLP, *Proxy Access Bylaw Developments and Trends,* at 4 (Aug. 18, 2015), available at *https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Proxy_Access_Bylaw_Developments_and_Trends.pdf* (''S&C 2015 Report''); Wachtell, Lipton, Rosen & Katz, *Nominating and Corporate Governance Committee Guide,* at 22 (2015), available at *http://www.wlrk.com/files/2015/NominatingandCorporateGovernanceCommitteeGuide2015.pdf. See also* Arthur Fleischer, Jr., Gail Weinstein and Scott B. Luftglass, *Takeover Defense: Mergers and Acquisitions* (9th ed. 2020) (stating, ''As of December 31, 2020, over 98% of the S&P 500 firms had at least a 60-day advance-notice requirement for board nominations and/or shareholder proposals'').

[71] The sample (''contested elections sample'') is based on staff analysis of EDGAR filings for election contests with dissident preliminary proxy statements filed in calendar years 2017 through 2020, other than election contests involving funds. The staff has identified 101 proxy contests involving competing slates of director nominees during this time period. For purposes of determining the earliest date the dissident provided some form of notice of its intent to nominate candidates for election to the board, staff considered disclosure in the dissident's definitive additional soliciting materials filed under Rule 14a–12, disclosure in amendments to the dissident's Schedule 13D and disclosure in both the registrant's and dissident's proxy statements.

[72] Several commenters expressed concern that the proposed 60-day deadline would shorten the notice

19(b) will not meaningfully impact dissidents because, as discussed above, most registrants' advance notice provisions impose an earlier deadline to provide notice of a dissident's nominees.[73] In those cases, the new requirement does not affect timing considerations, as dissidents would already have signaled to registrants their intent to launch a contest pursuant to the registrants' bylaw requirements.

We acknowledge that where the registrant does not have an advance notice provision in its governing documents, or has such a provision requiring less than 60 days' advance notice, Rule 14a–19(b) imposes an additional obligation. Such late-developing contests are rare.[74] The Rule 14a–19(b) 60-day notice requirement is designed to ensure the orderly conduct of proxy contests under the new universal proxy framework and justifies the potential burden that may arise in the few director contests at companies with no advance notice provision or a provision requiring less than 60 days' advance notice.

Despite some commenters' suggestions,[75] we are not adopting exceptions to the 60-day notice deadline imposed by new Rule 14a–19. The universal proxy requirement we are adopting is designed to ensure consistency and predictability in election contests; exceptions to the 60-day deadline would likely invite gamesmanship, create confusion, and fundamentally undermine the goals of the rulemaking. As discussed above, the orderly use of universal proxy cards in director election contests requires timely notice to the registrant, with the 60-day deadline in Rule 14a–19(b) establishing a baseline for such notice.[76] Exceptions to this deadline, or requiring less than 60 days' advance notice, could lead to confusion among registrants, dissidents, and shareholders, as well as increase the risk that universal proxy cards and other proxy materials would not be delivered in a timely and orderly manner. Finally, in response to the commenters who supported allowing contests to take place after the 60-day deadline,[77] we would note that while dissidents who are unable to meet the 60-day notice deadline would be prevented from conducting an election contest under the rule amendments we are adopting,[78] such dissidents would not be prevented from taking other actions to attempt to effectuate changes to the board, such as initiating a ''vote no'' campaign, conducting an exempt solicitation, or calling a special meeting (to the extent permitted under the registrant's bylaws) to remove existing directors and appoint their own nominees to fill the vacancies.

The Rule 14a–19(b) notice requirement should not deter settlements between dissidents and registrants. Under current market practice, settlements often occur after the parties have filed their proxy statements and even after they have begun soliciting. The new notice requirement therefore is unlikely to affect this practice. Finally, the purpose of the notice requirement is not served by requiring that the notice be made public. However, in practice, each of the dissident and the registrant is likely to publicize the sending of the notice voluntarily.[79]

C. Registrant's Notice of Its Nominees

1. Proposed Rules

Similar to the notice required from a dissident under Rule 14a–19(b), the Commission proposed to require the registrant to notify the dissident of the names of its nominees unless the names have already been provided in a preliminary or definitive proxy statement filed by the registrant.[80] For the registrant, the Commission proposed that the deadline for such notice be no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date.

2. Comments Received

Relatively few commenters addressed this proposed requirement. Two commenters expressly supported the proposed notice requirement for registrants.[81] Three others argued in favor of establishing the same notice deadline for registrants and dissidents.[82] One of these commenters believed the proposed later deadline for registrants would give registrants a significant strategic advantage over dissidents in the solicitation.[83] This commenter suggested that registrants should be required to publicly announce their nominees before dissidents are required to provide notice of their nominees.[84] By contrast, two commenters opposed any notice requirement for registrants.[85]

3. Final Amendments

We are adopting Rule 14a–19(d) as proposed. As discussed in the Proposing Release and as explained above in the context of the dissident's notice deadline, notification deadlines are important in a mandatory universal proxy system to provide the parties with a definitive date by which they will have the names of all nominees to compile a universal proxy card. Absent such a requirement for registrants, dissidents could face an informational and timing disadvantage in a universal proxy system. Registrants would know the names of dissident nominees no later than 60 days prior to the meeting,[86] while dissidents would not necessarily know the names of the registrant nominees until the registrant files its preliminary proxy statement, which is only required to be filed at least 10 calendar days before the definitive proxy statement is first sent to shareholders and may be filed much closer to the meeting date.[87] In that case, dissidents would have to wait to file their definitive proxy statement and proxy card until the registrant filed its preliminary proxy statement with the names of the registrant nominees.

that registrants receive of impending proxy contests. *See* letters from CCMC; CGCIV; Society; IBC. To clarify and address these concerns, where an advance notice bylaw provision requires dissidents to provide earlier notice of its nominees, that longer time period controls. Rule 14a–19(b) establishes a minimum, not a maximum, notice period.

[73] According to a law firm report, 99% of the S&P 500 and 95% of the Russell 3000 had advance notice provisions at 2020 year-end. *See* WilmerHale, *2021 M&A Report,* at 6 (2021), available at *https://www.wilmerhale.com/en/insights/publications/2021-manda-report* (*citing www.SharkRepellent.net*) (''WilmerHale M&A Report'').

[74] Based on a review of the contested elections sample, *see supra* note 71, the staff found that dissidents provided notice of their intent to nominate director candidates fewer than 60 calendar days prior to the shareholder meeting date in 10% of the contests.

[75] *See,* in particular, letters from Olshan.

[76] Further, as previously noted, most registrants require advance notice under their governing documents far earlier than the Rule 14a–19(b) notice requirement.

[77] *See supra* note 65 and accompanying text.

[78] In our view, this is appropriate when balanced against the goals of the rulemaking and the necessity of the notice period for the orderly solicitation process under a mandatory universal proxy system.

[79] For example, depending on the particular facts and circumstances, the registrant may disclose the notice under its Form 8–K filing obligations. We acknowledge the commenter who suggested that a publication requirement could be beneficial to those investors who engage in securities lending, but we see securities lenders' voting practices and record date disclosure practices as outside the scope of this rulemaking, with any concerns more appropriately addressed through a separate effort.

[80] *See* proposed Rule 14a–19(d).

[81] *See* letters from CalSTRS; CII.

[82] *See* letters from Olshan; CFA Institute; Elliott.

[83] *See* letters from Olshan.

[84] *See* letters from Olshan.

[85] *See* letters from Society; Sidley.

[86] Because the deadline under proposed Rule 14a–19(b)(1) is tied to the anniversary of the previous year's annual meeting date, 60 calendar days before the meeting date approximates the latest date on which registrants would know the names of dissident nominees.

[87] *See,* as adopted, Rule 14a–19(b)(1); 17 CFR 240.14a–6(a).

A deadline that is 10 calendar days after the latest date the registrant will receive the dissident's notice of nominees is appropriate because it provides a sufficient period of time for the registrant to consider the dissident's notice, finalize its nominees, and respond with its own notice of nominees. The 10-day period is appropriate, given that the dissident's notice of nominees may be the first indication of a contested solicitation that the registrant receives. Moreover, the 50-day deadline is appropriate for providing dissidents with timely access to the names of registrant nominees for purposes of preparing a universal proxy card. While the deadline for registrants is 10 days after the deadline for dissidents, as a practical matter, dissidents are unlikely to be disadvantaged because registrant nominees are often existing directors about whom information will already be available.

Based on a review of recent contested elections and the staff's experience, dissidents typically do not file their definitive proxy statement more than 50 calendar days before the meeting date.[88] Thus, based on this market practice, we would not expect the rules adopted in this document to delay the timing of the filing of dissident's definitive proxy statement.

It is possible that a registrant could provide notice of the names of its nominees under Rule 14a–19 and later change its nominees. As with the notice requirement for dissidents, Rule 14a–19(d), as adopted, requires a registrant to promptly notify the dissident of any change in the registrant's nominees. If there is a change in the registrant's nominees after the dissident has disseminated a universal proxy card, the dissident could elect, but would not be required, to disseminate a new universal proxy card reflecting the change in registrant nominees. Each side will generally be incentivized to amend its own card if such a change occurs to make it more appealing to shareholders, who could otherwise turn to the other side's universal proxy card for a current list of director nominees. Votes for an individual nominee who withdraws his or her name from consideration are generally disregarded pursuant to state law, as under current rules.

D. Minimum Solicitation Requirement for Dissidents

1. Proposed Rules

The Commission proposed, as a key piece of the new universal proxy requirement, that the dissident in a contested election be required to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors. The Commission also proposed that the dissident would need to affirm its intention to meet the minimum solicitation requirement by making a statement to that effect in its proxy materials and in its notice to the registrant.[89]

The minimum solicitation requirement was intended to strike the appropriate balance to ensure that, where a universal proxy requirement is implemented, dissidents must still engage in meaningful independent solicitation efforts in order to have their director nominees elected. Current proxy rules do not obligate a dissident to solicit any number of shareholders or percentage of voting power in an election contest; rather, current rules only require a dissident to furnish a proxy statement to each person solicited.[90] The Proposed Rules were based on the premise that, while registrants would have to include dissident nominees on their universal proxy card, dissidents would be subject to a new requirement to solicit a minimum percentage of voting power. The concept of a minimum solicitation threshold for dissidents remains central to the universal proxy requirement we are adopting, and we have increased the threshold for the reasons discussed below.

2. Comments Received

We received significant comment on the proposed minimum solicitation requirement for dissidents. Initially, there was significant support for the majority minimum solicitation requirement proposed.[91] When the comment period was reopened in 2021, however, most commenters who addressed the issue favored an increased minimum solicitation requirement.[92] Most of those advocating an increased solicitation threshold for dissidents recommended either two-thirds or 75% of the voting power. Two commenters advocated a 100% minimum solicitation requirement for dissidents in order to treat retail investors equally with institutional investors and because, as a practical matter, the registrant will solicit all shareholders as well.[93] Two commenters recommended that the Commission adopt a requirement that all soliciting parties solicit proxies from the same number of shareholders, which in practice would likely mean all shareholders (because registrants typically solicit all shareholders).[94]

Another commenter urged a minimum solicitation threshold of a majority of shareholder accounts (versus voting power) entitled to vote on director nominations, asserting that this would help ensure meaningful dissident solicitation efforts.[95] Another commenter suggested that the Commission consider whether an additional requirement that a minimum number of registered shareholders are solicited is necessary to prevent frivolous use of universal proxy.[96]

One commenter suggested that, ''as a compliance mechanism, a dissident should provide the registrant with a written statement indicating that the dissident has taken the necessary steps to solicit shareholders of at least a majority of the voting power.'' [97] Another commenter suggested that registrants should reimburse dissidents for the reasonable costs associated with the solicitation process when at least 50% (or a more appropriate percentage established by the Commission) of a dissident's nominees are elected.[98] Another commenter opposed any type

[88] Because the deadline under Rule 14a–19(d) is tied to the anniversary of the previous year's annual meeting date, 50 calendar days prior to the meeting date approximates the latest date on which registrants would be required to notify the dissident of the names of the registrant's nominees. Based on a review of the contested elections sample, *see supra* note 71, we estimate that dissidents filed their definitive proxy statement more than 50 calendar days prior to the shareholder meeting date in 20% of the contests.

[89] *See* proposed Rule 14a–19(a)(3) and (b)(3).

[90] *See* 17 CFR 240.14a–3.

[91] *See* letters from ICI; CII; CalSTRS; CFA Institute; SBA–FL; Carpenters; NY Comptroller; Colorado PERA; AFSCME.

[92] *See* letters from ICI; Society; CCMC; OPERS; Mediant; Elliott; letter dated May 27, 2021 from American Business Conference (''ABC''). CII, in its third letter submitted to the comment file, dated Nov. 8, 2018, indicated that, while it continued to agree with the minimum solicitation requirement as originally proposed, it would—in light of concerns expressed by then-Chairman Clayton—support moving to a higher threshold in the final rule that would (i) increase the minimum solicitation requirement to 75% and (ii) require that the total number of persons solicited exceeds 10. In its fourth and final letter submitted to the comment file, dated Jun. 2, 2021, CII indicated support for moving to a minimum solicitation threshold of two-thirds of outstanding voting power. *See also* letter from UPWG, which states that a two-thirds dissident minimum solicitation requirement ''could also be workable,'' while noting that its members held differing views on the subject. *See also* IAC Report, which also supports increasing the dissident minimum solicitation threshold to 67%.

[93] *See* letters from SIFMA; Mediant.

[94] *See* letters from BM; Mediant.

[95] *See* letter from Elliott.

[96] *See* letter from CalSTRS.

[97] *See* letter from CalSTRS.

[98] *See* letter from BM.

of solicitation requirement for dissidents.[99]

3. Final Amendments

For reasons described in more detail in the Proposing Release,[100] a universal proxy requirement without a minimum solicitation requirement could enable dissidents to capitalize on the registrant's solicitation efforts while relieving dissidents of the time and expense necessary to undertake meaningful solicitation efforts, thereby potentially exposing registrants to frivolous proxy contests. The minimum solicitation requirement establishes a fundamentally important check in that regard.[101]

After careful consideration of the many comments received on this topic, and an updated economic analysis of the costs and benefits of setting the minimum solicitation threshold at various levels, we have decided to adopt the requirement that dissidents solicit holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors. We have raised the threshold from a majority of the voting power to 67% of the voting power in response to commenters' concerns that setting the threshold at the proposed majority of the voting power would insufficiently deter the potential for ''freeriding'' of dissident nominees on the registrant's proxy card. A 67% threshold represents an appropriate balance between achieving the benefits of the universal proxy requirement for shareholders and preventing dissidents from capitalizing on the inclusion of dissident nominees on the registrant's universal proxy card without undertaking meaningful solicitation efforts. Comments from a wide range of market participants, including comments received from the Universal Proxy Working Group and the IAC indicated that a 67% threshold enjoys broad support and represents a reasonable compromise between the competing policy objectives related to this topic.[102]

The increase in the dissident minimum solicitation requirement to 67% should mitigate concerns that the originally-proposed threshold would have incentivized dissidents to solicit only the minimum number of shareholders while ignoring all others, particularly retail shareholders with small holdings. Notably, our analysis of data provided by a proxy services provider demonstrates that dissidents overwhelmingly tend to solicit a substantial majority of voting power despite not being subject to any minimum solicitation threshold in contested elections.[103] We agree that a higher threshold better incentivizes dissidents to engage and solicit votes from more shareholders without imposing an undue burden on dissidents. As a practical matter, those shareholders who are not solicited by the dissident will receive the registrant's proxy materials with the names of the dissident's nominees and information on how to access the dissident's materials on the Commission's website. Therefore, those shareholders who wish to do so can take steps to access information about dissident nominees before exercising their vote, whether or not they are solicited by the dissident. As noted above, current proxy rules do not require a dissident to solicit any minimum number of shareholders, so the 67% minimum solicitation threshold we are adopting represents an important step forward in establishing a minimum requirement for dissidents to engage with shareholders.

A requirement for dissidents to solicit holders of 100% of the voting power, as some commenters recommended, would represent a substantial burden on dissidents and would likely deter bona fide efforts by dissidents, particularly those with fewer resources, to elect directors to a registrant's board.[104] While we recognize that a minimum solicitation threshold of anything less than 100% of voting power may mean that dissidents may exclude some retail shareholders from their solicitation efforts, as noted above, current proxy rules do not contain a requirement to solicit any minimum number of shareholders. Under the rules we adopt in this document, as under current rules, the primary incentive for a dissident to solicit is to have its director nominees elected, which remains more likely the more shareholders the dissident solicits. In addition to the sizeable costs imposed by a 100% voting power solicitation requirement, such a requirement would represent a drastic change from current proxy rules, which do not mandate that dissidents solicit even a single shareholder. In establishing a minimum solicitation requirement for dissidents, we are cognizant of the fact that those soliciting on behalf of an incumbent board of directors can, win or lose, routinely expect to be reimbursed by the company for their costs under state law, while a dissident's only hope of reimbursement occurs if its solicitation succeeds, or if it otherwise reaches a settlement with the registrant.[105] A significant increase in the minimum solicitation threshold may therefore further tip the economic scales in favor of the registrant. Finally, given the practical possibility of a very small number of shareholders being unintentionally omitted from a proxy solicitation, we would envision justifiable concerns regarding compliance, and the potential for related gamesmanship contrary to shareholder interests—in the form of registrants seeking to take advantage of dissidents' technical or immaterial failures to solicit every last shareholder account—if a 100% minimum threshold were adopted.

One commenter suggested imposing a threshold based on a minimum number of registered shareholders in addition to a voting power threshold ''to prevent frivolous use of the Universal Proxy rule.'' [106] We do not agree that such a requirement is necessary to prevent proxy contests where dissidents have no intention of conducting their own solicitations. We note that there are relatively few registered shareholders, as the vast majority of voting shares of public companies are held in ''street name'' through securities intermediaries (such as broker-dealers).[107] Imposing an additional requirement for dissidents to solicit those relatively few registered shareholders when most voting shares are held by ''street name'' shareholders would increase the burdens on

[99] *See* letter dated Dec. 5, 2016 from Bulldog Investors, LLC (''Bulldog'') (asserting that ''The Commission seems troubled by the prospect that such a condition is needed to deter 'nominal' or 'frivolous' proxy contests but fails to clearly articulate the actual harm resulting from such contests'').

[100] *See* Proposing Release at Section II.B.4.

[101] In response to the commenter who questioned whether actual harm results from frivolous contests, unserious contests launched by dissidents who are not truly invested in the registrants they target impose costs on those registrants and their shareholders without a corresponding benefit. *See supra* Section II.D.2 (discussing comments regarding such contests).

[102] *See* letter from UPWG and IAC Report.

[103] Based on industry data from a proxy services provider, all dissidents solicited a number of shareholders that exceeded a 67% threshold of shares entitled to vote in a sample of 31 proxy contests for annual meetings held between July 1, 2018 and June 30, 2019. In addition, data provided by a proxy services provider for an earlier sample of 35 proxy contests from June 30, 2015 through April 15, 2016, which we used in the economic analysis in the Proposing Release, show that only two dissidents (around 6% of the sample) solicited less than 67% of the shares entitled to vote. *See infra* Section IV.C.2.a.

[104] *See infra* Section IV.C.5.b.

[105] *See* IAC Report.

[106] *See* letter from CalSTRS.

[107] *See Concept Release on the U.S. Proxy System,* Release No. 34–62495 (Jul. 14, 2010) [75 FR 42982 (Jul. 22, 2010)], at Section II.A, for an explanation of registered shareholders and ''street name'' shareholders.

dissidents while doing little to address the freeriding concerns discussed above.

For similar reasons, a requirement for the dissident to solicit a minimum number of all shareholder accounts (both registered and ''street name'' shareholders), as suggested by one commenter, could impose significantly higher burdens on dissidents, particularly those seeking to effect change at large, widely-held public companies.[108] A requirement to solicit a minimum of 67% or even a majority of the shareholder accounts could result in dissidents having to deliver proxy statements and universal proxy cards to thousands or tens of thousands of shareholder accounts, including those that have relatively few shares entitled to vote on the director election. The high cost of such deliveries could unduly deter many dissidents, particularly those with fewer resources, from attempting to effect change by contesting the election of registrants' nominees. Such a burden is unnecessary to address the freeriding concerns underlying the minimum solicitation requirement.

We have not adopted a special mechanism for ensuring compliance with the minimum solicitation requirement because existing proxy rules are adequate in that regard. If a dissident fails to meet the 67% minimum solicitation threshold, that failure would constitute a violation of Rule 14a–19 and the dissident would face the same liability as if it had violated any other proxy rules. In addition, Rule 14a–19(a)(3) requires dissidents to include a statement in the proxy statement or form of proxy that it intends to solicit holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors. The dissident would be subject to liability under 17 CFR 240.14a–9 (Exchange Act Rule 14a–9), which prohibits material misstatements or omissions in proxy soliciting materials, if such a statement is false.

In response to the suggestion that registrants reimburse dissidents for the reasonable costs associated with the solicitation process when at least 50% of a dissident's nominees are elected, the universal proxy rules are not intended to address the appropriate cost-sharing between registrants and dissidents for soliciting fees, which is a separate issue. The purpose of the minimum solicitation requirement is to prevent freeriding by dissidents who want to take advantage of the benefits of the universal proxy requirement but do not intend to undertake meaningful solicitation efforts. We also note that registrants often have policies in their governing documents outlining when reimbursement can be sought, and the universal proxy requirement is not intended to intrude into those arrangements.

We acknowledge the concern regarding some retail investors not receiving proxy materials from dissidents electing to solicit the minimum required. Increasing the minimum solicitation threshold to 67% of the voting power may help address this concern. However, as explained above, we must balance this concern against the risk of imposing undue costs on dissidents and thereby deterring legitimate, potentially value-enhancing contests.

Finally, we recognize any minimum solicitation requirement imposes on the dissident the costs of delivering proxy materials to shareholders. To address this concern, the adopted rules, like the Proposed Rules, do not mandate a specific method of furnishing the proxy materials. A dissident may choose to use the less costly e-proxy delivery method (*i.e.,* the ''notice and access'' method of mailing a notice of internet availability and posting the proxy materials on a website) should it wish.[109] We also acknowledge that some dissidents might have chosen to initiate contests to pursue goals other than changes in board composition, such as to publicize a particular issue or to encourage management to engage with the dissident.[110] Such contests will not be possible without meaningful solicitation efforts under the rules we adopt in this document.

E. Dissident's Requirement To File Definitive Proxy Statement 25 Calendar Days Prior to Meeting

1. Proposed Rules

The Commission proposed to require a dissident in a contested election to file its definitive proxy statement with the Commission by the later of 25 calendar days prior to the meeting date or five calendar days after the registrant files its definitive proxy statement, regardless of the proxy delivery method. As proposed, the five calendar day deadline would be triggered if the registrant files its definitive proxy statement fewer than 30 calendar days prior to the meeting date, in which case the dissident would be required to file its definitive proxy statement no later than five calendar days after the registrant files its definitive proxy statement.

2. Comments Received

We received few comments on this proposed requirement. Three commenters expressed support for the deadline imposed on dissidents to file their definitive proxy statement with the Commission.[111] One commenter opposed a filing deadline for the dissident in the absence of a similar deadline for registrants.[112] This commenter advocated requiring the registrant to publicly disclose in a Form 8–K the names of its nominees, as well as other information about the shareholder meeting, such as the record and meeting dates, at least 30 days before the earlier of the nomination deadline under the registrant's governing instruments or the notice deadline established in proposed Rule 14a–19.[113] One commenter proposed, as a disciplinary measure, that if a dissident fails to file and disseminate its definitive proxy statement by the deadline, then the dissident should be prohibited from engaging in a proxy contest at any registrant (or at least, the registrant in question) for a period of time (*e.g.,* three years).[114]

3. Final Amendments

We are adopting, as proposed, the requirement that a dissident in a contested director election file its definitive proxy statement with the Commission by the later of 25 calendar days prior to the meeting date or five calendar days after the registrant files its definitive proxy statement.

Due to the typical sequencing of registrant and dissident proxy filings, as well as the fact that dissidents may choose not to solicit all shareholders, shareholders may not have seen information about the dissident's nominees when they receive a universal proxy card from the registrant. Therefore, a dissident filing deadline is appropriate to help ensure that shareholders who receive a universal proxy card will have access to information about all nominees sufficiently in advance of the meeting.[115] We recognize, however, that

[108] *See infra* notes 390–397 and accompanying text for a detailed discussion of the potential costs associated with such a requirement.

[109] *See infra* Section IV.B.2.b for additional detail regarding this topic.

[110] *See* discussion in Section IV.B.2.c *infra.*

[111] *See* letters from ICI; CFA Institute; CII.

[112] *See* letters from Olshan.

[113] *See* letters from Olshan.

[114] *See* letter from Sidley.

[115] As discussed in Section II.F *infra,* we are also adopting a requirement that each party in a contested election include a statement in its proxy materials referring shareholders to the other party's proxy statement for information about the other party's nominees and explaining that shareholders

some shareholders could receive the registrant's proxy statement and submit their votes on the registrant's universal proxy card before the dissident's proxy statement is available. The 25 calendar day deadline will provide those shareholders with sufficient time to access the dissident's proxy statement, once available, and to change their votes if preferred.

We acknowledge that dissidents that use the full set delivery method in a contested election have not previously been subject to a filing deadline for their definitive proxy statement, and thus this new requirement will impose a new filing deadline for such dissidents.[116] Although some dissidents may be required under the final rules to prepare their proxy statements earlier than they would have otherwise, dissidents filed their definitive proxy statement 25 or more calendar days prior to the shareholder meeting date in 82% of the contests initiated in 2017 through 2020.[117] Therefore, the new filing deadline should not impose a significant additional burden for most dissidents.

We are not adopting a filing deadline for registrants. State corporate statutes generally require a registrant to hold an annual shareholder meeting for the purpose of electing directors, and those statutes generally impose a quorum requirement for such meetings.[118] Unlike dissidents, registrants therefore already have an incentive to file the definitive proxy statement and proxy card [119] to solicit proxies well in advance of the meeting date to achieve a quorum for the meeting. For example, based on a review of the 101 contested elections initiated from 2017 through 2020, the staff found that registrants filed their definitive proxy statement 25 or more calendar days prior to the shareholder meeting date in over 95% of the contests.[120] We also note that where the registrant nominees are incumbent directors, shareholders will have access to information about those nominees from prior Commission filings before the registrant files and disseminates its definitive proxy statement.

We recognize that it is possible that a registrant will have prepared and disseminated its definitive proxy statement, including a universal proxy card more than 25 calendar days before the meeting (*i.e.,* the general deadline under Rule 14a–19 for a dissident to file its definitive proxy statement with the Commission). If a registrant discovers after disseminating its universal proxy card that a dissident failed to file its definitive proxy statement 25 calendar days prior to the meeting (or five calendar days after the registrant files its definitive proxy statement),[121] the registrant could elect to disseminate a new, non-universal proxy card including only the names of the registrant's nominees. Where a dissident fails to comply with Rule 14a–19, the new rules will not permit the dissident to continue with its solicitation under 17 CFR 240.14a–1 through 240.14a–21 and Schedule 14A (Regulation 14A).

In response to the commenter who suggested we adopt a specific penalty for dissidents who fail to file a definitive proxy statement by the deadline, we believe that existing proxy rules serve as an adequate deterrent, in a similar manner to that explained above in the context of a potential violation of the new minimum solicitation requirement. If a dissident fails to file its definitive proxy statement by the new deadline prescribed, that failure would constitute a violation of Rule 14a–19 and the dissident would face the same liability as if it had violated any other proxy rules.

Because a registrant may disseminate a universal proxy card before discovering that a dissident is not proceeding with its solicitation, we are requiring the registrant, as proposed, to include disclosure in its proxy statement advising shareholders how it intends to treat proxy authority granted in favor of a dissident's nominees in the event the dissident abandons its solicitation or fails to comply with Regulation 14A.[122]

As a result of the adopted rules described above, and as set out in the Proposing Release, the overall timing of the process for soliciting universal proxies generally would operate as follows:

Due date	Action required
No later than 60 calendar days before the anniversary of the previous year's annual meeting date or, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant. [new Rule 14a–19(b)(1)].	Dissident must provide notice to the registrant of its intent to solicit the holders of at least 67% of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant's nominees and include the names of those nominees.
No later than 50 calendar days before the anniversary of the previous year's annual meeting date or, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, no later than 50 calendar days prior to the date of the annual meeting. [new Rule 14a–19(d)].	Registrant must notify the dissident of the names of the registrant's nominees.

can access the other party's proxy statement on the Commission's website. Because this required disclosure will be included in the registrant's proxy materials, which all shareholders would likely receive, the rules should ensure that even those shareholders that do not receive the dissident's proxy materials will have access to information about the dissident's nominees.

[116] We understand from a proxy services provider that in the 31 proxy contests from July 1, 2018 through June 30, 2019, dissidents sent full sets of proxy materials to each of the shareholders solicited. Dissidents that elect notice and access delivery are currently required to make their proxy statement available by the later of 40 calendar days prior to the meeting date or 10 calendar days after the registrant files its definitive proxy statement. For such dissidents, the new filing deadline will provide five fewer days to furnish a proxy statement where the registrant files its definitive proxy statement less than 30 calendar days before the meeting date, which we estimate occurred in 11% of recent contested elections. Based on past practice, as described above, we would not expect a dissident to elect notice and access delivery in a contested election, although it is unclear whether this practice would change under the rules adopted in this document.

[117] Based on staff analysis of the contested elections sample. *See supra* note 71 and *infra* note 219 and accompanying text. The data is based on 74 out of 101 identified proxy contests since the dissident did not file a definitive proxy statement in 27 cases.

[118] *See, e.g.,* Del. Code. Ann. tit. 8, section 211(b) and section 215(c).

[119] The definitive proxy statement, form of proxy and all other soliciting materials must be filed with the Commission no later than the date they are first sent or given to shareholders. 17 CFR 240.14a–6(b).

[120] Based on staff analysis of the contested elections sample. *See supra* note 71.

[121] A dissident could meet the deadline for director nominations under the company's governing documents and the deadline for providing notice to the registrant under Rule 14a–19 but fail to proceed with or later abandon its solicitation. This could happen for a number of reasons. For example, the dissident and the registrant may enter into a settlement agreement, the dissident may elect to discontinue its solicitation for another reason or the dissident may fail to comply with some aspect of Rule 14a–19.

[122] *See* newly-adopted Item 21(c) of Schedule 14A.

Due date	Action required
No later than 20 business days before the record date for the meeting. [existing 17 CFR 240.14a–13 (Rule 14a–13)].	Registrant must conduct broker searches to determine the number of copies of proxy materials necessary to supply such material to beneficial owners.
By the later of 25 calendar days before the meeting date or five calendar days after the registrant files its definitive proxy statement. [new Rule 14a–19(a)(2)].	Dissident must file its definitive proxy statement with the Commission.

F. Access to Information About All Nominees

1. Proposed Rules

The Commission proposed new Item 7(h) of Schedule 14A (relettered as Item 7(f) in this document) to require that each party in a contested election refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement without cost on the Commission's website. The Commission also proposed to revise Rule 14a–5(c) to permit the parties to refer to information that would be furnished in a filing of the other party to satisfy their disclosure obligations.[123] Taken together, these proposed changes were intended to enable shareholders to access information with respect to all nominees when they receive a universal proxy card. Finally, the Commission proposed to change the definition of ''participant'' in Instruction 3 to Items 4 and 5 of Schedule 14A to ensure that, even though all nominees would be included on the universal proxy card, only the party's own nominees would be considered ''participants'' in that party's solicitation.

2. Comments Received

Several commenters expressed support for the requirements that each soliciting person in a contested election must refer shareholders to the other party's proxy statement for information about the other party's nominees and must explain that shareholders can access the other party's proxy statement without cost on the Commission's website.[124] Many of these commenters indicated that such a statement is sufficient and no additional information, such as instructions as to how to access proxy statements on the Commission's website or a hyperlink to that website, is necessary.[125] One of these commenters noted that requiring a reference to proxy materials available on the Commission's website will allow shareholders to make an informed voting decision where they receive a proxy statement and universal proxy card from only one soliciting party.[126]

Several commenters expressed concern that retail investors would not receive proxy materials from dissidents electing to solicit the minimum required.[127] One of these commenters indicated that shareholders omitted from the dissident's solicitation would be at an informational disadvantage, making it difficult for those shareholders to make informed voting decisions which would potentially discourage shareholders from participating in the election.[128] Two commenters suggested adopting an additional requirement to include a toll-free telephone number where shareholders could request paper copies of proxy materials free of charge.[129] To permit retail investors to obtain dissident materials without having to navigate the Commission website, two commenters suggested permitting broker-dealers to provide dissident proxy materials to shareholders upon request and requiring dissidents to bear any associated costs.[130]

Two commenters argued that requiring both the registrant and dissident to ''publicize the election campaign'' of the opposing side in the contest is an inappropriate attempt by the Commission to compel corporate speech, in contravention of the First Amendment.[131]

3. Final Amendments

We are adopting, as proposed: (i) New Item 7(f) of Schedule 14A, (ii) the changes to Rule 14a–5(c) described above, and (iii) the changes to Items 4 and 5 of Schedule 14A described above, in each case for the reasons detailed in the Proposing Release.[132] Although we acknowledge the views of the dissenting commenters described above, the final rule changes will sufficiently enable shareholders to access information with respect to all nominees when they receive a universal proxy card. Requiring a new toll-free telephone number is unnecessary, given that existing rules already mandate that proxy statements include information on how to obtain paper copies.[133] In our view, the Commission website, including the EDGAR system, is sufficiently user-friendly, with available aids and ongoing enhancements, for all investors to access proxy statements filed with the Commission through a simple search, and we therefore disagree that retail investors will lack the information to locate such materials. Furthermore, proxy solicitors and others involved in the contest are available to assist retail investors in this regard. Given these facts, the imposition of additional costs on dissidents in connection with additional delivery procedures, such as through required reimbursement of broker-dealers, would not be justified.

Finally, we do not agree with commenters that suggest that the final rule runs afoul of the First Amendment. Far from being ''controversial corporate speech,''[134] the rule simply provides shareholders voting by proxy with the same information—the names of all the candidates for whom they can vote—as they would receive if they attended the shareholder meeting in person, and is squarely within the ''economic or investor protection benefits that our rules ordinarily strive to achieve.''[135] Under the existing proxy rules, soliciting parties in a contest commonly direct shareholders to required disclosure that appears in the other side's proxy statement.[136]

[123] Prior to these rule changes, Rule 14a–5(c) permits parties only to refer to information that has already been furnished in a filing of another party.

[124] *See* letters from CII; Fidelity; CFA Institute; SBA–FL; Carpenters; NY Comptroller; CalSTRS; Colorado PERA; AFSCME.

[125] *See* letters from CII; SBA–FL; Carpenters; NY Comptroller; CalSTRS; Colorado PERA; AFSCME.

[126] *See* letter from Fidelity.

[127] *See* letters from BM; SIFMA; ABC; CCMC; CGCIV; Davis Polk; letter dated Jan. 9, 2017 from Business Roundtable (''BR'').

[128] *See* letter from BR.

[129] *See* letters from Fidelity; SIFMA.

[130] *See* letters from Fidelity; SIFMA.

[131] *See* letters from CCMC; CGCIV.

[132] *See* Proposing Release at Section II.B.5.b.

[133] *See* 17 CFR 240.14a–16 (Rule 14a–16).

[134] *See* letters from CCMC; CGCIV.

[135] *Nat'l Ass'n of Manufacturers* v. *SEC,* 800 F.3d 518, 521 (D.C. Cir. 2015) (internal quotation marks omitted). Similarly, we do not agree with the commenter's suggestion that the rule requires a corporation to ''subsidize and publicize'' speech with which it may not agree; the rule requirements may be met by, for example, the registrant simply pointing out that the opponent's materials can be accessed at no cost on the Commission's website.

[136] *See* Rule 14a–5(c).

G. Formatting and Presentation of the Universal Proxy Card

1. Proposed Rules

The Commission proposed Rule 14a–19(e) to include the following presentation and formatting requirements for universal proxy cards:

- The proxy card must set forth the names of all duly nominated director candidates;
- The proxy card must provide a means for shareholders to grant authority to vote for the nominees set forth;
- The proxy card must clearly distinguish among registrant nominees, dissident nominees, and any proxy access nominees;
- Within each group of nominees, the nominees must be listed in alphabetical order by last name on the proxy card;
- The same font type, style and size must be used to present all nominees on the proxy card;
- The proxy card must prominently disclose the maximum number of nominees for which authority to vote can be granted; and
- The proxy card must prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected, in a manner that grants authority to vote for fewer nominees than the number of directors being elected, or in a manner that does not grant authority to vote with respect to any nominees.

In addition, where both parties have presented a full slate of nominees and there are no proxy access nominees, the Commission proposed Rule 14a–19(f), which would allow (but not require) the universal proxy card to provide the ability to vote for all dissident nominees as a group and all registrant nominees as a group.

2. Comments Received

The formatting and presentation requirements for the universal proxy card and whether each party in a contest should be permitted to customize and use its own universal proxy card were the subject of multiple comments. Many commenters expressly supported the Proposed Rules' presentation and formatting requirements.[137] Some favored a more prescriptive approach, including standardized colors for registrant and dissident proxy cards, noting that priority should be afforded to standardization and uniformity to avoid shareholder confusion.[138] Several commenters favored mandating identical or similar universal proxy cards,[139] including specific requirements for font, style, and text size across both cards.[140]

3. Final Amendments

We are adopting the formatting and presentation requirements for universal proxy cards as proposed. As under current rules, each side will disseminate its own proxy card. Each side will be free to choose the design of its card, subject to the requirements of the final rules.

As discussed in the Proposing Release, we considered the merits of creating a system whereby the registrant and dissident distribute an identical card, with the only difference being the persons given proxy authority on the card. In our view, such a system would be inferior to the one adopted in this document for the reasons discussed in the Proposing Release.[141] While we recognize the potential benefits of more prescriptive requirements for the universal proxy card, the final rules, as adopted, appropriately strike a balance between ensuring clarity and fairness on the one hand while preserving flexibility on the other. Under current proxy rules, each side in a contest has the ability to design and use its own proxy card, subject to the requirements set forth in the proxy rules. This ability will continue under the new rules we adopt. Rather than specifically mandating a set format for each card or requiring that each side's universal proxy card look identical to the other's, we are allowing each party some latitude in designing and distributing its own universal proxy card. However, we note that the font type, style, and size must be consistent for all nominees presented on the same card. This should avoid concerns about bolding or otherwise drawing attention to certain candidates. The goal of our adopted rules with respect to the formatting and presentation of the universal proxy cards is to ensure clarity and fairness in presentation, so that the cards allow shareholders to make an informed voting decision, while at the same time providing flexibility for each side in a contest to craft its own card, as under current rules.

Though we understand the concern of commenters who worry about the potential for shareholder confusion in the absence of additional formatting and presentation requirements, including the standardization of proxy card colors, we disagree that such additional regulation is necessary. Existing disclosure requirements, such as the Rule 14a–4(a) requirement that the proxy card prominently identify whether the card is sent by the registrant or dissident, along with the new presentation requirements described above, will sufficiently inform shareholders as to the party sending the card and mitigate any potential confusion resulting from the universal proxy cards. We do not believe it is necessary to limit each soliciting party to a specific color proxy card to ensure shareholders know which party is soliciting their vote, and we note that this is not a limitation under current rules. Furthermore, any potential confusion over which side may be sending a particular card may be less consequential, as each side's card will list the full group of nominees from both sides.

In addition, permitting each side to use its own proxy card will preserve each side's ability to exercise discretionary authority under Rule 14a–4(c). As explained in the Proposing Release, we did consider a system whereby the registrant would distribute a single universal proxy card that would include the names of the registrant's nominees and the dissident's nominees, as well as all other proposals to be considered at the meeting.[142] However, our reasons for rejecting that idea in the Proposing Release still hold.[143]

Finally, we adopt, in slightly modified form, the rule that permits (but does not require) the universal proxy card to allow a shareholder to grant authority to vote for all of the nominees of either the dissident or the registrant as a group, so long as the card also provides a similar means by which a shareholder can withhold authority to vote for such group of nominees and so long as the number of nominees of the registrant or the dissident is less than the number of directors being elected.[144]

[137] *See* letters from Colorado PERA; CalSTRS; SBA–FL; Carpenters; NY Comptroller; AFSCME; UPWG; ISS.

[138] *See* letters from Sidley; OPERS; CFA Institute; UPWG; CII.

[139] *See* letters from Mediant; ISS; Broadridge Financial Solutions, Inc.; Bulldog.

[140] *See* letter from SIFMA.

[141] *See* Proposing Release at Section II.B.6.

[142] *See* Proposing Release at Section II.B.6.

[143] In addition to the reasons set out in the Proposing Release, we agree with the reasoning set out in the letter from UPWG: ''We believe both of these alternative models could cause unnecessary disruption for market participants accustomed to the circulation of two competing cards. The core improvement we seek is the ability of shareholders to use any proxy card they choose to vote for any combination of board nominees they prefer.''

[144] *See* Rule 14a–19(f). Under the final rules and to avoid shareholder confusion, where the form of proxy includes one or more shareholder ''proxy access'' nominees, the form of proxy may not confer the ability to vote for the registrant and dissident nominees as a group.

A new instruction to the adopted rule clarifies that, where applicable state law gives legal effect to votes cast against a nominee, a soliciting party that wishes to present the ''for-all'' voting option described above on its universal proxy card must also provide shareholders an ''against-all'' option rather than a ''withhold-all'' option.[145]

H. Director Election Voting Standards Disclosure and Voting Options

1. Proposed Rules

The Commission proposed additional amendments to the form of proxy and disclosure requirements with respect to voting options and voting standards that would apply to all director elections.[146] First, the Proposed Rules would amend Rule 14a–4(b) to: (1) Mandate the inclusion of an ''against'' voting option in lieu of a ''withhold authority to vote'' option on the form of proxy for the election of directors where there is a legal effect to such a vote; and (2) provide shareholders who neither support nor oppose a director nominee an opportunity to ''abstain'' (rather than ''withhold authority to vote'') in a director election governed by a majority voting standard.[147] Second, the proposed rule would amend Item 21(b) of Schedule 14A to expressly require the disclosure of the effect of a ''withhold'' vote. Finally, the Proposed Rules would delete the phrase ''the method by which votes will be counted'' from Item 21(b) of Schedule 14A.

2. Comments Received

Several commenters supported the proposed requirement that the form of proxy for a director election governed by a majority voting standard include a means for shareholders to vote ''against'' each nominee and a means for shareholders to ''abstain'' from voting in lieu of providing a means to ''withhold authority to vote.'' [148] Many of these commenters requested that the Commission further amend the proxy rules to prohibit registrants from providing an ''against'' voting option if making that choice has no legal impact on the outcome of the election and to require registrants to refer to voting options consistently throughout the proxy materials.[149] One commenter suggested that Instruction 2 to Rule 14a–4(b)(2) be eliminated entirely, and that same commenter recommended that the Commission replace the ''withhold'' voting option with an ''abstain'' option for director elections governed by a plurality voting standard.[150]

Several commenters addressed the proposed changes to Item 21 of Schedule 14A. These commenters supported the proposed amendment to Item 21(b) of Schedule 14A to require the disclosure of the effect of a ''withhold'' vote.[151] Another commenter believed that the phrase ''the method by which votes will be counted'' in Item 21 of Schedule 14A should be retained, in order to clarify for shareholders the effect of each voting option presented on the proxy card, as well as how each voting option will be counted.[152]

3. Final Amendments

We are adopting the rule amendments with the modifications described below. Rule 14a–4(b) mandates, as proposed, the inclusion of an ''against'' voting option in lieu of a ''withhold authority to vote'' option on the form of proxy for the election of directors where there is a legal effect to such a vote. It also provides shareholders who neither support nor oppose a director nominee an opportunity to ''abstain'' (rather than ''withhold authority to vote'') in a director election governed by a majority voting standard. These changes will provide shareholders with a better understanding of the effect of their votes on the outcome of the election. We also have not eliminated Instruction 2 to Rule 14a–4(b)(4), as one commenter had requested, because it may provide useful guidance about voting options where applicable state law gives legal effect to votes cast against a nominee.

We agree with commenters, however, that including an ''against'' voting option on a proxy card where there is no legal effect to such vote is unnecessarily confusing for shareholders and have therefore amended Rule 14a–4(b) to prohibit such a voting option on the proxy card where such votes have no legal effect. Further, in light of comment received from the public, we are retaining the phrase ''the method by which votes will be counted'' from Item 21(b) of Schedule 14A to avoid any ambiguity regarding the need for clear disclosures in the proxy statement regarding the effect of each voting option presented to shareholders.

I. Bona Fide Nominee and Short Slate Rules

1. Elimination of the Short Slate Rule

a. Proposed Rules

The Commission proposed to amend Rule 14a–4(d) to eliminate the short slate rule for registrants other than funds. The short slate rule allows dissidents soliciting in support of a partial slate of nominees that would make up a minority of the board of directors to seek authority to vote for some of a registrant's nominees.[153] The Proposed Rules would eliminate the short slate rule for operating companies because it would be unnecessary with a universal proxy requirement and the revised bona fide nominee rule. The Proposed Rules, however, would maintain the short slate rule for funds, since, as proposed, they would not be included in the universal proxy requirement.[154]

b. Comments Received

Relatively few commenters addressed the proposed elimination of the short slate rule for operating companies that would be subject to a mandated universal proxy requirement. Several commenters supported its elimination in connection with the adoption of a universal proxy requirement, noting that such a system would eliminate many of the practical constraints associated with the short slate rule (as well as the bona fide nominee rule).[155] Another commenter similarly supported the changes, but also advocated retaining the short slate rule, in optional form, if the universal proxy requirement is not mandated.[156]

c. Final Amendments

We are eliminating the short slate rule, as proposed, for operating companies that will be subject to the final rules mandating the use of universal proxy cards. The revisions we adopt to the bona fide nominee rule,[157] along with the changes to mandate the use of a universal proxy card in all non-exempt director election contests, obviate the need for the short slate rule

[145] *See* Instruction 2 to paragraph (f) of Rule 14a–19. *See also* Section II.H below and similar changes to the text of Rule 14a–4.

[146] The proposed amendments to the form of proxy and disclosure requirements with respect to voting options discussed in this section would apply to funds.

[147] *See* proposed Rule 14a–4(b)(4).

[148] *See* letters from CII; Colorado PERA; CalSTRS; SIFMA; SBA–FL; NY Comptroller; AFSCME; Carpenters; letter dated Jun. 7, 2021 from California Public Employees' Retirement System (''CalPERS'').

[149] *See* letters from CII; CalSTRS; SBA–FL; NY Comptroller; Colorado PERA; AFSCME.

[150] *See* letter from Carpenters.

[151] *See* letters from CalPERS; CII.

[152] *See* letter from Carpenters.

[153] *See* Rule 14a–4(d)(4). Rule 14a–4(d)(4)(ii) provides that a dissident using the short slate rule may not name the registrant nominees for which it will vote using proxy authority; rather, the dissident may name only those registrant nominees for which it is *not* seeking proxy authority. This requirement may render the proxy card confusing for shareholders.

[154] *See infra* Section II.J.

[155] *See* letters from Elliott; CFA Institute.

[156] *See* letter from Colorado PERA.

[157] *See infra* Section II.I.2.

for operating companies. The amended short slate rule, however, will continue to be available for funds in contested elections, which will not be subject to the universal proxy requirements at this time.[158] If we later adopt rule changes to make the universal proxy requirement applicable to some or all funds, we will consider whether to eliminate the short slate rule completely at that time.

2. Modification of the Bona Fide Nominee Rule

a. Proposed Rules

In order to facilitate the ability of both parties in a contested election to include the names of all nominees on each side's proxy card, the Proposed Rules would revise the bona fide nominee rule. To remove the technical impediment to including the names of the other side's nominees on a universal proxy card created by Rule 14a–4(d)(1) and (4), the Proposed Rules would revise the determination of a ''bona fide nominee'' in Rule 14a–4(d).[159] The proposed revisions would change the requirement that a nominee consent to being named in ''the'' proxy statement of the party listing that nominee on its card, to a more general requirement that a nominee consent to being named in ''a'' proxy statement of either side in the contest. Proposed Rule 14a–4(d)(1)(i) would maintain the requirement that a nominee consent to serve, if elected.

b. Comments Received

Multiple commenters who supported the adoption of a universal proxy requirement supported the proposed changes to the bona fide nominee rule to effectuate that system.[160] Several of these commenters expressly supported allowing a soliciting party to include the names of some or all of the registrant's nominees on its own proxy card even when the soliciting party is not nominating its own candidates.[161]

Some commenters advocated more limited changes to the consent required by the bona fide nominee rule to narrow its application. As proposed, revised Rule 14a–4 would permit (but not require) a dissident soliciting in favor of its own proposal, without its own slate of director candidates, to include some or all of the registrant's nominees on the dissident's proxy card. Similarly, a dissident conducting a ''vote no'' campaign against some of the registrant's nominees could (but would not be required to) include on the dissident's proxy card those registrant nominees it did not oppose. One commenter warned of the shareholder confusion that might result in those instances in which the dissident chooses not to include all registrant nominees on the dissident's card, and argued that such confusion could lead to under-voting that would distort voting results.[162] Several commenters favored limiting the consent provided under the revised bona fide nominee rule to situations where the opposing side solicits in favor of its own nominees.[163]

c. Final Amendments

We are adopting changes to the consent requirement for a bona fide nominee in Rule 14a–4(d)(1)(ii) as proposed. This rule change expands the scope of a nominee's consent in an election contest to include consent to being named in *any* proxy statement for the applicable meeting. The rule amendment is necessary to permit the universal proxy requirement we adopt in this document, because it expands the concept of consent to allow a nominee to be considered a bona fide nominee when named on any side's proxy card in a director election contest.

As a practical matter and as noted by commenters, it will also permit a dissident soliciting in favor of a proposal (but not its own director nominees) to include some or all of the registrant's nominees on its proxy card. It further allows a dissident conducting a ''vote no'' campaign without presenting its own slate of competing nominees to permit shareholders to vote for select registrant nominees on the dissident's card. In both of these circumstances, the changes to the bona fide nominee rule will further shareholder enfranchisement. Although including a registrant's nominees on its own proxy card in both of these circumstances will remain optional for the dissident under the final rules, this optionality will not limit shareholders' voting choices. If the dissident does not include some or all registrant nominees on the dissident's card, shareholders will always be able to vote on the registrant's proxy card. Where a dissident includes some but not all registrant nominees on its proxy card, or where it solicits in favor of a proposal but does not include registrant nominees on its proxy card, the dissident should—in order to avoid potential liability under Rule 14a–9 for omission of material facts—disclose the fact that its proxy card does not include some or all of the registrant nominees and that shareholders who wish to vote for nominees not included on the dissident's proxy card may do so on the registrant's proxy card. Such disclosure should mitigate the risk of shareholder confusion.

In addition, and in response to the commenter who was concerned with the potential of under-voting, we note that the potential for disenfranchisement exists under the status quo, but in a more severe form. Under current rules, dissidents who are ineligible to use the short slate rule (including those not soliciting on behalf of their own director nominees) lack the ability to list registrant nominees on their proxy card. The risk of any disenfranchisement under the final amendments may be mitigated because we expect that dissidents will have an incentive to include the registrant nominees on their proxy card (so as to increase the incentive for shareholders to use their card) and will generally not have strategic reasons to exclude registrant nominees from their proxy card due to the lack of a competing slate. Finally, to the extent that shareholders vote for fewer nominees than open board seats because they are voting on a dissident's proxy card that does not list all registrant nominees, this will occur in the context of an uncontested election, in which the consequences of casting fewer votes in favor of any particular nominee are less significant than in the context of a contested election.

The final rules maintain the requirement that a bona fide nominee consent to serve if elected.[164] This will ensure that neither party nominates an individual who has not consented to serve if elected as a director. To the extent that any nominee would not serve if elected with other nominees (or would not serve unless certain other nominees were elected), we would expect this material fact to be disclosed prominently in the proxy statement of the party nominating such individual. If one or more of the registrant's nominees will not serve under such circumstances, the registrant should explain in its proxy statement how such vacancies would be filled.

[158] *See* Rule 14a–4(d)(1)(ii)(A)–(D).

[159] *See* proposed Rule 14a–4(d)(1)(i). Without the adoption of the proposed revisions, Rule 14a–4(d)(1) and (4) would limit the ability of one side in a contested election from seeking proxy authority to vote for any director nominee unless such nominee consented to being named in that side's proxy statement, and to serve if elected.

[160] *See, e.g.,* letters from CII; CalSTRS; CalPERS; Colorado PERA; UPWG; NY Comptroller; AFSCME; SBA–FL; Elliott; CFA Institute.

[161] *See* letters from CalSTRS; Colorado PERA; CFA Institute; letter from CII dated Dec. 28, 2016.

[162] *See* letter from BR.

[163] *See* letters from Society; Sidley; Davis Polk; BR.

[164] *See* proposed Rule 14a–4(d)(1)(i).

J. Funds

1. Proposed Rules

The Proposed Rules excluded funds. Like operating companies, funds have boards of directors that are elected by shareholders. Also like operating companies, fund boards have significant responsibilities in protecting shareholder interests and funds are subject to the Federal proxy rules. However, fund shareholders also have important rights granted to them under the Investment Company Act of 1940 that distinguishes funds from operating companies. For reasons detailed in the Proposing Release,[165] the Commission did not propose to apply the universal proxy requirement to funds, but solicited comment on whether funds should be covered by the Proposed Rules. In the Reopening Release, the Commission observed that since the Proposing Release, there had been certain developments in corporate governance matters affecting funds, particularly registered closed-end funds and BDCs. In light of such developments, the Commission stated that it was considering applying the proposed universal proxy card requirements to registered closed-end funds and BDCs and again solicited comment on whether funds should be covered by the Proposed Rules, with particular emphasis on issues related to such funds.[166]

2. Comments Received

Comments received in response to the Proposing Release and Reopening Release were mixed. On the one hand, many commenters supported excluding funds from the Proposed Rules because of the differences between funds and operating companies—including the investor protections provided by applicable securities laws and regulations and fund governance structures.[167] With respect to statutory and regulatory protections, some commenters observed that the Investment Company Act of 1940 supplements state law to provide shareholders with the right to approve fundamental fund features, including the right to approve the investment advisory contract and any material amendments to the investment advisory contract and changes to any of a fund's fundamental investment policies.[168] With respect to fund governance structures, several commenters observed that split-ticket voting that results in dissident directors joining a fund board could disrupt the widespread practice of unitary and cluster boards at funds,[169] which could lead to additional and costly administrative complexities and redundancies for funds that ultimately would be borne by fund shareholders.[170]

In addition to providing reasons that the universal proxy rules should not apply to funds generally, some commenters also discussed the application of those universal proxy rules to specific types of management investment companies. Specifically, some commenters stated that universal proxies are not necessary for open-end funds because open-end funds are not required to have annual shareholder meetings and investors are able to redeem at net asset value, resulting in contested elections being rare.[171] With regard to closed-end funds and BDCs, several commenters also suggested that universal proxies are not necessary because dissidents almost always nominate a full slate of nominees in order to achieve a specific objective, such as a liquidation event.[172] Therefore, according to these commenters, shareholders typically have a binary choice to vote with fund management or against it and these commenters believed such binary choices would likely continue with the use of a universal proxy card.[173]

On the other hand, many commenters opposed the exclusion of funds generally, and registered closed-end funds and BDCs in particular, from the Proposed Rules.[174] Some commenters contended that because of the large retail investor base of registered closed-end funds and BDCs, it is difficult for shareholders to effect change when necessary.[175] One commenter expressed support for universal proxies for BDCs and closed-end funds and suggested that whether shareholders of such entities are well-served by unitary or cluster boards is an open question.[176] Another commenter stated that the administrative efficiency of a unitary board structure, while worth considering, should be secondary to allowing shareholders to promote nominees of their choosing to effect the investment objectives of the fund.[177] A separate commenter recommended extending the Proposed Rules to closed-end funds and BDCs, but not to open-end funds, given the latter's greater organizational complexity and the extreme rarity of proxy contests affecting them.[178]

3. Final Amendments

The final rules we adopt in this document will not apply to funds at this time, as the Commission continues to consider any application of the rules to funds. Developments since 2016, along with various comments discussed above that we have received have led us to conclude that further consideration of potential application of the universal proxy rules to certain funds is warranted.

K. Compliance Dates

Because the rule amendments we adopt in this document involve significant changes to the manner in which election contests are conducted, a transition period is appropriate. New Rule 14a–19 imposes notice and other mandates that will require planning and coordination by both parties to an election contest. Therefore, to avoid disruption to the upcoming proxy season, the rule changes we adopt in this document will become effective for any shareholder meeting featuring an election contest held after August 31, 2022. The length of this transition period is designed to allow adequate time for affected parties to plan and prepare for compliance with the new rules, and to adjust to the elimination of existing provisions, such as the short slate rule.

Some of the rule amendments we adopt in this document will apply to all director elections, not just those that are contested. While these changes do not require coordination and notice to the other party, as is required in a contested election, they do involve enhanced disclosure of the legal effect of votes under the applicable voting standard for the election. The amendments also impose new voting options where the

[165] *See* Proposing Release at Section II.D.

[166] *See* Reopening Release at Section II.

[167] *See, e.g.,* letters from ICI; CII; Fidelity; letter dated Jan. 9, 2017 from Independent Directors Council (''IDC''); letter dated Feb. 27, 2017 from Mutual Fund Directors Forum (''Forum'').

[168] *See* letters from CII, ICI; IDC; Fidelity.

[169] *See* letters from ICI; IDC; Fidelity; Forum.

[170] *See* letters from ICI; IDC; Forum. In addition, those commenters explained that a dissident director may disrupt other fund governance standards such as standards regarding disinterested and independent directors.

[171] *See* letters from ICI; IDC; Fidelity; Forum.

[172] *See* letters from Forum; ICI; *see also* letter from IDC. One commenter stated that to serve the interests of long-term investors, the Commission should provide closed-end funds with more protections against activist investors and not erode the protections and benefits offered by closed-end funds. *See* letters from ICI.

[173] *See* letters from ICI; IDC; Forum.

[174] *See* letters from Bulldog; Ad Hoc Coalition; E. Burke; BM; Mediant; letter dated Jan. 12, 2017 from Blue Bell Private Wealth Management; letter dated Feb. 3, 2017 from Almitas Capital (''Almitas''); letter dated Jun. 29, 2021 from Saba Capital Management, L.P. (''Saba'').

[175] *See* letters from Almitas; Bulldog.

[176] *See* letter from Ad Hoc Coalition.

[177] *See* letter from Saba.

[178] *See* letter from Mediant.

applicable voting standards give effect to abstain or withhold votes. Given these changes, the same transition period for compliance (for shareholder meetings held after August 31, 2022) is appropriate for all of the rule amendments we adopt in this document.

III. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated these rules a ''major rule,'' as defined by 5 U.S.C. 804(2).

IV. Economic Analysis

We are attentive to the costs imposed by and the benefits obtained from the final amendments.[179] The discussion below addresses the potential economic effects of the final amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition, and capital formation. We also analyze the potential costs and benefits of reasonable alternatives to the amendments.

A. Introduction

As discussed above, we are adopting amendments that will require the use of a universal proxy card in all contested elections with competing slates of director nominees to address concerns over the inability of shareholders using the proxy system to vote for the combination of candidates of their choice in a contested election. These amendments will allow shareholders voting by proxy to choose among director nominees in an election contest in a manner that more closely reflects the choice that could be made by voting in person at a shareholder meeting. Shareholders voting in person in a contested election with competing slates of nominees are able to choose among all of the duly nominated candidates. By contrast, shareholders currently voting by proxy are typically limited to voting for only registrant nominees or voting for only the dissident's nominees (or, in the case of certain short slate elections, for the dissident's nominees and certain registrant nominees chosen by the dissident).[180] If shareholders wish to vote for a combination of nominees across the two slates, they generally must do so in person by attending or sending a representative to the shareholder meeting and incurring the costs of doing so. In some cases, parties such as proxy solicitors may make arrangements for one or more individuals to attend a meeting on behalf of certain shareholders to facilitate split-ticket voting. However, many shareholders, particularly retail shareholders or those who do not hold a large stake in the registrant, might not be willing or able to bear the costs of voting in person and may not have access to other arrangements. Therefore, these shareholders may not currently be able to vote for their preferred selection of candidates.

The mandated use of universal proxies will allow shareholders to vote for any combination of nominees when voting their shares by proxy in advance of the meeting, which is generally the way in which the vast majority of shares are voted. For shareholders who would otherwise incur incremental costs to vote for a combination of candidates that could not be voted for by proxy, such as by attending the meeting in person, universal proxies will result in direct cost savings. Universal proxies will also enable shareholders who want to split their vote but are unwilling (or unable) to bear additional costs to be able to vote for their preferred combination of nominees to do so without incurring additional costs.

The nomination and election of directors by shareholders represents a fundamental governance mechanism that can mitigate conflicts of interest between shareholders and management. While the most direct effect of the final amendments will be to improve the efficiency of the voting process and permit shareholders greater choice when voting by proxy in contested director elections, they will also likely impose direct costs on dissidents and registrants in certain contests. The final amendments may also have broader impacts on corporate governance and the relationship between shareholders and management. For reasons discussed below,[181] it is difficult to predict the likely extent or direction of these broader potential effects, but we cannot rule out the possibility that they could be significant.[182] For example, enabling split-ticket voting could lead to a greater number of boards that are composed of a mix of registrant-nominated [183] and dissident-nominated directors (''mixed boards''), which may affect the effectiveness of boards, either positively or negatively. Additionally, mandating the use of universal proxies by registrants as well as dissidents—which, in practice, would likely result in the names of dissident nominees being disseminated via registrant proxy cards to all shareholders—may provide potential dissidents with a new means of generating publicity for alternative nominees or for the broader concerns behind a contest at a relatively low cost, which could change the nature of interactions between potential dissidents and management.[184] The overall incidence of contested elections may change as well. These and other potential effects, as well as possible mitigating factors, are discussed in detail below.

At the outset, where possible, we have attempted to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the final amendments. In many cases, however, we are unable to quantify the potential economic effects because we lack information necessary to provide a reasonable estimate. For example, we are unable to quantify the

[179] Exchange Act Section 3(f) requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of shareholders, whether the action will promote efficiency, competition, and capital formation. 15 U.S.C. 78c(f). Exchange Act Section 23(a)(2) requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition, and prohibits any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. 15 U.S.C. 78w(a)(2).

[180] Though our economic analysis focuses on contests between a registrant and a single dissident for ease of exposition, we believe that the economic effects discussed below would also apply to contests involving more than one dissident. Election contests with more than one soliciting dissident are uncommon. For example, the staff has identified only one proxy contest in operating companies from 2017–2020 that involved more than one dissident with separate slates of nominees.

[181] *See* Section IV.C.

[182] We are unaware of any empirical studies that find that universal proxies would have significant effects on corporate governance and the relationship between shareholders and management. A recent study submitted by a commenter (*see* letter from Prof. Hirst) finds that a universal proxy is unlikely to lead to more proxy contests or to greater success by special interest groups. *See* Scott Hirst, *Universal Proxies,* Yale J. on Reg. 35, 437 (2018) (''Hirst Study''). This is an updated version of a study we previously discussed in the Proposing Release (*see* note 209 in the Proposing Release). We note that this study relies on several critical assumptions that might not be reliable. *See infra* note 284.

[183] For ease of exposition, we refer throughout this economic analysis to the nominees of the board, including those that are incumbent directors, or its nominating committee, as the nominees of the registrant and, in total, as the registrant slate.

[184] *See, e.g.,* letter from CCMC (arguing that ''Seeking to avoid the cost and distraction of an SEC-sanctioned proxy fight, many companies will simply follow the path of least resistance and negotiate to place dissident directors directly on their boards without the need for a shareholder vote.'').

potential change in the number of mixed-board outcomes at contests as a result of the final amendments. We are also unable to quantify the change in the instance of proxy contests that may result from the final amendments.

Although many commenters supported the mandated use of universal proxy in contested director elections, some commenters raised a number of economic concerns with the proposed amendments and also suggested alternatives in some cases. We have considered those concerns and, where appropriate, have expanded our economic analysis to address those concerns and alternatives.

B. Baseline

To assess the economic impact of the final amendments, we are using as our baseline the current state of the proxy process. Our baseline includes existing Commission rules, state laws, and corporate governing documents that jointly govern the ability to solicit proxies in support of director nominees other than the registrant nominees and the manner in which contested elections are conducted. This section discusses the parties involved in director election contests under the current legal framework, current proxy voting practices, and the means available to shareholders to influence the composition of boards of directors.

1. Affected Parties

We consider the impact of the final amendments on shareholders, registrants, dissidents in contested elections (who are typically also shareholders), and directors.

a. Shareholders

Different types of shareholders exhibit different degrees of involvement in voting on matters up for a vote at the companies they invest in. In particular, a study by a proxy services provider found that there are, on average, large differences in involvement by institutional investors compared to retail investors.[185] Institutional and retail investors also face different levels of difficulty and resource constraints to vote for their preferred choices of nominees in contested director elections under current rules.[186] As a result, the final amendments are likely to have a differential impact with respect to the costs of voting and feasible voting choices for these two types of shareholders.

The number of beneficial shareholder accounts for U.S. public companies varies significantly by company market capitalization: The average (median) number of beneficial shareholder accounts is approximately 3,900 (1,400) for companies with less than $300 million in market capitalization, approximately 11,000 (5,700) for companies with between $300 million and $2 billion in market capitalization, approximately 28,300 (16,500) for companies with between $2 billion and $10 billion in market capitalization, and approximately 279,000 (102,700) for companies with market capitalization above $10 billion.[187] Among all companies, we estimate that 91% of account holders are retail investors.[188] For U.S. public companies that held their annual meetings in the main 2020 proxy season (*i.e.,* between January 2020 and June 2020), a study by a proxy services provider found that retail investors held approximately 29% of shares held in brokerage accounts and institutional investors held 71%.[189] An earlier study by the same proxy services provider for U.S. public companies that held their annual meetings in the main 2016 proxy season (*i.e.,* between January 2016 and June 2016), found that the percentage of ownership by retail investors varies significantly with company size, and was estimated to be 67% in companies with less than $300 million in market capitalization, 32% in companies with between $300 million and $2 billion in market capitalization, 23% in companies with between $2 billion and $10 billion in market capitalization, and 27% in companies with market capitalization above $10 billion.[190]

Retail and institutional shareholders exhibit very different voting behavior. In the main 2020 proxy season, while institutional investors voted 92% of their shares, retail investors voted only 28% of their shares.[191] Based on an earlier study of the main 2015 proxy season, the voting propensity of retail investors does not vary significantly by the size of the registrant.[192] By contrast, institutional investors vote a significantly smaller portion of their shares in registrants with less than $300 million in market capitalization (72%) than in larger registrants (91% to 93%),[193] which may be a function of the types of institutions that invest in companies of different sizes.

Retail and institutional investors may also have differential access to resources that can be expended in order to cast a vote, and may have different levels of incentive to expend such resources. In general, we expect retail investors to face greater resource constraints than institutional investors. Differences across shareholders in the ability to take advantage of different approaches to voting and in the resources expended on voting are discussed in more detail in Sections IV.B.2.d and IV.C.1 below.

b. Registrants

The final amendments mandating the use of universal proxy cards in director election contests will apply to all registrants that have a class of equity securities registered under Section 12 of the Exchange Act and are thereby subject to the Federal proxy rules, except funds. The amendments will not apply to foreign private issuers or companies with reporting obligations under only Section 15(d) of the Exchange Act, whose securities are not subject to the Federal proxy rules. As of December 31, 2020, we estimate that approximately 5,400 registrants had a class of securities registered under Section 12 of the Exchange Act and will be subject to the amendments mandating the use of a universal proxy card in contested director elections.[194]

[185] *See* Broadridge and PwC, *Proxy Pulse 2020 Proxy Season Review* (2020), available at *https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2020-review.pdf* (''Proxy Pulse 2020'').

[186] *See infra* Section IV.B.2.d for a discussion on different shareholders' current ability to arrange split-ticket voting.

[187] Based on industry data provided by a proxy services provider. Note that an individual shareholder may have more than one account, so the number of beneficial shareholders likely is lower than the number of beneficial shareholder accounts. For the purpose of estimating costs related to distribution of proxy materials, the number of accounts is the more relevant number because dissemination costs such as intermediary and processing fees apply on a per account basis per NYSE Rule 451. The data is based on domestic companies that held shareholder meetings between July 1, 2018 and June 30, 2019.

[188] *Id.*

[189] *See* Proxy Pulse 2020.

[190] *See* Broadridge and PwC, *Proxy Pulse 2016 Proxy Season Review* (3d ed. 2016), available at *https://www.broadridge.com/proxypulse/_assets/docs/broadridge-proxypulse-3rd-edition-2016.pdf* (''Proxy Pulse 2016'').

[191] *See* Proxy Pulse 2020. We acknowledge that the voting participation of retail shareholders in particular could increase in the case of a contested election, because of greater media coverage and expanded outreach efforts, but we do not currently have data that would allow us to separately estimate the degree of retail participation in contested elections.

[192] *See* Broadridge and PwC, *Proxy Pulse 2015 Proxy Season Wrap-up* (3d ed. 2015), available at *http://media.broadridge.com/documents/ProxyPulse-Third-Edition-2015.pdf.*

[193] *Id.*

[194] We are able to estimate the number of registrants with the class of securities registered under Section 12 of the Exchange Act by reviewing all Forms 10–K and 10–K amendments filed during calendar year 2020 with the Commission. After reviewing all forms, we then count the number of unique registrants that identify themselves as having a class of securities registered under Section 12(b) or Section 12(g) of the Exchange Act. Foreign private registrants that filed both Forms 20–F and 40–F, as well as asset-backed registrants that filed

We also are adopting some changes to the form of proxy and proxy statement disclosure requirements applicable to all director elections. Because these changes apply to all registrants subject to the Federal proxy rules, they will also apply to registered funds. As of September 30, 2021, there were 14,062 registered management investment companies that were subject to the proxy rules: (i) 13,347 Open-end funds, out of which 2,497 were Exchange Traded Funds (''ETFs'') registered as open-end funds or open-end funds that had an ETF share class; (ii) 701 closed-end funds; and (iii) 14 variable annuity separate accounts registered as management investment companies.[195] In addition, as of June 2021, we identified 99 BDCs that were subject to the proxy rules.[196]

There is substantial variation across registrants in characteristics such as incumbent executive and director ownership and governance structure, which may affect the degree to which different registrants are affected by the final amendments.

Incumbent Executive and Director Ownership

We expect that incumbent executives and directors would vote in support of the registrant's slate of nominees in a director contest at the annual meeting,[197] and that the mandated use of a universal proxy card is unlikely to change this expected voting behavior. We therefore think that the percentage of total voting power held by a registrant's incumbent executives and directors can have an effect on the impact of the final amendments on the incidence and outcome of contested director elections.

Table 1 below reports estimates of the average combined vote ownership by incumbent executives and directors for a broad sample of 3,841 potentially affected registrants, as well as for several size-related sub-samples of registrants: Those included in the S&P 500 index (''large-cap stocks''), in the S&P 400 index (''mid-cap stocks''), in the S&P 600 index (''small-cap stocks''), and outside the S&P 1500 index that is composed of these three indices (and which tend to be smaller than those registrants in the S&P 1500). The average (median) percentage is 14.6% (5.8%) for all registrants, and this percentage is greatest for registrants outside the S&P 1500 index. We also estimate the percentage of registrants for which incumbent executives and directors hold a majority of the voting power, and hence can control who is elected to the board in most circumstances. Overall, incumbent executives and directors hold a majority of votes in 8.1% of registrants. This percentage ranges from 2.0% for S&P 500 registrants to 11.4% for non-S&P 1500 registrants.

The data in Table 1 indicates that to the extent incumbent executives and directors tend to vote for the registrant's slate of director nominees in contested elections, the impact of such behavior on the economic effects of the final amendments is likely to be more important in the non-S&P 1500 category of smaller registrants.

TABLE 1—INCUMBENT EXECUTIVE AND DIRECTOR VOTE OWNERSHIP OF REGISTRANTS SUBJECT TO PROXY RULES [198]

	Incumbent executive and director vote ownership (% of total voting power)				Percentage with majority ownership
	Mean	25th percentile	Median	75th percentile	
All registrants	14.6	1.8	5.8	18.8	8.1
S&P 500 registrants	4.4	0.3	0.8	2.3	2.0
S&P 400 registrants	6.8	1.0	2.0	5.5	2.0
S&P 600 registrants	9.5	1.8	3.4	8.4	4.1
Non-S&P 1500 registrants	19.3	4.0	10.4	27.8	11.4

Governance Structure

Registrants' governance characteristics may affect the incidence and outcomes of proxy contests currently as well as the effects, if any, of potential changes in the proxy rules on the incidence and outcomes of proxy contests.[199] For example, as discussed in more detail in the Proposing Release, the presence of a staggered board structure in a registrant will mitigate the impact on board composition of any final amendments to the proxy rules by prolonging the time over which any changes in board composition would occur.[200] We estimate that approximately 42% of registrants have a staggered board.[201] This percentage varies substantially across market capitalization categories: Approximately 14% for S&P 500 registrants, 38% for S&P 400 registrants, 43% for S&P 600 registrants, and 48% for non-S&P 1500 registrants.[202]

As discussed in more detail in the Proposing Release, cumulative voting for directors may increase the ability of

Forms 10–D and 10–D/A during calendar year 2020 with the Commission are excluded from this estimate. This estimate also excludes BDCs; *see infra* note 196.

[195] We estimate the number of unique registered management investment companies based on Forms N–CEN filed between December 2020 and September 2021 with the Commission. Open-end funds are registered on Form N–1A, while closed-end funds are registered on Form N–2. Variable annuity separate accounts registered as management investment companies are trusts registered on Form N–3.

[196] BDCs are entities that have been issued an 814-reporting number. Our estimate includes 82 BDCs that filed Form 10–K in 2020, as well as 17 BDCs that were not traded.

[197] Note that in the case of a dissident who is also an insider (such as an incumbent director), this may not be the case.

[198] Estimates based on staff analysis of director and senior executive vote ownership data from Institutional Shareholder Services Inc. (''ISS'') as of calendar year 2019. This data is available for 3,841 of the potentially affected registrants and may include ownership through options exercisable within 60 days. The sample represents over 70% of potentially affected registrants. It is our understanding that the registrants for which data is missing in the ISS database tend to be the smallest registrants in terms of market capitalization, and therefore the data presented may not be representative for these registrants. In particular, we believe it is likely that incumbent management ownership for this group of registrants is on average even greater than for the non-S&P 1500 registrants listed in Table 1.

[199] In the Proposing Release, we also discussed the use of dual class shares, where one class of shares has greater voting rights than the other, as a mechanism that could potentially concentrate the voting control of a registrant in the hands of insiders (*see* Section IV.B.1.b of the Proposing Release). However, the potential impact of such dual class share structures on the economic effects of the final amendments would ultimately flow through the vote ownership of insiders, which we discuss above.

[200] See Section IV.B.1.b of the Proposing Release.

[201] Estimates based on staff analysis of board characteristics data from ISS as of calendar year 2019. This data is available for 3,841 of the potentially affected registrants.

[202] *Id.*

minority shareholders to elect a director and may therefore also be important to consider when evaluating the potential effects of the final amendments on proxy contests.[203] We estimate that 3.3% of registrants have cumulative voting. This percentage also varies across market capitalization categories: Approximately 2.2% for S&P 500 registrants, 3.1% for S&P 400 registrants, 4.1% for S&P 600 registrants, and 3.4% for non-S&P 1500 registrants.[204]

Registrants' governing documents generally provide that one of two main standards be applied to the election of directors: Either a majority voting standard or a plurality voting standard. Under a majority voting standard, directors are elected only if they receive affirmative votes from a majority of the shares voting or present at the meeting, and shareholders can vote ''for'' each nominee, ''against'' each nominee, or ''abstain'' from voting their shares. By contrast, under a plurality voting standard, the nominees receiving the greatest number of ''for'' votes are elected, and shareholders can withhold votes from specific nominees but cannot vote ''against'' any of them. In those cases in which a majority standard is in place in director elections, registrants tend to have a carve-out in the bylaws (or charter) that applies a plurality standard in contested director elections. In the case of a majority voting standard in a contested election, there is a risk that some or all of the nominees receiving the highest relative shareholder support may still not win a majority of votes cast. This risk is especially high when nominees only appear on either the registrant's or the dissident's card, which is generally the case under the current proxy rules. Based on data that we have available for affected S&P 1500 registrants, we estimate that whereas approximately 70% have a majority standard in director elections, only approximately 6% of the affected S&P 1500 registrants have a majority standard without a carve-out for a plurality standard in the case of a contested election.[205]

c. Dissidents in Contested Elections

The dissidents in contested elections are typically shareholders of the registrant, but may fit into one of several categories. A common category of dissidents is activist hedge funds that take a proactive approach to the companies in their investment portfolios by trying to influence the management and decision-making through various means, such as proxy contests. Dissidents may also be former insiders or employees of the registrant. A party to a possible business combination may also contest the election of directors at a registrant when, for example, it is seeking to acquire the registrant but the registrant's current board does not approve of the transaction. In some cases, a group of dissatisfied shareholders other than activist hedge funds jointly contests an election. Section IV.B.2.a below provides further information about the relative frequency of different types of dissidents in recent director contests.

d. Directors

We note that reputational concerns may be an important consideration for directors and potential directors.[206] Past research has found that proxy contests may affect the reputation of incumbent directors, in that such contests appear to have had a significant adverse effect on the number of other directorships they hold.[207] Therefore, any changes to the proxy rules that would increase the likelihood of proxy contests at any given registrant could reduce the willingness of current and potential directors to be nominated to serve on the registrant's board in the future.

2. Contested Director Elections

Currently, a shareholder voting by proxy is generally limited to voting for either the registrant slate or the dissident slate (and, when used to round out a slate, certain registrant nominees chosen by the dissident).[208] By contrast, a shareholder that attends an annual meeting may vote for any combination of registrant and dissident nominees.

a. Proxy Contest Data

We identify 148 proxy contests[209] that were initiated through the filing of preliminary proxy statements by dissidents in calendar years 2017–2020 across all registrants subject to the proxy rules other than funds.[210] Of these proxy contests, we estimate that 101 involved an election contest with competing slates of director nominees at an annual meeting of shareholders.[211] In one case, there were two dissidents with separate slates of nominees. Most of the contests with competing slates of board nominees were in smaller to midsize companies: Nine were S&P 500 companies, 13 were S&P 400 companies, 17 were S&P 600 companies, and 62 were outside the S&P 1500. In terms of the type of dissidents initiating proxy contests with competing slates, activist investors (mainly hedge funds and other types of investment companies) were dissidents in approximately 79% of the contests, whereas former or current insiders and employees, other groups of shareholders, or companies seeking

[203] *See, e.g.,* David Ikenberry & Josef Lakonishok, *Corporate Governance through the Proxy Contest: Evidence and Implications,* 66 J. Bus. 405, 413 (1993) (finding that dissidents are successful in obtaining at least one seat in 41.3% of contests held under straight voting and that this increases to 71.9% in contests using cumulative voting).

[204] Estimates based on staff analysis of board characteristics data from ISS as of calendar year 2019. This data is available for 3,841 of the potentially affected registrants. We do not have ready access to this data for other registrants.

[205] Estimates based on staff analysis of governance data for S&P 1500 companies from ISS as of calendar year 2020.

[206] *See, e.g.,* Ronald Masulis & Shawn Mobbs, *Independent Director Incentives: Where Do Talented Directors Spend Their Limited Time and Energy?,* 111 J. Fin. Econ 406, 426 (Feb. 2014) (concluding that director reputation is a powerful incentive for independent directors).

[207] *See* Vyacheslav Fos & Margarita Tsoutsoura, *Shareholder Democracy in Play: Career Consequences of Proxy Contests,* 114 J. Fin. Econ. 316, 326 (2014) (finding that, following a proxy contest, all directors in the targeted company experience on average a significant decline in the number of their directorships, not only in the targeted company, but also in other, non-targeted companies).

[208] However, it may be possible for a registrant to require a dissident's nominees to consent to be named on the registrant's card pursuant to the director questionnaires required under a registrant's advance notice bylaw provisions. As noted above, the staff has observed an increased use of this tactic since 2016. This option is not available to the dissident. In addition, we have observed at least one case since 2016 where universal proxy was used by both parties, presumably based on obtaining voluntary consent by the included nominees. *See supra* note 43 and accompanying text.

[209] This total number of proxy contests includes all cases in which a proponent or dissident initiated a ''solicitation in opposition'' to the registrant, whether in relation to an election of directors or with respect to another issue. A solicitation in opposition includes (i) any solicitation opposing a proposal supported by the registrant; and (ii) any solicitation supporting a proposal that the registrant does not expressly support, other than a shareholder proposal included in the registrant's proxy material pursuant to Rule 14a–8. *See* 17 CFR 240.14a–6(a), Note 3. The total number includes consent solicitations for special meetings and written consent solicitations (36 cases), which may be board related contests but are not subject to the required use of universal proxies. This total number of proxy contests does not include exempt solicitations, which are discussed in Section IV.B.3, *infra.*

[210] Based on staff review of EDGAR filings in calendar years 2017 through 2020.

[211] This represents on average approximately 25 board-nomination contests per year, which is lower than the average of 36 initiated contests per year we found for 2014 and 2015 in the Proposing Release. The 47 proxy contests initiated in 2017–2020 that did not represent election contests with competing slates of candidates at an annual meeting of shareholders include: Consent solicitations for the removal and election of directors at a special meeting or through written consent; contests involving ''vote no'' campaigns; and proposals on issues other than director nominees. Consent solicitations and ''vote no'' campaigns are discussed in Section IV.B.3, *infra.*

business combinations made up the rest of the dissidents.[212]

Approximately 30% of the contests with competing slates were contests for majority control of the board.[213] However, because less than a majority of board seats were up for election in approximately 31% of the contests due to staggered board structures, dissidents sought majority control in 43% of contests where it was possible to do so (30 out of 70 cases). Among the 31 cases where less than a majority of seats were up for election, dissidents nominated candidates for all of the seats that were up for election in 48% of contests (15 cases). Overall, dissidents nominated candidates for all of the seats that were up for election in approximately 25% of contests (25 cases out of 101).

b. Notice, Solicitation, and Costs of Proxy Contests

The Commission's proxy rules do not currently require dissidents to provide notice to registrants of their intention to solicit votes for their nominees. However, as discussed, advance notice bylaws are common among registrants. For example, at the end of 2020, 99% of S&P 500 registrants had advance notice provisions, and 95% of the Russell 3000 had such provisions.[214] We understand that the latest date on which notice may be provided under advance notice bylaws typically ranges from 90 to 120 days before the anniversary of the meeting date.[215]

Among the 101 director election contests initiated in years 2017–2020, approximately 90% of dissidents either publicly announced or communicated their intent to nominate directors to the registrant at least 60 days before the anniversary of the previous year's annual meeting date (or 60 days before the annual meeting date if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting had changed by more than 30 calendar days from the previous year).[216] Further statistics on the distribution of the timing for initial nomination communications and filing of preliminary proxy statements are shown in Table 2 below.

TABLE 2—TIMING OF INITIATION OF ELECTION CONTESTS AND FILING OF PRELIMINARY PROXY STATEMENTS RELATIVE TO ANNIVERSARY OF PREVIOUS YEAR'S MEETING DATES, IN 2017–2020[217]

	Percentage			Mean	Median	Min	Max
	At least 45 days	At least 60 days	At least 90 days				
Days between first announcement or communication of election contest intent and anniversary of previous year's meeting date	93	90	65	108	93	16	377
Days between dissident filing preliminary proxy statement and anniversary of previous year's meeting date	75	43	13	65	56	7	369

For the contests where dissidents ultimately file a definitive proxy statement (74 cases), approximately 80% of dissident definitive statements are filed at most 50 days before the anniversary of the previous year's annual meeting date (or 50 days before the annual meeting date if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting had changed by more than 30 calendar days from the previous year).[218] In addition, more than 82% of dissidents' definitive statements are filed 25 days or more before the actual annual meeting date.[219]

While dissidents in proxy contests are required to make their proxy statements publicly available via the EDGAR system, they are not currently subject to any requirements as to how many shareholders they must solicit. When dissidents actively solicit shareholders they have the choice of sending shareholders a full package of proxy materials (''full set'') or sending only a one-page notice informing them of the online availability of proxy materials (''notice and access'' or ''notice-only''). We estimate that approximately 52% of dissidents solicited all shareholders in a sample of recent proxy contests.[220] Furthermore, the dissidents in this sample of contests sent full sets of proxy materials to each of the shareholders solicited.[221] The use of the full set delivery method may be driven by findings that such solicitations are associated with a higher rate of voting than notice-only solicitations.[222] Among those contests in which dissidents did not solicit all shareholders, the average (median) percentage of shares held by solicited shareholders was approximately 95% (96%) of the outstanding shares of the registrant eligible to vote, and the minimum (maximum) percentage of the outstanding shares eligible to vote held by solicited shareholders was approximately 83% (99.9%).[223] The average (median) percentage of shareholder accounts solicited in these contests was approximately 20% (14%), and the minimum (maximum) percentage of accounts solicited was 1% (71%).[224]

[212] Based on information from Factset's SharkRepellent database and staff's review of EDGAR filings.

[213] This percentage is somewhat larger than the 26% reported in the Proposing Release for 72 board contests initiated in years 2014 and 2015.

[214] *See* WilmerHale M&A Report. An advance notice bylaw can generally be waived by a registrant's board of directors at their discretion, though we do not have data that would allow us to determine the frequency with which such bylaws are waived. If not waived, such bylaws may also be challenged in court (such as in the case of ''inequitable circumstances''). *See, e.g., AB Value Partners, L.P.* v. *Kreisler Mfg. Corp.,* No. 10434–VCP, 2014 WL 7150465 (Del Ch. Dec. 16, 2015).

[215] *See* S&C 2015 Report.

[216] Based on information from Factset's SharkRepellent database and staff's analysis of EDGAR filings. When available, staff gathered information on the timing of dissidents' direct communications to registrants of their intent to nominate directors from the parties' proxy filings, which frequently list such information as part of the solicitation background descriptions. Such communications are not always immediately publicly disclosed.

[217] *Id.* For 37 of the 101 director contests initiated in 2017–2020, the announcement and filing days are measured relative to the annual meeting date rather than the anniversary of the previous year's meeting date, because either the registrant did not hold an annual meeting during the previous year or the date of the meeting changed by more than 30 calendar days from the previous year.

[218] Based on data from Factset's SharkRepellent database and staff analysis of EDGAR filings.

[219] *Id.*

[220] Based on industry data provided by a proxy services provider for a sample of 31 proxy contests for annual meetings held between July 1, 2018 and June 30, 2019.

[221] *Id.*

[222] *See, e.g.,* Broadridge, *Analysis of Traditional and Notice & Access Issuers: Issuer Adoption, Distribution and Voting for Fiscal Year Ending June 30, 2013* (Oct. 2013), available at *http://media.broadridge.com/documents/Broadridge-6-Yr-NA-Stats-Report-2013.pdf.*

[223] Based on industry data provided by a proxy services provider for a sample of 31 proxy contests for annual meetings held between July 1, 2018 and June 30, 2019.

[224] *Id.*

In proxy contests, both registrants and dissidents incur direct costs of solicitation.[225] These costs may include, for example, fees paid to proxy solicitors, expenditures for attorneys and public relations advisors, and printing and mailing costs. We understand that for registrants, the costs of solicitation in proxy contests generally exceed the solicitation costs associated with a shareholder meeting without a contested election. Both dissidents and registrants are required to provide estimates of the costs of solicitation in their proxy statements.[226] As shown in Table 3 below, based on a review of proxy contests initiated in years 2017–2020, the median reported estimated total costs were approximately $1,650,000 for registrants and approximately $750,000 for dissidents.[227]

TABLE 3—REPORTED ESTIMATES OF SOLICITATION EXPENSES IN ELECTION CONTESTS INITIATED IN 2017–2020[228]

	Mean	Median	Minimum	Maximum
Estimated Total Costs:				
Registrant	$3,891,886	$1,650,000	$65,000	$35,000,000
Dissident	1,812,938	750,000	20,000	25,000,000
Estimated Fees Paid to Proxy Solicitor:				
Registrant	540,486	300,000	10,000	3,500,000
Dissident	278,614	125,000	12,500	2,500,000

Beyond these estimated solicitation expenses, proxy contests may be associated with other indirect costs, such as the cost of management or dissident time spent in the process of conducting the contest and expenses associated with any discussions held between management and the dissident(s) or other participants who could influence the outcome (*e.g.,* large investors and proxy advisor firms). We do not have data on these indirect costs. One study that considers the cost of earlier as well as later stages of engagement between management and activist hedge fund dissidents, which eventually culminate in a proxy contest, estimates that a campaign ending in a proxy contest has a total (direct and indirect) average cost to the dissident of approximately $10 million over the full period of engagement.[229]

In addition to the typical proxy contests[230] discussed above, on rare occasions, there have also been ''nominal contests,'' in which the dissidents incur little more than the basic required costs to pursue a contest. In particular, a dissident engaging in a nominal proxy contest would have to bear the cost of drafting a proxy statement and undergoing the staff review and comment process for that filing. However, a dissident in a nominal contest would not expend resources on substantial solicitation, such as to disseminate its proxy materials through full set delivery to a substantial percentage of shareholders versus only to select shareholders, to hire the services of a proxy solicitor, or to engage in other broad outreach efforts, as would be the case in a typical proxy contest. Based on staff experience in administering the proxy rules, nominal contests are very rare, and the staff is unaware of any nominal contest that has resulted in the dissident gaining seats for its nominees. We do not have data that is well-suited for empirically identifying nominal contests, in part because a contest is sometimes settled or withdrawn before the dissident has filed its definitive proxy statement and no estimates are included in the preliminary proxy statement.

c. Results of Proxy Contests

A proxy contest may result in several possible outcomes. Our staff's review of 101 proxy contests initiated in 2017–2020 found that approximately 53% (54 cases) did not make it to a vote. In these cases, registrants may have settled by agreeing to nominate or appoint some number of the dissident's candidates to the board of directors or by making other concessions, the dissident may have chosen to withdraw in the absence of any concessions, or other events may have precluded a vote.[231] Among the approximately 47% (47 cases) of proxy contests initiated in 2017–2020 that proceeded to a vote, dissidents were at least partially successful (*i.e.,* achieved some board representation) in about 38% (18 cases) of these contests.[232] In six voted contests where dissidents achieved board representation, only some of the nominees on the dissident's slate were elected to the board, which represents a ''split-ticket'' outcome in around 13% of the contests that went to a vote. In 17 of the voted contests where dissidents achieved board representation, the end result was a ''mixed board'' with directors elected from both slates, whereas the dissident's nominees were elected to fill all positions of the board in one contest. Between settlements and voted contests, dissidents achieved at least some board

[225] In some cases, dissidents may seek reimbursement of their expenses from registrants. Such potential reimbursement is governed by state law and is more likely in the case of a successful proxy contest. The proxy rules require dissidents to disclose whether reimbursement will be sought from the registrant, and, if so, whether the question of such reimbursement will be submitted to a vote of shareholders. *See* 17 CFR 240.14a–101, Item 4(b)(5).

[226] Registrants may, but do not have to, exclude from the total estimated solicitation costs the amount normally expended for a solicitation for an election of directors in the absence of a contest, and costs represented by salaries and wages of regular employees and officers, provided a statement to that effect is included in the proxy statement. It is our understanding that most registrants exclude such costs from their estimated total costs.

[227] This represents a substantial increase in median (and average) reported solicitation expenses for both registrants and dissidents compared to earlier years, as reported in the Proposing Release (*see* Section IV.B.2.b of the Proposing Release for data on estimated solicitation expenses in earlier years).

[228] Based on data from Factset's SharkRepellent database and staff analysis of EDGAR filings in calendar years 2017–2020.

[229] *See* Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model,* 107 J. Fin. Econ. 610, 624 (2013).

[230] For ease of reference, we use ''typical proxy contests'' to refer to contested elections of directors other than the nominal contests described below.

[231] This percentage of director election contests not proceeding to a vote is higher than the 33% that we found in the Proposing Release for a sample of 72 contests initiated in 2014 and 2015. However, it is in line with what has been reported in previous research for contests prior to 2014. *See, e.g.,* Vyacheslav Fos, *The Disciplinary Effects of Proxy Contests,* 63 Manag. Sci. 655 (2017) (''Fos study'') (finding that, for proxy contests including contested elections as well as a much smaller number of issue contests from 1994 to 2012, about 53% did not make it to a vote, where 25% were settled, 15% were withdrawn, 6% ended with a delisting or a takeover, and 7% did not make it to a vote for other reasons).

[232] The estimated percentage of voted director election contests that lead to dissident board representation is somewhat less than what has been found for contest samples from earlier years, where dissidents won board representation in about half of the cases that went to a vote at the annual meeting. *See* Section IV.B.2.c of the Proposing Release.

representation in a bit more than half of the director election contests (53 out of 101), and achieved majority control in approximately 20% of contests.

Contests differ in the closeness of voting outcomes. The staff has analyzed the difference in votes between the elected director with the lowest number of votes and the nominee who came closest to being elected. Out of the 47 contests initiated in 2017–2020 that proceeded to a vote, registrants disclosed full voting results in Form 8–K filings in 41 contests. In these contests, the median director elected with the fewest votes received 73% more votes than the nominee with the next highest number of votes. The median difference in votes received between the director elected with the fewest votes and the nominee with the next highest number of votes as a percentage of total outstanding votes was approximately 19%, and around 24% of the contests (10 out of 41) had a difference in votes received as a percentage of outstanding votes of 5% or less. In the contests where the difference in votes received was 5% or less of total outstanding votes, the elected director who received the fewest votes received no more than 13% more votes than the non-elected nominee who received the greatest votes. For the purpose of our analysis below, we define ''close contests'' as those where the difference in votes received between the director elected with the fewest votes and the nominee with the next highest number of votes is 5% or less of total outstanding votes, because in such contests a relatively small number of shareholders could have been determinative of the outcome.

We are unaware of any nominal contest that has resulted in the dissident gaining seats for their nominees. Dissidents may nevertheless choose to initiate nominal contests to pursue goals other than changes in board composition, such as to publicize a particular issue or to encourage management to engage with the dissident. However, we do not have data that would allow us to measure success along those other dimensions.

d. Split-Ticket Voting

Shareholders have the option of voting a split ticket but can do so only by attending the shareholder meeting in person and voting their shares at that meeting. In practice, however, in-person meeting attendance may be limited due to cost and other logistical constraints,[233] which may be especially likely for small shareholders and retail investors. We understand that in certain elections, the parties to the contest and their agents (*e.g.,* proxy solicitors) will help some shareholders ''split their ticket'' by arranging for an in-person representative to vote these shareholders' shares at the meeting on the ballots used for in-person voting. We do not have data on the number or characteristics of shareholders that are arranging to vote a split ticket through current practices, but our understanding is that these practices are available only to relatively large shareholders.

We recognize that the monetary costs and other burdens of attending a meeting in person will likely be lower to shareholders if the meeting is held virtually, because the time and expenses associated with travelling to the meeting would be eliminated. However, there may still be time or other resource constraints that would affect a shareholder's ability to attend a virtual meeting. Before the COVID–19 pandemic, fully virtual or hybrid annual meetings were a small fraction of annual meetings, but growing steadily. For example, one recent study of shareholder meetings by U.S. registrants found that virtual or hybrid shareholder meetings grew from 20 in 2011 to 285 in 2019, with about 60 to 70 new companies adopting meetings with a virtual component each year after 2015.[234] The arrival of the COVID–19 pandemic in the United States in March 2020 caused many registrants to switch to a virtual format for their shareholder meetings, and one study found that more than 2,300 annual meetings were held virtually in 2020. Based on 1,957 virtual meetings hosted by one proxy services provider in 2020, the average number of shareholders voting at virtual meetings (rather than voting in advance by proxy), held in 2020 was 13 shareholders for meetings with shareholder proposals (218 cases) and 2 shareholders for meetings without shareholder proposals.[235] Thus, in-person voting appears to have been rare also in virtual meetings, suggesting shareholder still have a strong preference for voting by proxy, or face barriers to attending and voting at the meeting, even when meetings are held virtually. It is our understanding that virtual meetings are still in widespread use this year (2021) as we are still in the COVID–19 pandemic. It remains to be seen to what extent registrants that were forced to switch to virtual meetings during the current pandemic will continue to hold virtual meetings going forward. Moreover, among the 101 proxy contests initiated from 2017–2020, staff analysis found that only 13 annual meetings were held virtually, and all of those were held after March 2020 (making up approximately 59% of the meetings in the sample that were held after March 2020).

For shareholders that do not have ready access to other arrangements, the decision of whether or not to attend a meeting or seek other arrangements for splitting their ticket is likely to depend on having the ability and resources to do so, as well as having the incentive to incur the associated costs. To the extent an individual investor believes vote splitting is beneficial, the larger its ownership stake is, the greater the financial incentives to incur the current costs of arranging a split-ticket vote. However, beyond the direct financial incentives from a larger ownership stake, a large investor also has a voting impact commensurate with that stake, which increases the likelihood that its votes are determinative. This in turn, increases the large investor's incentives to arrange for vote splitting when deemed beneficial. We believe institutions are more likely than retail shareholders to have both the resources and the incentives to currently vote a split ticket (if they have the preference to do so).

Because the incentive to arrange a split-ticket vote when such a vote is preferred is dependent on having both a sizable financial stake, in dollar terms, as well as significant voting influence, in percentage terms, we consider the distribution of both of these factors for institutional shareholders. We use data from Form 13F filings to estimate these distributions, which limits us to considering institutions required to report their holdings on Form 13F.[236]

[233] *See, e.g.,* letter from the Council of Institutional Investors dated Jan. 8, 2014, available at *https://www.sec.gov/rules/petitions/2014/petn4-672.pdf* (describing in-person attendance as ''generally an expensive and impractical proposition''). *See also* letter from CII dated Dec. 28, 2016; letter from Fidelity; letter dated Dec. 23, 2016 from Hermes (''Hermes''); letter from Trian. The burden of attending a meeting for the purpose of voting a split ticket may be significantly lower in the case of a virtual shareholder meeting but such online meetings are still relatively rare.

[234] *See* Francois Brochet, Roman Chychyla & Fabrizio Ferri, *Virtual Shareholder Meetings,* European Corporate Governance Institute—Finance Working Paper No. 777/2021, at 10 (July 1, 2021), available at *https://ssrn.com/abstract=3743064* (retrieved from SSRN Elsevier database) or *http://dx.doi.org/10.2139/ssrn.3743064.*

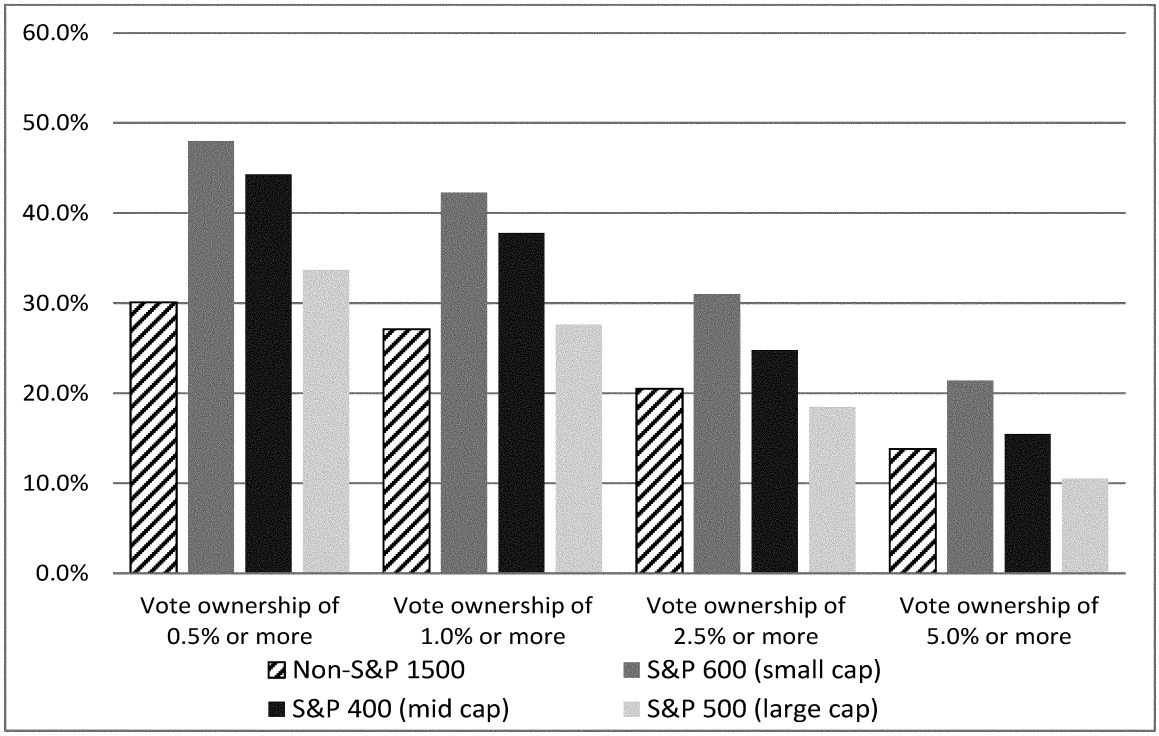
[235] *See* Broadridge, *Virtual Shareholder Meetings 2020 Facts and Figures* (April 2021), available at *https://www.broadridge.com/_assets/pdf/vsm-facts-and-figures-2020-brochure-april-2021.pdf.*

[236] Non-exempt institutional investment managers that exercise investment discretion over $100 million or more in Section 13(f) securities are required to report their holdings on Form 13F with the Commission.

Moreover, we only consider shares over which these institutions have voting authority in contested director elections. We do not have comparable data for other institutional shareholders or for retail shareholders.

We first consider the potential incentive to arrange split-ticket vote based on voting influence, as measured by fraction ownership of voting shares. Figure 1 shows the average percentage, across registrants, of the total outstanding shares held by Form 13F filers that each meet a given minimum threshold of ownership of voting shares. The average percentage of the total outstanding shares is calculated across all registrants within different size categories. As in previous analyses, registrant size is approximated by reference to the S&P index. The data suggest that there is currently a substantial portion of outstanding shares for which institutional holders may have enough individual voting influence to incentivize them to arrange split-ticket voting if preferred. For example, if we consider average total ownership by Form 13F filers that are larger block holders (individually owning 5% or more of shares) and therefore are likely to be pivotal voters, the average percentage of the total outstanding shares held by these institutions is approximately 14% for non-S&P 1500 registrants, 21% for S&P 600 registrants, 16% for S&P 400 registrants, and 11% for S&P 500 registrants. The large difference in ownership between S&P 600 and non-S&P 1500 registrants, despite both groups being relatively small registrants, is due to a smaller number of institutions holding stock (of any amount) in the non-S&P 1500 registrants. Figure 1 also shows the average total ownership of shares held by Form 13F filers meeting lower minimum thresholds of ownership of voting shares (0.5%, 1.0%, and 2.5% respectively), in case ownership less than 5% may provide sufficient voting influence to incentivize an institution to arrange split-ticket voting. Because we are only considering ownership by institutions required to report their holdings on Form 13F, there may be additional owners with incentives to arrange split-ticket voting (for any given minimum ownership threshold) that are not captured in the data presented in Figure 1.

Figure 1: Average percentage of outstanding shares held by institutions (Form 13F filers) with different levels of minimum individual vote ownership, across registrants in different size categories.[237]

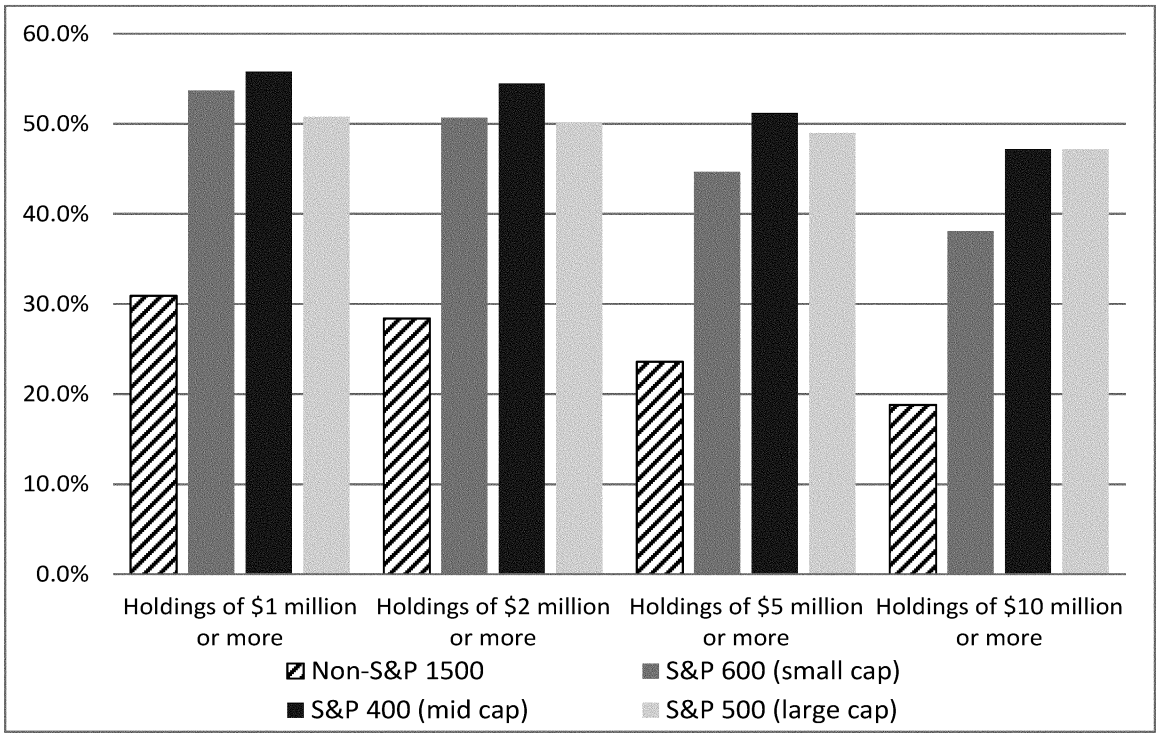


Even a large voting stake in a company may not currently be enough to incentivize a shareholder to incur the costs of attending the annual meeting to vote a split ticket if the investment is low in dollar terms. Therefore we also consider the combined voting power by institutions filing Form 13F that individually have a substantial dollar investment in a registrant. In particular, Figure 2 shows the average percentage, across registrants, of the total outstanding shares held by Form 13F filers that each meet a given threshold of minimum dollar stake in the registrant. For example, for Form 13F filers that hold stock worth $1 million or more in a given registrant, the average percentage of the total outstanding shares held by these institutions is above 50% for all registrants belonging to one of the S&P 1500 component indexes. By contrast, the corresponding average percentage of outstanding shares held among non-S&P 1500

[237] The estimates in the figure are based on staff analysis of Form 13F filings related to potentially affected registrants from the first quarter of 2020 in the Thomson Reuters Form 13F database, which is the most recent time period we had access to for this analysis. The analysis reflects only holdings for which institutions have voting authority in contested director elections.

registrants is approximately 31%. If we instead consider only Form 13F filers that each hold stock worth $10 million or more, the average percentage of outstanding shares held by these institutions is 47% for S&P 500 registrants, 47% for S&P 400 registrants, 38% for S&P 600 registrants, and 19% for non-S&P 1500 registrants. Overall, the estimates in Figure 2 suggest that a substantial portion of voting shares in registrants are held by institutions that have a significant financial interest. This is particularly so for relatively larger registrants.

Figure 2: Average percentage of outstanding shares held by institutions (Form 13F filers) with different levels of minimum financial interest, across registrants in different size categories.[238]



3. Other Methods To Seek Change in Board Representation

As discussed in more detail in the Proposing Release,[239] beyond proxy contests culminating at annual meetings, we note that under the baseline, there are a number of other methods shareholders currently can use to potentially affect changes to the composition of a board of directors. Such shareholder interventions could be in the form of (i) making recommendations for director candidates directly to the nominating committee of the board,[240] (ii) pursuing consent solicitations,[241] (iii) pursuing exempt solicitations at the annual meeting, (iv) taking advantage of proxy access provisions in corporate bylaws to nominate a limited number of director candidates for inclusion in the registrant's proxy statement, (v) withholding votes from (or voting against) directors in uncontested elections as well as waging formal ''vote no'' campaigns to encourage other shareholders to do so, or (vi) seeking a change in board composition by making nominations from the floor of a meeting, without soliciting proxies.

C. Discussion of Economic Effects

The economic benefits and costs of the final amendments, including impacts on efficiency, competition, and capital formation, are discussed below. We first address the effects of the changes to the proxy process together as a package, including both benefits and costs. In particular, we discuss the anticipated effects of the final amendments on shareholder voting and then consider anticipated effects with respect to the costs, outcomes, incidence, and perceived threat of contested elections at affected registrants. We then discuss the economic effects that can be attributed to specific implementation choices in the final amendments, to the extent possible, and the relative benefits and costs of the principal reasonable

[238] *Id.* Financial interest is estimated as the market value of all shares held by the individual institution in a specific registrant. For the average percentage of outstanding shares, we only considered holdings for which institutions had voting authority in contested director elections.

[239] *See* Section IV.B.3 of the Proposing Release.

[240] *See* letter from NACD (stating that ''NACD actively encourages such shareholder participation on director nomination. Indeed, contested elections will likely become less common as boards continue to improve their work in creating optimal boards and in communicating their methods for achieving them.'').

[241] Consent solicitations may take the form of a two-step procedure where a dissident first obtains sufficient support from shareholders to call a special meeting or sufficient voting ownership to call a special meeting, and then puts to a vote, either by proxy or in person at the special meeting, a proposal to remove certain directors and elect certain other nominees. The criteria for how and when a special meeting can be called vary both by state law and corporate bylaws and governing documents (*e.g.,* certificate of incorporation). Depending on state law and governing documents, a dissident may alternatively be able to perform a consent solicitation in one step, in which it seeks support for a proposal to remove certain directors and elect certain other nominees purely through written consent by shareholders.

alternatives to these implementation choices.

Our economic analysis of the final amendments reflects our consideration of a number of broad issues related to corporate governance and the proxy system. First, the design of the voting process, as a primary mechanism through which shareholders provide input into the composition of boards, can affect the ability of shareholders to exercise one of their most fundamental rights—to select and hold accountable the fiduciaries responsible for overseeing their investments. Second, it is difficult to predict how the various parties involved in contested elections are likely to respond to any changes to the proxy process, complicating the evaluation of whether such changes would enhance or detract from board effectiveness and registrants' efficiency and competitiveness. Third, corporate governance involves a number of closely interrelated mechanisms, so any effects on contested elections may be either mitigated or magnified by changes in the use or effectiveness of other mechanisms. These issues are discussed in more detail in the Proposing Release and provide context for the discussion of potential economic effects that follows.[242]

1. Effects on Shareholder Voting

By mandating the use of a universal proxy in contested elections, the final amendments will allow all shareholders to vote through the proxy system for the combination of director nominees of their choice, as they will no longer be limited to voting for only nominees chosen by the registrant or for only nominees chosen by the dissident.[243] In addition, the ability to vote for dissident nominees by proxy would no longer be limited to shareholders solicited by the dissident because any shareholders not solicited by the dissident would still be able to vote for those nominees using the registrant's proxy card.[244] This change is expected to increase the efficiency with which shareholders vote in contested elections. In particular, universal proxies will result in benefits in the form of cost savings for shareholders who would otherwise expend time and resources to attend a shareholder meeting in person or otherwise arrange to vote for a combination of candidates that could not be voted for by proxy. Other shareholders may be newly able to vote for their most preferred candidates. That is, there may be shareholders who would vote for a combination of management and dissident candidates if a universal proxy were available but who do not currently do so because it is not feasible (and in particular cost-effective) to undertake such a vote. In the Proposing Release, we discussed in more detail the current cost or inability for investors to vote for their preferred mix of director candidates from both slates of nominees, as well as investors' express demand for split-ticket voting.[245]

Several commenters expressed general support for the use of universal proxy to enable split-ticket voting, arguing that split-ticket voting is currently either too costly or outright impossible to achieve for most shareholders given currently available approaches.[246] By contrast, one commenter argued against the mandated use of universal proxy and claimed that there already exist less costly ''work arounds'' for investors who want to be able to choose candidates from both slates without voting in person.[247] We acknowledge ''work arounds'' exist, but as discussed above, such approaches may still be too costly or are not generally available to all shareholders who wish to split their ticket, whereas mandated use of universal proxy will ensure all shareholders—regardless of time, resources, sophistication, or ability to use other approaches—have access to a comparatively low-cost alternative for split-ticket voting.

As described in Section IV.B.2.d, the increased use of virtual meetings can reduce the cost for shareholders to vote a split-ticket at the annual meeting by eliminating the time and expenses associated with travelling to physically attend the meeting. However it is unclear how widespread the use of virtual meetings will be after the current COVID–19 pandemic is over, especially for meetings with contested director elections. Despite the lower cost of attending virtual meetings, voting by proxy card is likely to be less time-consuming and gives shareholders the flexibility to fill out the card with their votes at a time of their choosing, compared to having to attend a virtual meeting at one specific point in time. Supporting this, the evidence on shareholder attendance and voting at virtual meetings show that a vast majority of shareholders rely on the proxy process to vote even when the meeting is held virtually.[248]

For reasons discussed in more detail in the Proposing Release, we expect that institutional shareholders and large shareholders are relatively more likely than other shareholders to implement a split-ticket vote under current rules, and therefore will experience cost savings by being able to do so more easily via the proxy process under the final amendments adopted in this document.[249]

As discussed in more detail in the Proposing Release, the availability of universal proxies would also expand the voting alternatives of shareholders, such as retail shareholders or other small shareholders, for whom it would not otherwise be practical or feasible to vote for their preferred combination of candidates.[250] To the extent that such shareholders are interested in splitting their ticket, the availability of universal proxies may result in a greater number of split-ticket votes than under the current system.

In addition, because dissidents currently are not required to solicit all shareholders, we observe that, in a substantial fraction of proxy contests, many shareholders do not receive the dissident's proxy card and thus cannot vote by proxy for dissident candidates.[251] The requirement in the

[242] *See* Section IV.C in the Proposing Release.

[243] Nominees ''chosen'' by the dissident may include certain registrant nominees. The short slate rule permits a dissident in certain circumstances to solicit votes for some of the registrant's nominees through the use of its proxy card where the dissident is not nominating enough director candidates to gain majority control of the board in the contest, thereby allowing shareholders using the dissident's proxy card to split their vote. However, shareholders voting on the dissident's proxy card would still be limited to voting for those registrant nominees selected by the dissident, rather than any registrant nominee of their choice.

[244] For shareholders not solicited by the dissident, while the registrant's universal proxy card would allow them to support dissident nominees, they would still need to seek out the dissident's proxy statement in the EDGAR system (as directed by the registrant's proxy statement) to obtain information about the dissident nominees.

[245] *See* Section IV.D.1.a in the Proposing Release.

[246] *See, e.g.,* letters from CII dated Dec. 28, 2016; Fidelity; Hermes; Trian.

[247] *See* letter from Society dated Jan. 10, 2017.

[248] *See supra* note 235 and accompanying text.

[249] *See* Section IV.D.1.a of the Proposing Release. *See supra* Section IV.B.1.a and IV.B.1.d for updated data on shareholders, including ownership statistics.

[250] One commenter particularly highlighted increased access to split-ticket voting for retail investors and other small shareholders as a benefit of mandating the use of universal proxy; *see* letter from CII dated Sep. 7, 2017 (stating that ''Importantly, requiring a universal proxy would benefit retail investors and institutional investors with relatively smaller positions by allowing them to choose among all board nominees without attending the shareholder meeting, which can involve travel and other costs that may be prohibitive.'').

[251] Based on industry data provided by a proxy services provider for a sample of proxy contests from July 1, 2018 through June 30, 2019, we estimate that there are some shareholders that dissidents do not solicit in approximately 48% of contested elections, while dissidents in the remainder of contested elections solicit all shareholders. In contests in which fewer than all shareholders were solicited, only those accounts

final amendments that registrants, as well as dissidents, use universal proxies will allow shareholders who are not solicited by dissidents to nonetheless vote for some or all of the dissident nominees through the proxy process, by using the registrant's universal proxy card.

Thus, by providing for a universal proxy card, the final amendments will allow all shareholders to vote for their preferred candidates. We expect that retail and small shareholders are more likely than other shareholders to vote differently under a universal proxy system than under the current system because they currently have limited access to other means of voting a split-ticket and a lower likelihood of being solicited by dissidents. However, we also note that such shareholders may be less likely to vote in general.[252] For these shareholders, the final amendments are not likely to result in direct cost savings, but will allow them to submit votes that better reflect their preferences. The indirect benefits or costs of their expanded voting options depend on whether such changes in voting behavior are widespread enough to change actual or expected election outcomes, and the nature of these changes in outcomes, as discussed below.[253]

There is also a possibility that universal proxies could lead some shareholders to be confused about their voting options and how to properly mark the proxy cards to accurately reflect their choices, as noted by some commenters.[254] This may give rise to minor costs to some shareholders in contested elections, if it increases the time required by these shareholders to mark and submit a proxy card. It may also increase the risk that some shareholders submit proxy cards that do not accurately reflect their intentions or that could be invalidated because they are improperly marked. However, we believe that the risk of any such confusion will be mitigated by the presentation and formatting requirements of the final amendments, as discussed in Section IV.C.5.b below.

Finally, to the extent shareholders currently erroneously believe they can vote for a mix of nominees from the competing slates by using both the registrant's and the dissident's card, universal proxies are likely to mitigate any such behavior among shareholders.

2. Potential Effects on Costs of Contested Elections

The final amendments may directly impose minor costs on registrants[255] and dissidents that engage in proxy contests, relative to the current costs that these parties bear in proxy contests.[256] The final amendments may also have effects on the expected outcomes of contested elections that could result in either a net increase or net decrease in the total costs that either registrants or dissidents incur in contested elections, primarily because of strategic changes in discretionary solicitation expenditures. The extent and direction of such indirect changes in costs incurred are difficult to predict. We also consider the amendments' cost implications in the context of nominal contests, in which the dissidents incur little more than the basic required costs to pursue a contest, which are currently rare but could become more or less frequent under the final amendments.

a. Typical Proxy Contests

The total cost borne by a registrant or dissident in a typical proxy contest would generally include solicitation costs, such as basic proxy distribution and postage costs, expenditures on proxy solicitors, attorneys and public relations advisors, and any time spent by the parties or their staff on outreach efforts. The total cost to registrants would also reflect items such as any additional time spent by staff on determining and implementing a strategy in response to the contest and any costs of revising their proxy materials given the proxy contest. The total cost to dissidents would also reflect time spent by the dissident to pursue a contest, the cost to seek nominees and gain their consent to be nominated, and the cost of drafting a preliminary and definitive proxy statement and undergoing the staff's review and comment process for those filings. These total costs are difficult to estimate because the components of these costs (other than estimated solicitation expenditures) are not specifically required to be disclosed and may vary significantly across contests. However, we note that many of the components of these costs are not likely to be affected by the final amendments. In much of the discussion that follows, we focus primarily on solicitation costs because we believe that these costs are most likely to be affected by the final amendments.

We first consider the direct cost implications of the final amendments. As discussed in more detail in the Proposing Release,[257] we do not expect the solicitation requirement to impose a large incremental cost burden on dissidents in typical proxy contests in which the dissident engages in substantial solicitation efforts. We continue to expect this even though the final rule, in a modification of the proposed rule, raises the solicitation threshold from a majority of the voting power to 67% of the voting power. Our continued expectation is based on staff analysis of data that show most dissidents in director election contests currently solicit at least 67% of the voting power even in the absence of any solicitation requirement.[258] Therefore, in the vast majority of cases, we expect dissidents that would have engaged in proxy contests even in the absence of the final amendments not to bear any incremental direct costs due to the solicitation requirement. Similarly, for dissidents that newly decide to engage in a typical proxy contest (as opposed to a nominal contest) as a result of the final amendments, we do not expect the solicitation requirement to change the costs that they would expect to bear relative to the costs of any other typical proxy contest.[259]

In the infrequent cases in which dissidents in a typical proxy contest may currently not solicit shareholders holding 67% of the voting power, dissidents are still likely to solicit shareholders holding a significant proportion of these shares to have a chance of winning any board seats.[260] In addition, the number of accounts required to reach the minimum

holding a number of shares of the registrant that exceeded a minimum threshold of shares were subject to solicitation by the dissident.

[252] Retail shareholders vote 28% of their shares on average, though their participation rate could be higher in the case of a contested election, because of factors such as increased media coverage, expanded outreach efforts, and greater shareholder interest in the contest. *See supra* Section IV.B.1.a.

[253] *See infra* Sections IV.C.3 and IV.C.4.

[254] *See, e.g.,* letters from BR; Broadridge Financial Solutions, Inc.; Society.

[255] Note that costs on registrants are borne by the registrants' investors.

[256] The potential direct cost savings resulting from the final amendments for certain shareholders are discussed in Section IV.C.1 *supra.*

[257] *See* Section IV.D.2.a of the Proposing Release.

[258] In particular, as noted above, all dissidents solicited a number of shareholders that exceeded the 67% threshold of shares entitled to vote in a sample of 31 recent proxy contests. *See supra* notes 220 and 223 and accompanying text. In addition, data provided by a proxy services provider for an earlier sample of 35 proxy contests from June 30, 2015 through April 15, 2016, which we used in the economic analysis in the Proposing Release, show that only two dissidents (around 6% of this sample) solicited less than 67% of the shares entitled to vote in elections.

[259] The median total solicitation cost was approximately $750,000 for dissidents initiating contests in years 2017–2020. *See supra* Section IV.B.2.b.

[260] Based on data provided by a proxy services provider for a sample of 35 proxy contests from June 30, 2015 through April 15, 2016, the two dissidents that solicited less than 67% of shares entitled to vote solicited accounts representing 31.5% and 60% of the shares, respectively.

solicitation requirement in typical contests is generally a small fraction of the total accounts outstanding. For example, within a sample of recent proxy contests, we estimate the number of accounts that one would have had to solicit to meet the 67% minimum solicitation requirement ranges from about 0.1% to 13% of the outstanding shareholder accounts, with the median number of accounts required equaling about 1.4% of the total shareholder accounts.[261] Based on our sample, we expect that the incremental cost to a dissident currently soliciting less than the required 67% of the voting power will be minor relative to the total costs incurred by dissidents in typical proxy contests. However, because of the increase in the minimum solicitation requirement compared to the proposal, any such incremental costs will be larger under the final amendments compared to what they would have been under the proposed majority of the voting power requirement.

Specifically, in the infrequent case in which a dissident would otherwise have solicited shareholders representing a substantial fraction, but not 67%, of the voting power, we estimate that such a dissident would bear an incremental cost of approximately $5,400, if using the least expensive approach,[262] to expand solicitation to meet the minimum 67% solicitation requirement.[263] This estimated incremental cost is larger than the $1,000 incremental cost we estimated in the Proposing Release for dissidents not meeting the proposed majority solicitation requirement. However, it is still minor compared to the median total solicitation expenses estimated for dissidents in director election contests, representing less than one percent of the median total solicitation cost reported in recent proxy statements by dissidents (which may include expenditures for proxy solicitors, attorneys, and public relations advisors as well as the more basic proxy distribution fees and postage costs).[264] The level of any such incremental cost will be driven by any shortfall in the number of shareholders that would otherwise be solicited compared to the number that will be required to be solicited to meet the 67% voting threshold. Factors that may affect this shortfall include the size of the dissident's own voting stake in the registrant and the demographics of the shareholder base, such as whether share ownership is widely dispersed or more concentrated in a given registrant.

It is possible dissidents in future typical contests could target companies more similar to the general population of registrants rather than the type of target companies we have observed in recent contests. Based on aggregated data provided by a proxy services provider for more than 5,000 operating companies holding shareholder meetings from July 1, 2018 through June 30, 2019, we have information on the average distribution of shares by account size within four different size (in terms of market capitalization) categories of registrants. Using this data, we estimate that in the broader population of operating companies, the average fraction of accounts needed to be solicited to meet the minimum requirement ranges from approximately 0.2% for companies with more than $10 billion in market capitalization to approximately 1% for companies with less than $300 million in market capitalization. These estimated fractions fall within the range of the observed solicited fractions of accounts in the sample of recent proxy contests, which further supports our expectation that the solicitation requirement is unlikely to impose a large incremental cost burden on dissidents in typical proxy contests in which the dissident engages in substantial solicitation efforts.

Registrants may also incur minor incremental costs in typical proxy contests as a direct result of the final amendments to implement the required changes to their proxy cards. For example, under the final amendments, registrants must list dissident nominees on their proxy cards and provide disclosure about the consequences of voting for a greater or lesser number of nominees than available director positions. In addition, both registrants and dissidents may incur costs to make additional changes to their proxy statements in reaction to the final amendments, such as additional disclosures urging shareholders not to support their opponent's candidates using their card and expressing their views as to the importance of a unified or a mixed board. These costs are expected to be minimal in comparison to the total costs that registrants and dissidents bear in a typical proxy contest.[265]

We next consider indirect effects of the final amendments on the costs of proxy contests. As noted in the Proposing Release, for both registrants and dissidents in typical proxy contests, other effects of the final amendments have the potential to result in more significant changes in costs than the effects related to revising proxy materials or the solicitation requirement. This is because the greatest potential impact on the cost of proxy contests is likely related to strategic increases or decreases in discretionary solicitation efforts in response to any changes that the final amendments may bring about in the (actual or perceived)

[261] Based on industry data provided by a proxy services provider for a sample of 31 proxy contests from July 1, 2018 through June 30, 2019.

[262] As in the Proposing Release, staff assumed that the dissident would use the least expensive approach (*i.e.,* notice and access delivery) to solicit additional accounts given that the dissident would not have chosen to solicit these accounts but for the proposed minimum solicitation requirement. To the extent that dissidents were to use an approach other than the least expensive approach to solicit additional shareholders to meet this requirement, their incremental costs would likely be higher than estimated here. Such approaches may include using full set rather than notice and access delivery, soliciting more than the minimum required number of shareholders, or incurring additional solicitation expenditures on phone calls or other forms of outreach. It is difficult to estimate how much more these approaches would cost than the least expensive approach because of the variety of approaches that could be used and because of the degree of variation in expenses, such as postage and printing costs, that would depend on the total size of the dissident's proxy materials.

[263] This estimate was derived by the staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. In particular, staff based this estimate on the two cases out of the 35 contests from June 30, 2015 through April 15, 2016 for which information was provided in which less than 67% of the shares eligible to vote were solicited by the dissident. The required increase in expenses to solicit 67% of the shares eligible to vote was estimated based on the number of additional accounts that would have to be solicited and the applicable fees under NYSE Rule 451 and postage costs for notice and access delivery. The staff also used the provided data on the proxy contests to estimate the increase in the number of banks or brokers considered ''nominees'' under NYSE Rule 451 that might be involved at the higher solicitation level. The estimated average incremental solicitation cost of approximately $5,400 includes nominee coordination fees of $22 for each of the additional nominees expected to be involved, plus basic processing fees, notice and access fees, preference management fees, and postage totaling $1.57 (for suppressed accounts, such as those that have affirmatively consented to electronic delivery) to $1.80 (for other accounts) per additional account to be solicited. Staff assumed that half of the additional accounts to be solicited are suppressed and that none of these accounts requested full set delivery by prior consent or upon receipt of the notice (because such delivery requirements may apply to only a small fraction of accounts and are not expected to significantly affect the overall estimate of costs). Additional notice and access fees of $0.25 per account were assumed to be required for each account that was solicited prior to increasing the level of solicitation because of the use of notice and access delivery for some accounts. Given the number of accounts involved, no additional intermediary unit fees were expected to apply. This estimate does not include printing costs for the notice, for which we do not have relevant data to make an estimate.

[264] The median total solicitation cost reported in proxy statements by dissidents in proxy contests in years 2017–2020 is approximately $750,000. *See supra* Section IV.B.2.b.

[265] *See infra* Section V for estimates for purposes of the Paperwork Reduction Act of 1995 of the incremental burden that may be required to prepare proxy materials under the final amendments.

likelihood of the different potential outcomes of the contest. Changes in discretionary solicitation efforts may include increases or decreases in expenditures on proxy solicitors or the degree of outreach through phone calls or mailings to convince shareholders to vote for a party's candidates. In particular, while we estimate that the median total solicitation cost for dissidents was approximately $750,000, we estimate that the median basic cost of soliciting shareholders, namely the proxy distribution fees and postage costs for the first mailing, was approximately $14,000.[266] The large expenditures on solicitation beyond the basic costs of soliciting shareholders (an estimated median incremental expenditure of over $736,000), demonstrate the potential for substantial increases or decreases in costs if a party were to change its approach to discretionary solicitation activities. However, it is difficult to predict the extent or direction of this potential effect because any changes in discretionary solicitation expenditures are highly dependent on the particular situation and the parties' own views as to how the final amendments would affect their likelihood of gaining or retaining seats and the potential impact of solicitation efforts.[267]

For example, registrants that expect that a universal proxy may otherwise result in more dissident nominees being elected may incur additional costs to increase outreach to shareholders in an effort to limit support for dissident nominees. Similarly, dissidents may increase solicitation expenditures in cases in which they expect the use of universal proxies and any corresponding increase in split-ticket voting to result in more registrant nominees retaining seats than otherwise expected. At the same time, registrants or dissidents may reduce solicitation expenditures in cases in which they believe that any increased split-ticket voting related to universal proxies would result on average in more support for their own nominees, given that they may therefore be able to achieve the same expected outcome at a lower cost than in the absence of universal proxies.[268] They may also reduce their expenditure if the use of universal proxies is more likely to lead to a less consequential outcome (for example, an expected mixed-board outcome instead of an expected change in majority control), or if the expenditure were less likely to change that outcome than under the current rules.

Supporting the possibility of no change in discretionary expenses at all, one commenter expressed doubt that dissidents or registrants will materially alter solicitation expenditures under the amendments, with the argument that proxy fights already put a premium on each side getting its message out to investors and that letting shareholders vote by proxy for their preferred mix of candidates will not alter this equation.[269]

b. Nominal Proxy Contests

The final amendments may also have implications for nominal contests, in which the dissidents incur little more than the basic required costs to pursue a contest by refraining from material solicitation efforts, such as arranging for full set delivery, use of a proxy solicitor, and other outreach. As discussed in the Proposing Release, despite the fact that there may be a low chance of succeeding in obtaining a board seat if a dissident does not undertake substantial solicitation efforts as it would in a typical proxy contest, dissidents may nevertheless choose to initiate nominal contests to pursue goals other than changes in board composition. Such contests are currently rare[270] but could become more or less attractive as a result of the final amendments, as discussed in Section IV.C.4.b below.

A dissident engaging in a nominal proxy contest currently must bear the cost of drafting a preliminary proxy statement and undergoing the staff's review and comment process for that filing. Under the final amendments, such a dissident would also be required to meet the notice requirements and bear the cost of meeting the solicitation requirements of the final amendments. Using aggregated data on average share account distributions by account size for registrants in four different size (market capitalization) categories,[271] we estimate the average cost of using the least expensive approach[272] to meet the 67% minimum solicitation requirement through an intermediary for each of these categories of registrants.[273] Specifically, we estimate that the average cost for a dissident to meet the solicitation requirement is approximately $5,300 at companies with less than $300 million in market capitalization, approximately $5,800 at companies with between $300 million and $2 billion in market capitalization,

[266] Our estimate of total solicitation costs is based on costs reported in proxy statements in calendar years 2017–2020. *See supra* Section IV.B.2.b. Our estimate of proxy distribution fees and postage costs is based on industry data provided by a proxy services provider for a sample of 31 proxy contests from July 1, 2018 through June 30, 2019, and excludes dissident printing costs (for which we do not have relevant data to make an estimate).

[267] Effects on strategic discretionary expenditures, whether increases or decreases, are more likely in the case of what would otherwise be close contests. We estimate that approximately 24% of proxy contests that went to a vote in 2017–2020 were close contests, as defined in *supra* Section IV.B.2.c.

[268] That said, such registrants or dissidents could alternatively decide to increase solicitation expenditures relative to what they would otherwise have spent if they think that they may actually be able to gain or retain more seats than would otherwise have been feasible.

[269] *See* letter from CII dated Dec. 28, 2016.

[270] Based on staff experience. *See supra* Section IV.B.2.b.

[271] Based on aggregated industry data provided by a proxy services provider for more than 5,000 operating companies holding shareholder meetings from July 1, 2018 through June 30, 2019. The four different categories for which we have data on operating companies' average distribution of shares are: (i) Less than $300 million in market capitalization, (ii) between $300 million and $2 billion, (iii) between $2 billion and $10 billion, and (iv) above $10 billion.

[272] *See supra* note 262.

[273] The cost estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. The required cost to meet the proposed solicitation requirement was estimated based on the number of accounts that would have to be solicited on average at a registrant in each of four market capitalization categories and the applicable fees under NYSE Rule 451 and postage costs for notice and access delivery. Specifically, industry data provided by a proxy services provider indicates that to reach 67% of the voting power a dissident would have to solicit on average approximately 46 accounts at companies with less than $300 million in market capitalization, approximately 88 accounts at companies with between $300 million and $2 billion in market capitalization, approximately 147 accounts at companies with between $2 billion and $10 billion in market capitalization, and approximately 529 accounts at companies with market capitalization above $10 billion. (*See supra* Section IV.B.1.a for statistics on average total number of accounts in each respective category.) Staff also estimated that the number of brokers and banks involved for the purpose of determination of the nominee coordination fee ranges from 12 for the smallest category to 176 nominees for the largest category of registrants. The estimated solicitation costs ranging from $5,300 to $9,800 includes intermediary unit fees, which apply with a minimum of $5,000, plus nominee coordination fees of $22 per bank or broker considered a ''nominee'' under NYSE Rule 451, plus basic processing fees, notice and access fees, preference management fees, and postage totaling $1.57 (for suppressed accounts, such as those that have affirmatively consented to electronic delivery) to $1.80 (for other accounts) per account. Staff assumed that half of the accounts in question are suppressed and that none of these accounts requested full set delivery by prior consent or upon receipt of the notice (because such delivery requirements may apply to only a small fraction of accounts and are not expected to significantly affect the overall estimate of costs). This estimate does not include printing costs for the notice, for which we do not have relevant data to make an estimate. Note that an individual shareholder may have more than one account, so the number of beneficial shareholders likely is lower than the number of beneficial shareholder accounts. For the purpose of estimating costs related to distribution of proxy materials, the number of accounts is the more relevant number because dissemination costs such as intermediary and processing fees apply on a per account basis per NYSE Rule 451.

approximately $6,300 at companies with between $2 billion and $10 billion in market capitalization, and approximately $9,800 at companies with market capitalization above $10 billion.[274] These estimated average costs are significantly less than the average total solicitation expenses incurred by a dissident in a typical proxy contest. As noted above in Section IV.B.2.b, reported proxy solicitation expenses for dissidents in recent contests range from $20,000 to $25 million, with an average (median) of approximately $1.8 million ($750,000). These expenses substantially exceed the estimated cost of a nominal contest in part because a dissident in a typical proxy contest would generally incur higher proxy dissemination costs through the use of full set delivery and the solicitation of a larger fraction of the shareholders entitled to vote, but also because of substantial additional expenditures on solicitation beyond the cost of proxy dissemination, such as the expense of hiring a proxy solicitor to perform additional outreach.

The basic required cost to contest an election at a given registrant may also be affected by the dissident's own voting stake in the registrant and the characteristics of the shareholder base, such as whether share ownership is widely dispersed or more concentrated in a given registrant. In particular, these costs may be substantially lower in cases where a dissident can meet the solicitation requirement by disseminating materials on its own, without hiring a proxy services provider or similar intermediary, as in the case of a registrant with a very concentrated shareholder base and majority owners that are known and easily contacted. By contrast, these costs are likely to be substantially higher, for example, at larger registrants with highly dispersed ownership where the total number of shareholder accounts that will need to be solicited to reach at least 67% of the voting power can be very high.

Some commenters raised concerns that mandated use of universal proxy would increase the number of proxy contests and thereby expose more registrants to costly distraction.[275] In the Proposing Release we acknowledged that the mandated use of universal proxy may result in an increased incidence of nominal contests, and that we expect that registrants that are the subject of such additional contests will bear incremental costs. We continue to expect these costs to be higher than in the case of current nominal contests (for which we believe that the costs borne by registrants are relatively low), but still significantly lower than in the case of a typical proxy contest. In particular, registrants may revise their proxy materials and increase their solicitation expenditures to explain the appearance of the names of dissident nominees on their proxy cards and urge shareholders not to support the dissident's nominees. However, we do not expect solicitation expenditures to rise as much as they would in the average typical proxy contest because the registrant, in its solicitation efforts, would not be competing with a dissident that is spending significant resources on solicitation. For these reasons, we estimate that the cost borne by a registrant facing a nominal proxy contest may be approximately $65,000, based on the lowest incremental solicitation cost reported by registrants in recent proxy contests.[276]

3. Potential Effects on Outcomes of Contested Elections

In addition to reducing costs for certain shareholders who would submit split-ticket votes even in the absence of universal proxies, the mandated use of universal proxies we are adopting may result in additional shareholders submitting split-ticket votes. For those shareholders not solicited by dissidents, to the extent they do not support any of the registrant's nominees, universal proxies may also result in an increase in voting support for some or all of the dissident's nominees, as they will now have the ability to cast their votes for dissident nominees without being directly solicited by dissidents (or needing to make other arrangements to be able to vote for dissident nominees). Such changes in voting behavior could be significant enough to affect election outcomes in the contests that would have occurred even in the absence of the final amendments, as well as to change the incentive to initiate contests.[277] In particular, either more registrant nominees or more dissident nominees might be elected than under the baseline, where vote splitting is harder to achieve and some shareholders do not receive a proxy card that includes the dissident slate. Any resulting changes in board composition or changes in control of the board may result in both benefits and costs for the affected parties. However, these effects are uncertain because it is difficult to predict the extent or direction of any changes in voting behavior as a result of the final amendments and to evaluate whether any resulting changes in board composition will lead to more or less effective board oversight.

There may be elections in which universal proxies will result in changes to the percentage of the vote obtained by each director candidate, but in which the changes in vote totals would not be sufficient to change the ultimate election results. In our assessment this would be the likely outcome for the majority of contested elections that would have taken place in the absence of the final amendments. We estimate that approximately three-quarters of recent contests that went to a vote were not close contests and would require shareholders holding significant voting power (greater than 5%) to change their voting behavior to lead to a different election result.[278] We also note that the voting power represented by shareholders that may potentially change their voting behavior is limited due to the fact that some shareholders, particularly large shareholders, are currently able to send representatives to shareholder meetings or use other mechanisms to implement split-ticket votes when desired. We do not expect the votes submitted by these shareholders to change as a result of the final amendments. The extent to which other shareholders are interested in splitting their tickets or, for those not solicited by dissidents, in voting solely for some or all of the dissident nominees, is unclear, particularly as the option has not generally been available to them (without additional cost) under the current rules.[279]

[274] *Id.*

[275] *See, e.g.,* letters from BR; CCMC; CGCIV.

[276] *See supra* Section IV.B.2.b.

[277] The potential incidence of additional contests that would not have occurred in the absence of the final amendments is discussed in Section IV.C.4 *infra.*

[278] Based on staff review of contested elections initiated in 2017–2020, votes representing greater than 5% of the total outstanding voting power would have to change in order to change the result in about 76% of the elections. Within that 76%, almost two-thirds of the elections would have required a change in votes representing greater than 20% of the outstanding voting power to result in a change in the election outcome.

[279] For example, it has been asserted that retail shareholders, when they vote, tend to support management. *See, e.g.,* Neil Stewart, *Retail Shareholders: Looking out for the Little Guy,* IR Magazine (May 15, 2012), available at *http://www.irmagazine.com/articles/shareholder-targeting-id/18761/retail-shareholders-looking-out-little-guy/* (stating that ''as a rule, retail investors tend to support management''); Mary Ann Cloyd, *How Well Do You Know Your Shareholders?,* Harvard Law School Forum on Corporate Governance and Financial Regulation Blog, June 18, 2013, available at *https://corpgov.law.harvard.edu/2013/06/18/how-well-do-you-know-your-shareholders/* (stating that ''retail shareholders support management's voting recommendations at high rates''). Additionally, a recent study, using proprietary data on retail investors' voting behavior from a proxy services provider, found further evidence on retail investors voting in support of

However, any changes in voting behavior due to universal proxies could affect election outcomes in those contests that would otherwise have been very close contests. We estimate that in the 24% of contests that we consider to be close contests, the director elected with the fewest votes received no more than 13% more votes than the non-elected nominee with the most votes.[280] In such cases, universal proxies may be more likely to affect the election outcome. Close contests may be more likely to occur at registrants with cumulative voting.[281]

A recent study uses an alternative approach to estimate the percentage of contests in which universal proxies may be more likely to affect the election outcome.[282] This study estimates that it is possible that universal proxies would have led to different election outcomes in up to 15% of cases in a sample of proxy contests from 2001 through 2016.[283] This statistic is somewhat lower than our estimate that close contests may represent approximately one-fourth of recent contests, but is also a more direct attempt to estimate how many of the sample contests might have had different outcomes if, hypothetically, universal proxy had been used. However, we note that the study makes several assumptions in arriving at this statistic, and it is unclear whether these assumptions can be relied upon.[284]

To the extent universal proxies lead to changes in election outcomes, it is not clear how this would affect the composition of boards. There may be either more registrant nominees or more dissident nominees elected to boards, or there may be no change, on average, in the types of nominees elected.[285] Also, there may be either fewer changes in control or more changes in control, or there may be the same frequency of changes in control as under the baseline. The impact of forcing shareholders to choose between one proxy card and the other in an election contest depends on the dynamics of the particular contest. On the one hand, where dissatisfaction with current management is greater, shareholders who would otherwise prefer to split their vote may be more likely under the current proxy system to utilize the dissident's card and forego the opportunity to vote for some registrant nominees, to send the message that board change is needed. This choice will no longer be necessary under the final amendments, which may lead to a greater likelihood that one or more registrant nominees retain their seats. On the other hand, there also may be cases in which the registrant nominees would, in the absence of the final amendments, have retained all of their seats. Currently, we observe that registrant nominees retain all of the seats up for election in 62% of the contests that proceed to a vote.[286] In such cases, an increase in split-ticket voting, as well as any incremental votes for the full dissident slate by shareholders not solicited by the dissident, may increase the likelihood of dissident nominees gaining one or more of those seats.

Given some of these possible dynamics, we expect that the election of mixed boards will be somewhat more likely under the final amendments than under the current proxy system. We expect this in particular for typical contests where the dissidents are engaging in meaningful solicitation efforts.[287] By contrast, due to the expected minimal level of solicitation efforts by dissidents in nominal contests, we expect the registrant slate to prevail intact in most such contests. However, we cannot predict whether any increase in mixed boards would be the result of one or more registrant nominees retaining seats when a board composed of only dissident nominees would otherwise have been elected or one or more dissident nominees gaining seats when all registrant nominees would have retained their seats, nor can we predict the magnitude of any increase in the frequency of such mixed board outcomes under the final amendments.[288] Also, it is not necessarily the case that any such changes in outcomes would more accurately reflect shareholder preferences, even though these outcomes may be the product of removing constraints on the combination of nominees that shareholders can vote for, because of limitations in the way that voting rules can communicate preferences.[289]

management. Specifically, the study's analysis suggested that more retail ownership leads to more successful management proposals and fewer successful shareholder proposals in close votes. *See* Alon Brav, Matthew Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting,* J. Fin. Econ (Aug. 2021) (forthcoming). By contrast, a survey of 801 retail investors found that the majority of these retail investors believe activists add long-term value, and may thus be more likely to support activists than generally thought. *See* Brunswick Group, *A look at Retail Investors' Views of Shareholder Activism and Why it Matters* (July 2015), available at *https://www.brunswickgroup.com/media/597919/Brunswick-Group-Retail-Investors-Views-of-Shareholder-Activism-Summary-of-Results.pdf.*

[280] *See supra* Section IV.B.2.c.

[281] Under cumulative voting, each shareholder is generally allowed to cast as many votes as there are nominees and may allocate more than one vote to certain nominees, which may lead to a more concentrated distribution of votes. By contrast, close contests may be relatively less likely at registrants with majority voting standards that do not revert to a plurality standard in the case of a contested election, or with high levels of incumbent executive and director ownership. For example, we estimate that approximately 3% of S&P 1500 registrants have cumulative voting, approximately 6% of S&P 1500 registrants have majority voting standards that do not revert to a plurality standard in a proxy contest, and approximately 3% of registrants have incumbent executives and directors who together own a majority of the outstanding shares. *See supra* Section IV.B.1.

[282] *See* Hirst Study.

[283] *See* Hirst Study, at 488 (finding that 40 out of 269 proxy contests examined may have had outcomes that were distorted as a result of barriers to split-ticket voting).

[284] For example, the estimates in this study are based on an assumption that facilitating split-ticket voting through the availability of universal proxies could result only in changes in votes that were otherwise marked as ''withheld'' from a candidate, while votes ''for'' any candidate would be assumed not to change. Also, the study assumes that the degree of increase in ''for'' votes for any given candidate upon facilitating split-ticket voting would be limited to the number of votes withheld from a single opposing candidate, while votes withheld from a different opposing candidate would be assumed not to switch to be in favor of this candidate. For the study's own discussion of the validity and reliability of these assumptions, *see* Hirst Study, at 488. We are unable to test independently the reliability of these assumptions because we do not have data that would allow us to predict how voting behavior might change with the availability of a universal proxy.

[285] One study finds no evidence that universal proxies are likely to favor dissident nominees; if anything the evidence suggests that the opposite may be the case. *See* Hirst Study. However, this conclusion is based on several critical assumptions about how shareholder behavior may change upon the availability of universal proxy, and we are unable to test the reliability of these assumptions. *See supra* note 284.

[286] *See supra* Section IV.B.2.c.

[287] We estimate that approximately 38% of recent contests that proceeded to a vote resulted in a mixed board being elected. *Id.*

[288] One study questions whether universal proxies would result in a substantial increase in mixed board outcomes, based on an analysis indicating that mixed board outcomes could increase by no more than approximately 3% of the contests studied. *See* Hirst Study. However, this analysis and conclusion are based on several critical assumptions about how shareholder behavior may change upon the availability of universal proxies, and we are unable to test the reliability of these assumptions. *See supra* note 284.

[289] For example, consider a registrant with 100 voting shareholders, three director seats up for election, and a dissident with two nominees. Assume that 54 of the shareholders prefer to elect the dissident nominees but are indifferent about which registrant nominee retains the third seat. On a universal proxy, each of these shareholders therefore votes for one registrant nominee, with equal probability across the three registrant nominees. The remaining 46 prefer the full registrant slate. In this case, with a universal proxy, 54 votes would be earned by each of the dissident nominees, but 64 votes (46 plus one-third of 54 votes) would be earned by each of the registrant nominees, leading to the registrant slate winning the election even though a majority of shareholders prefer that the dissidents gain two seats. *See also* letter from CII dated Nov. 8, 2018 (providing

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Universal proxies may therefore result in either an increase or decrease in changes in control of a board, and in either dissidents or management winning more seats on the board, or a change in voting percentages without a change in the board composition. We expect that dissidents and registrants will take these potential impacts into consideration in their approach to potential proxy contests. For example, as discussed in more detail in the following section, if the parties to a contest anticipate that changes in voting behavior associated with universal proxies may change the number of seats that they expect to win, these expectations may affect the likelihood that they enter into a settlement agreement that results in changes to the board or other concessions. Such changes to board composition and concessions may either enhance or reduce, or have no significant effect on, the efficiency and the competitiveness of registrants.

It is also possible that parties will take measures to reduce the likelihood of changes in election outcomes. For example, proxy statements and other related communications could include additional disclosures intended to deter shareholders from voting split-tickets, such as emphasizing the importance of a unified board and clarifying whether some or all of one party's nominees might not agree to serve if their party does not hold a majority of board seats. Such disclosures might reduce the likelihood of split-ticket voting and limit any potential increase in mixed boards. Another potential tactical response may involve the adoption by registrants of additional defenses to shareholder interventions. For example, registrants might adopt director qualification bylaws or might limit the indemnification or committee membership of dissident-nominated directors.[290] Such changes could limit the likelihood of dissident nominees being elected or limit their impact if they are elected. Similarly, if dissidents anticipate that the final amendments could result in fewer dissident nominees being elected, they may choose to rely more heavily on other types of interventions, such as soliciting consents to replace some board members with their own nominees at a special meeting. Also, dissidents interested in minority representation may nonetheless choose to run longer slates of candidates, to the extent it could increase the likelihood that at least some of their nominees are elected.

While the measures discussed above would serve to blunt the effect of the final amendments on election outcomes, the effect of other potential responses may serve to magnify these effects. For example, the parties to a contested election may change what they spend on solicitation. Some parties may increase these expenditures to further capitalize on an advantage that they anticipate the final amendments would give them, or to mitigate a disadvantage they perceive. If so, that may result in a greater likelihood of the parties' candidates being selected.

The composition of boards may also be affected by changes in the set of potential nominees that may result from effects that the final amendments could have on the incentives of directors. As discussed above, reputational concerns may be an important consideration for directors and potential directors, and research has found that proxy contests may have an adverse effect on a director's reputation.[291] For this reason, some potential directors may be relatively less willing to be nominated if they believe that universal proxies would reduce the likelihood that they are elected to a seat or retain their seat on a board. While we do not have specific data that suggests the final amendments would result in an increase in the reluctance of directors to serve, and it is unclear whether any such reluctance would be more likely to affect more qualified or less qualified candidates, any incremental increase in the reluctance of directors to serve may affect the ability of registrants to recruit individuals with the different skill sets needed to compose an effective board.

The effects of any changes in election outcomes on board effectiveness are difficult to predict. On the one hand, if more dissident nominees are elected or dissidents are more likely to gain control, it could result in greater efficiency and competitiveness to the extent dissident-nominated directors may be more effective monitors.[292] On the other hand, if more registrant nominees retain their seats or are more likely to retain control, the board may be better able to focus on long-term value creation, because a lower risk of board turnover may reduce the risk that directors unduly focus on short-term metrics.[293] Also, a lower chance of changes in control may reduce the risk that expensive change in control provisions in debt covenants and other material contracts and agreements are triggered.[294] Universal proxies may lead to more mixed boards with directors from both parties than under the current proxy system. Mixed boards may increase the effectiveness of boards, such as through a reduction of ''groupthink'' and benefits stemming from inclusion of directors with diverse backgrounds,[295] particularly because

another hypothetical example that shows how voting outcomes may depart from shareholder preferences when universal proxy is used in combination with the dissident nominating a short slate). For further discussion of the limitations of voting rules, *see, e.g.,* Kenneth Arrow, *Social Choice and Individual Values* (1st ed. 1951).

[290] *See, e.g.,* J.W. Verret, *Defending Against Shareholder Proxy Access: Delaware's Future Reviewing Company Defenses in the Era of Dodd-Frank,* 36 J. Corp. Law 391, 404–06 (2011); Matthew D. Cain, Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *How Corporate Governance Is Made: The Case of the Golden Leash,* 164 U. Pa. L. Rev. 649, 671 –678 (2016).

[291] *See supra* Section IV.B.1.d.

[292] *See, e.g.,* Jun-Koo Kang, Hyemin Kim, Jungmin Kim, and Angie Low, *Activist-appointed Directors,* J. Fin. Quant. Anal. (2020) (forthcoming), available at SSRN: *https://ssrn.com/abstract=3380837* (retrieved from SSRN Elsevier database) or *http://dx.doi.org/10.2139/ssrn.3380837* (finding that companies appointing independent directors nominated by activists, either through contests or negotiations, experience a larger value increase than companies appointing other directors, and that the increase in value is higher among companies with greater monitoring needs and entrenched boards); Ian Gow, Sa-Pyung Sean Shin & Suraj Srinivasan, *Activist Directors: Determinants and Consequences,* Harv. Bus. Sch. Working Paper No. 14–120 (June 2014), available at *http://www.hbs.edu/faculty/Pages/item.aspx?num=47599* (finding that activist interventions that result in new directors being appointed to the board are associated with significant strategic and operational actions by firms, as well as with positive stock reactions and improved operating performance).

[293] *See, e.g.,* Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Long-Term Firm Value, Revisited,* 128 J. Fin. Econ 422 (Nov. 2017) (suggesting that a greater likelihood of longer director tenure can serve as a longer-term commitment device with positive effects on longer-term value creation).

[294] For example, one study found in its sample of debt issues that over half of the debt issued in 2012 contained change in control covenants that gave bondholders an option to require the issuer to offer to purchase all of the bonds (typically at 101% of their par value) if, at any time, the majority of the board of directors ceased to be those who were directors at the time of issuance or those whose election was approved by a majority of the continuing directors. *See* Frederick Bereskin & Helen Bowers, *Poison Puts: Corporate Governance Structure or Mechanism for Shifting Risk?,* working paper (Sept. 8, 2015), available at *https://www.weinberg.udel.edu/IIRCiResearchDocuments/2015/09/FINAL-Poison-Puts-Research-Sept-2015.pdf.* Triggering such covenants, often referred to as ''proxy puts,'' can result in companies repurchasing their own debt at a loss as well as having to incur expenses to refinance with a new debt issue. Such covenants are more binding when they are of the ''dead hand'' variety, which prevents the board from approving dissident-nominated directors in order to avoid triggering the covenant. *See* F. William Reindel, *Dead Hand Proxy Puts—What You Need To Know,* Harvard Law School Forum on Corporate Governance and Financial Regulation Blog, June 10, 2015, available at *https://corpgov.law.harvard.edu/2015/06/10/dead-hand-proxy-puts-what-you-need-to-know/.*

[295] *See, e.g.,* Jeffrey Coles, Naveen Daniel & Lalitha Naveen, *Director Overlap: Groupthink versus Teamwork,* working paper (2020), available at *https://dx.doi.org/10.2139/ssrn.3650609*

shareholders voting on universal proxies would have the ability to vote for the combination of directors that they believe provides the best mix of backgrounds given the specific circumstances of the registrant.[296] However, mixed boards may also lead to more frequent internal conflicts and result in less efficient decision-making within boards,[297] as also argued by some commenters.[298]

4. Potential Effects on Incidence and Perceived Threat of Contested Elections

As discussed in Sections IV.C.2 and IV.C.3 above, the effects of the final amendments on the outcomes and costs to registrants and dissidents of contested elections are uncertain, but could be significant. In this section, we consider how any such effects of the final amendments may change the incentives of dissidents to initiate proxy contests and the manner in which registrants react to the possibility of a contested election (the perceived ''threat'' of a contest), even in the absence of a contest.

We first consider the potential impact of the final rule on the incidence or perceived threat of typical proxy contests, in which the dissident expends significant resources on solicitation. We then consider the impact on the incidence or perceived threat of nominal contests, in which dissidents, taking advantage of the mandatory use of universal proxies, expend significantly fewer resources than in a typical proxy contest.[299] Any changes in the incidence of contested elections of these different types, or, even in the absence of a contest, in managerial decision-making or the relationship between shareholders and management as a result of a change in the perceived threat of such contests, may result in costs and benefits for shareholders, registrants, and dissidents.

Several commenters argued that mandating the use of universal proxy cards will likely increase the frequency of proxy contests, thereby increasing costs for registrants and distracting their managers.[300] By contrast, one commenter argued that mandating the use of universal proxy cards is unlikely to increase the frequency of contested elections, stating that ''[s]hareholders invest significant resources in running a proxy contest; the decision to proceed generally is driven by the shareholder's thesis regarding the economics of the engagement and likelihood of success.'' [301] Other commenters argued the effect on the number of contests is difficult to predict.[302] We disagree with the commenters arguing that contests are likely to increase due to the amendments; instead, we generally agree with the commenters arguing that any effects on the number of contests is hard to predict. In addition, although we to some extent agree with the commenters that argue that the costs to registrants will increase if the number of contests increases, we recognize that there could be benefits as well, which we discuss in more detail below. Overall, the effects on costs and benefits for all affected parties due to any changes in the incidence or perceived threat of contests are uncertain, as the extent and direction of the effects of the final amendments on the outcomes and costs of contested elections are unclear, both because it is difficult to predict how different parties will respond to such effects, and because it is difficult to evaluate whether changes in the incidence or perceived threat of contests would have positive or negative effects on board or registrant performance.

a. Typical Proxy Contests

Effects Related to Anticipated Changes in Outcomes

Any effects on the expected outcomes of typical proxy contests may affect the incidence of such contests as well as the likelihood that a registrant makes changes (whether in board composition or with respect to other decisions) even in the absence of actual contests. The likely effects of universal proxies on the outcome of a typical contest depend on the dynamics of the particular contest. Thus, it is not clear whether, on average, the final amendments would increase or decrease the likelihood of changes in control or the number of board seats won by either party.

On the one hand, a dissident who expects to gain more seats under the final amendments than under the baseline may have an increased incentive to initiate a typical proxy contest. This would particularly be the case for a dissident that expects a greater likelihood of gaining control of the board, and for whom majority control of the board would be required to institute the changes the dissident desires. On the other hand, a dissident who expects, under the final amendments, to gain fewer seats or face a lower likelihood of gaining control than under the baseline may have a decreased incentive to initiate a typical contest.

If, under the final amendments, a registrant is expected to face a higher risk of losing seats or control of the board to dissident nominees, it is likely that a potential dissident could exercise greater influence over that registrant. Conversely, it is likely that the influence of potential dissidents would be reduced where a lower risk of losing seats or control to dissident nominees is expected under the final amendments. These changes in influence may derive from the outcomes of election contests or from negotiations with registrants in the course of, or in the absence of, a contest. In particular, registrants facing a greater likelihood of contests, or a higher chance of losing seats (or control) if a contest were initiated, may be more likely to enter into a settlement agreement with the dissident and may also be more likely to concede at earlier stages of engagement or to make changes in response to alternative interventions (such as ''vote no'' campaigns).[303] Registrants facing a reduced likelihood of contests or a lower chance of losing seats (or control) if a contest were initiated may be less likely to enter into settlement agreements, to engage in negotiations at earlier stages, or to make

(retrieved from SSRN Elsevier database); David Carter, Betty Simkins & Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value,* 38 Fin. Rev. 33 (2003); Gennaro Bernile, Vineet Bhagwat & Scott Yonker, *Board diversity, firm risk, and corporate policies,* 127 J. Fin. Econ. 588 (2018).

[296] *See* letter from CII dated Dec. 28, 2016.

[297] *See, e.g.,* Anup Agrawal & Mark Chen, *Boardroom Brawls: An Empirical Analysis of Disputes Involving Directors,* 7 Quart. J. Fin. 1 (2017) (studying boardroom disputes that are disclosed upon directors resigning or declining to stand for re-election and finding that directors who are likely to be more independent of management are more likely to be involved in the dispute); Jason Roderick Donaldson, Nadya Malenko & Giorgia Piacentino, *Deadlock on the Board,* 33 Rev. Fin. Stud.4445 (October 2020) (showing that board diversity can exacerbate deadlock because differences in preferences over alternative polices gives directors an incentive to block implementation of alternatives preferred by other directors, to preserve their option to get their preferred alternative implemented in the future).

[298] *See supra* notes 35 and 36 and accompanying text.

[299] We also note that there may be effects on the incidence and perceived threat of ''late-breaking'' proxy contests, or contests initiated close to the meeting date, because of the notice requirement and the proxy statement filing deadline prescribed by the final amendments. These timing requirements and their potential effects are discussed in more detail in Section IV.C.5 *infra.*

[300] *See* letters from BR; CCMC; CGCIV; IBC.

[301] *See* letter from CII dated Dec. 28, 2016.

[302] *See* letters from Trian; Hermes.

[303] *See, e.g.,* Unofficial Transcript of the Proxy Voting Roundtable (Feb. 19, 2015), available at *https://www.sec.gov/spotlight/proxy-voting-roundtable/proxy-voting-roundtable-transcript.txt* (''Roundtable Transcript''), comment of Michelle Lowry, Professor, Drexel University, at 60 and Lisa M. Fairfax, Professor, George Washington University Law School, at 48 (noting that universal proxies could facilitate settlements with or accommodations to dissidents before a contest arose).

changes in response to alternative interventions.

Thus, it is likely that any changes in expectations regarding the outcome of a potential contest would affect the degree of a dissident's influence relative to that of a registrant's incumbent board and management. It is difficult to generalize about the effects of the final amendments as they are very likely to depend on the dynamics of a particular contest (or potential contest). Also, it is not clear whether the actual incidence of contested elections would increase or decrease, because any change in a dissident's incentive to initiate contests may be accompanied by a change in the likelihood that a registrant makes earlier concessions to prevent a disagreement from proceeding to the stage of a proxy contest.

Effects Related to Anticipated Changes in Costs

While it is unclear whether the final amendments are likely to change the expected costs of typical proxy contests to registrants and dissidents, any such changes in the expected costs may also affect the incidence or perceived threat of such contests. In particular, a dissident that expects to achieve a similar outcome at a lower cost may have a greater incentive to initiate a typical proxy contest.[304] Registrants that expect dissidents to face lower costs, or those registrants that expect to bear additional costs in the form of increased solicitation expenditures in a contested election, may have greater incentive to make concessions. By contrast, a dissident that expects to incur additional solicitation expenses to achieve the same outcome may have a lower incentive to initiate a typical proxy contest, while registrants that expect dissidents to face higher costs, or registrants that expect to face lower costs in a contested election, may have a lower incentive to make concessions.

Differential Effects Across Registrants

To the extent that the incidence and perceived threat of typical proxy contests may change, certain registrants may be affected more than others. For example, relatively smaller to midsize registrants may be more affected because they are currently the most likely to be involved in proxy contests.[305] Any marginal changes may therefore have the greatest impact on this group of registrants. However, more significant changes in the nature of proxy contests could also make it more attractive to target types of registrants that were infrequently the subject of proxy contests in the past. For example, to the extent that large registrants may currently be less likely to be targeted because of the greater resources they can expend to counter a dissident's solicitation efforts, a significant decrease in dissidents' expected discretionary solicitation expenditures or a large increase in their likelihood of success could lead to a higher threat or incidence of contests at such registrants.

The governance structures of registrants are also likely to play a role in the impact of the final amendments. On the one hand, registrants with governance characteristics that may increase the potential impact of proxy contests, such as cumulative voting, may be more affected than others.[306] On the other hand, registrants with governance characteristics that make them more difficult to target with certain kinds of election contests, such as those with high incumbent management ownership, may be less affected by the final amendments.[307]

b. Nominal Proxy Contests

The final amendments may also affect the incidence or perceived threat of nominal proxy contests, in which the dissidents incur little more than the basic costs required to engage in a contest and which are currently rare.[308] The nature of nominal proxy contests may be affected by the final amendments in two key ways. First, the solicitation requirement will likely increase the costs to dissidents of pursuing such contests. As discussed above, beyond the minimal costs currently incurred, such dissidents will also have to bear the costs required to meet the minimum solicitation requirement, which we estimate would be on average approximately $5,300 to $9,800 depending on the size of the registrant.[309] This cost could be lower in cases in which the services of an intermediary are not required to meet the solicitation requirement (as in the case of registrants with highly concentrated ownership) or higher at registrants with a more dispersed shareholder base. As discussed above, while this required solicitation cost will be greater than the expenditure currently required in a nominal contest, the costs will remain substantially lower than the solicitation costs dissidents bear in typical proxy contests.[310]

Second, requiring that registrants use universal proxies will, in practice, allow dissidents in nominal contests to put the names of their director candidates in front of all shareholders, via the registrant's proxy card, without additional expense. This change could somewhat increase the likelihood that a dissident in a nominal contest succeeds in gaining seats for their nominees, though, as in the case of current nominal contests, dissidents may have a very limited chance of succeeding in gaining seats if they do not engage in meaningful independent solicitation efforts. Dissidents engaging in a nominal contest will not be required to meet the eligibility criteria that apply to other alternatives that would allow dissidents to include some form of information on the registrant's proxy card, such as the requirements of a proxy access bylaw, where available. Dissidents may therefore consider engaging in a nominal contest when they would not qualify to use alternatives such as proxy access or when these alternatives are not available. However, the information included in the registrant's proxy materials would likely be more limited in the case of a nominal contest (just a list of names and a reference that the dissident's proxy materials are available without cost at the Commission's website) than these other alternatives.

Based on staff experience, we expect that a dissident that solicits holders that represent at least 67% of voting power and files a preliminary and definitive proxy statement, without engaging in any other solicitation efforts, would generally have a very limited chance of having any of its nominees elected to the board despite their names being included on the registrant proxy card. The likelihood that a nominal contest results in dissident nominees winning seats may depend on many factors

[304] It is possible that a significant reduction in the average cost to dissidents in typical proxy contests could have effects that reduce the incentive to initiate some contests. In particular, some studies have found that a high required cost of proxy contests may serve as a credible signal to other shareholders that the value that the dissident's slate of directors can bring to the registrant is high, or else the dissident would not be bearing the cost of a proxy contest. In an environment in which the average cost of a typical proxy contest is very low, the ability of dissidents to get support for their nominees may be decreased, as it may be more difficult and potentially more costly than otherwise for a dissident whose contest has strong merit to differentiate its contest from less worthy contests. *See, e.g.,* John Pound, *Proxy Contests and the Efficiency of Shareholder Oversight,* 20 J. Fin. Econ. 237 (1988); Utpal Bhattacharya, *Communication Costs, Information Acquisition, and Voting Decisions in Proxy Contests,* 10 Rev. Fin. Stud. 1065 (1997).

[305] For example, staff estimates that only nine of the 101 registrants involved in proxy contests initiated in years 2017–2020 were in the S&P 500 index. *See supra* Section IV.B.2.a.

[306] *See supra* note 203.

[307] *See supra* Section IV.B.1.b.

[308] *See supra* Section IV.B.2.b.

[309] *See supra* Section IV.C.2.b.

[310] *Id.*

including the identity of dissident's nominees, their backgrounds and name recognition, the shareholders' level of dissatisfaction with the registrant, and the efforts of the registrant to dissuade shareholders from supporting the dissident's nominees.[311] In general, we expect that engaging in a nominal contest will not be an attractive alternative for most potential dissidents that are truly interested in gaining board representation,[312] particularly if other alternatives are feasible.[313]

As discussed in more detail in the Proposing Release, even if the chance of obtaining board representation through a nominal contest may be low, dissidents may be interested in other possible effects, such as attracting attention to themselves and their agenda.[314] Such attention could be used by the dissident to publicize a desired change or a particular issue,[315] or to encourage management to engage with the dissident. However, it is unclear whether the inclusion of dissident nominees on the registrant's proxy card would significantly increase the publicity surrounding a nominal proxy contest.

It is difficult to say whether and to what extent the possibility of such publicity would lead dissidents to more frequently initiate nominal contests, and similarly, whether the ability of dissidents to run such contests would influence the incentives of management to pursue changes in response to such dissidents. We believe the likelihood of a significant increase in nominal contests will be mitigated by the new costs associated with the minimum solicitation requirement and the current availability to dissidents of other (potentially lower-cost) routes to obtaining publicity.[316] Also, while nominal contests are currently rare, it is also possible that their incidence could decline further under the final amendments given the new costs imposed on such contests. In particular, dissidents that would otherwise pursue nominal contests might consider alternatives that would not trigger the solicitation requirement, such as an exempt solicitation, or could choose not to take any such actions due to the higher costs imposed on nominal contests by the final amendments.

c. Effects of Any Changes in Incidence or Perceived Threat of Proxy Contests

Overall, it is in the incidence or perceived threat of proxy contests, and thus a change in the level of engagement with and the influence of dissidents. However, to the extent that any of these factors is significantly affected, we cannot rule out the possibility that there may be significant effects on the efficiency and competitiveness of registrants. Several commenters expressed concerns that mandating the use of universal proxy cards would increase the number of contests and have a negative impact on the working of boards and managerial decision-making to the detriment of shareholders.[317] We discussed such potential effects in the economic analysis of the Proposing Release and discuss them as well in more detail below.[318] However, we note that while any increase in the incidence or threat of proxy contests would likely increase costs for registrants and take more of registrant management's time and effort, such an increase could still benefit shareholders if the contests (or threat thereof) ultimately result in more effective boards and improved registrant performance. We also discuss the potential for such benefits below.

There is some evidence that proxy contests may be beneficial to shareholders. For example, studies have found proxy contests to be associated with positive share price reactions.[319] In this vein, some observers have argued that the low incidence of proxy contests is due to collective action problems related to the high costs of proxy contests [320] and that a higher rate of proxy contests may be optimal.[321] Any increase in engagement between management, dissidents, and shareholders that may result because of changes in the likelihood of proxy contests, such as discussions at earlier stages of a campaign or reactions to other types of shareholder interventions, could similarly be beneficial. Such engagement may improve the effectiveness of boards, may lead to value-enhancing changes, and may perhaps be a more efficient means to achieve such changes than expensive proxy contests. For example, one study found that an increased likelihood of being targeted with a proxy contest (even if an actual proxy contest does not materialize) is associated with changes in corporate policies that are followed

[311] While the registrant's universal proxy card would permit a vote for dissident nominees, its proxy statement can and likely will include disclosure arguing against such a vote. If the dissident does not counter with positive information about its nominees disseminated in a meaningful way to a significant percentage of shareholders, we expect that the dissident's odds of success in the solicitation will be low.

[312] We note that the Commission's 2007 amendments to the proxy rules allowing notice and access delivery of proxy statements decreased the minimum cost at which a proxy contest could be conducted through potentially reduced mailing costs, but did not seem to cause an increase in contested elections, which may be evidence of the importance of full set delivery and other solicitation expenditures in gathering support for dissident nominees. *See, e.g.,* Fabio Saccone, *E-Proxy Reform, Activism, and the Decline in Retail Shareholder Voting,* The Conference Board Director Notes Working Paper No. DN–021 (Dec. 26, 2010), available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1731362* (retrieved from SSRN Elsevier database). For details on the 2007 amendments to the proxy rules, *see Shareholder Choice Regarding Proxy Materials,* Release No. 34–56135 (July 26, 2007) [72 FR 42222 (Aug. 1, 2007)].

[313] These alternatives may include a typical proxy contest (with additional solicitation expenditures but also, potentially, with a higher chance of success) or use of a proxy access bylaw (if available and if the dissident is eligible to use proxy access). We are unaware of any cases in which such bylaws have been used to nominate directors to date. However, most proxy access bylaws would require a registrant to include information about the dissident nominees and a supporting statement from the dissident in its proxy materials and would not require the dissident to bear the costs and meet the requirements described above. That said, it is possible that dissidents interested in board representation but for whom additional expenditures are not feasible or justified, and for whom proxy access is unavailable, may consider a nominal proxy contest.

[314] *See* Section IV.D.4.b of the Proposing Release.

[315] While the shareholder proposal process may be used to raise some such concerns, and would allow these concerns to be expressed more directly in the registrant's proxy statement, such proposals would also need to meet the requirements of Rule 14a–8. For example, proposals on certain topics, such as those pertaining to ordinary business matters, may be properly excluded by registrants from their proxy materials. *See* 17 CFR 240.14a–8(i)(7).

[316] For example, for a much lower cost, a dissident required to file beneficial ownership reports under Section 13(d) could send a letter to the board detailing its desired changes and file it as an attachment to a Schedule 13D filing, making it available to the public (though, unlike a registrant's universal proxy card, the Schedule 13D filing would not be mailed or otherwise disseminated to shareholders).

[317] *See supra* notes 34–36 and accompanying text.

[318] *See* Section IV.D.4.c of the Proposing Release.

[319] *See, e.g.,* Yair Listokin, *Corporate Voting versus Market Price Setting,* 11 Am. L. & Econ. Rev. 608 (2009) (finding that, in a sample of proxy contests, close dissident victories were related to positive stock price impacts, while close management victories were related to negative stock price impacts); Harold Mulherin & Annette Poulsen, *Proxy Contests and Corporate Change: Implications for Shareholder Wealth,* 47 J. Fin. Econ. 279, 307 (1998) (finding that their sample of proxy contests was associated with shareholder value increases, particularly when the contests led to management turnover or acquisitions) (''Mulherin & Poulsen Study''); Fos Study (finding that the average abnormal returns to target shareholders reach 6.5% around proxy contest announcements). *See also* Matthew Denes, Jonathan M. Karpoff & Victoria McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research,* 44 J. Corp. Fin. 405 (2017).

[320] That is, when a small group of shareholders must bear all of the costs of proxy contests while sharing in only a fraction of any benefits, with other shareholders absorbing the rest, the small group may be discouraged from initiating potentially value-enhancing proxy contests.

[321] *See, e.g.,* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise,* 93 Va. L. Rev. 675, 712 (2007); Bernard S. Black, *Shareholder Passivity Reexamined,* 89 Mich. L. Rev. 520 (1990).

by improved operating performance.[322] In these ways, an increase in the incidence or perceived threat of proxy contests could represent a valuable disciplinary force for some boards.

Conversely, an increase in the incidence and perceived threat of contests could also have a negative impact on the efficiency and competitiveness of registrants. For example, studies have found that proxy contests in which dissidents win one or more seats but there is no change in the incumbent management team and the registrant is not acquired are associated with underperformance in the years after the contest.[323] These results are consistent with the idea that conflicts in the boardroom may have detrimental effects for shareholders. An increase in the perceived threat of proxy contests or in engagement with dissidents could also have negative implications. For example, some studies have found that boards that face a lower threat of being replaced because of poor short-term results may be better able to focus on long-term value creation.[324] Studies have also found that increased dissident influence may be detrimental, to the extent that managers make concessions or policy changes that are value-decreasing in order to deter activists.[325] Thus, in some cases, an increase in the incidence or perceived threat of proxy contests could represent a costly distraction for boards and corporate officers, as also argued by some commenters.[326] However, for the reasons outlined above, we are not able to assess the likelihood and extent of such costly distraction as a result of the final amendments. In addition, two commenters argued that adoption of a mandated universal proxy card could increase the incentive for founders to keep their companies private.[327] Any such increased incentive for companies to stay or go private rather than bear the threat of proxy contests could negatively affect capital formation,[328] but given the overall relatively low annual frequency of director election contests compared to the number of public registrants, we do not think the final amendments are likely to significantly affect the decisions of founders to take their companies public, even if they perceive the mandated use of universal proxies negatively.

Given these competing factors, to the extent there is any change in the incidence and perceived threat of typical proxy contests, the effects are likely to vary from registrant to registrant, and it is difficult to predict the average effects of changes in the nature of proxy contests across all registrants. The possible effects of changes in the incidence or threat of nominal proxy contests are similarly unclear. To the extent that such contests have the potential to affect the outcomes of director elections, the actual incidence or perceived threat of such contests may either increase director discipline or create a distraction for boards, as in the case of typical proxy contests. However, as discussed above, because of the low level of solicitation efforts by dissidents in a nominal contest, we anticipate that these contests will be much less likely to affect the outcomes in director elections compared to typical contests. Nevertheless, such contests may be used to attract attention in the interest of pursuing other changes. In some cases, drawing attention to particular issues in this way could lead to value-enhancing changes. In other cases, dissidents may use such contests to pursue interests that may not be shared by other shareholders, in which case the average shareholder may be unlikely to benefit and yet likely bear the costs of registrants expending additional resources on solicitation in such contests. In these cases, the negotiations resulting from such contests or the perceived threat of such contests could also result in registrants making concessions to dissidents that may not be in the best interest of the average shareholder in order to reduce the costs of contending with such contests.

Finally, the effects of any changes in proxy contests may be affected by managers and market participants altering their behavior in reaction to the final amendments. In particular, changes in the nature of proxy contests may increase or decrease the use of complementary or substitute governance mechanisms.[329] For example, studies have found that a historical increase in proxy contests was associated with a decrease in hostile takeovers, in which an entity acquires control of a company against the wishes of the incumbent board by purchasing its stock, suggesting proxy contests and hostile takeovers may be substitute mechanisms for control challenges.[330] By contrast, activist shareholders with large holdings in a particular registrant (''activist blockholders'') who may be able to directly monitor and communicate with management, may represent a type of governance mechanism that can be a complement to proxy contests.[331] For example, if activist blockholders are present, it may be easier to overcome collective action problems and initiate and win a proxy contest. Thus, any increase in the potential impact of proxy contests may be enhanced by the presence of activist blockholders. At the same time, if the potential impact of proxy contests increases, the incentive of registrants to engage with activist blockholders and make suggested improvements may increase, enhancing the monitoring value of activist blockholders.[332]

Any effects that follow from increasing the incidence or perceived threat of proxy contests may be either mitigated or magnified by indirect effects on these substitute and complementary mechanisms. For example, any increase in the incidence of proxy contests could be offset by reductions in the use of substitute

[322] *See* Fos Study.

[323] *See, e.g.,* Mulherin & Poulsen Study, at 305–08; David Ikenberry & Josef Lakonishok, *Corporate Governance Through the Proxy Contest: Evidence and Implications,* 66 J. of Bus. 405, 424–25 (1993).

[324] *See* Martijn Cremers, Lubomir Litov & Simone Sepe, *Staggered Boards and Long-Term Firm Value, Revisited,* 126 J. Fin. Econ 422 (2017); Martijn Cremers, Erasmo Giambona, Simone Sepe & Ye Wang, *Hedge Fund Activism and Long-Term Firm Value,* 17–20, working paper (Nov. 19, 2015), available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2693231* (retrieved from SSRN Elsevier database).

[325] *See, e.g.,* John Matsusaka & Oguzhan Ozbas, *A Theory of Shareholder Approval and Proposal Rights,* 33 J. Law Econ. Organ. 377 (2017).

[326] *See, e.g.,* letters from CCMC; CGCIV; IBC; Society.

[327] *See* letters from CCMC; CGCIV.

[328] *See, e.g.,* Geoff Colvin, *Going Private: Take this Market and Shove it,* Fortune Magazine (May 29, 2016), available at *http://fortune.com/going-private/* (citing the avoidance of proxy contests as motivation for firms to go private). While it is possible that companies could have some incremental incentive to stay or go private, we believe it is unlikely that the final amendments would result in an increased incentive for registrants to relist or redomicile overseas, given that these changes alone would not be sufficient to avoid being subject to the U.S. proxy rules. For example, foreign issuers may be subject to the U.S. proxy rules unless they qualify as foreign private issuers under 17 CFR 240.3b–4(c) (Exchange Act Rule 3b–4(c)). In particular, a foreign registrant cannot qualify as a foreign private issuer if more than 50% of its securities are held by U.S. residents and at least one of the following applies: (i) A majority of the officers and directors are U.S. citizens or residents; (ii) more than 50% of the issuer's assets are located in the U.S.; or (iii) the issuer's business is principally administered in the U.S. *See* 17 CFR 240.3b–4.

[329] The concepts of complementary and substitute governance mechanisms are discussed in Section IV.B *supra.*

[330] *See, e.g.,* Fos Study.

[331] *See* Section IV.B.1.b for the frequency and size of institutional blockholdings among potentially affected registrants for which this data is available.

[332] For a broader review of issues concerning the role of activist blockholders in corporate governance, *see* Alex Edmans, *Blockholders and Corporate Governance,* 6 Ann. Rev. Fin. Econ. 23 (2014).

mechanisms such as takeovers.[333] Relatedly, two commenters argued that adoption could impede private ordering and frustrate recent efforts by issuers and their shareholders to adopt ''proxy access'' bylaws.[334] We cannot rule out this possibility, but if shareholders view a universal proxy system as such a close substitute to proxy access bylaws that they would disband efforts to pass proxy access bylaws at registrants, it is not apparent that it would come at a loss to shareholders. By contrast, another commenter did not expect such substitution, arguing that a universal proxy requirement would not change the equation for those who may use proxy access bylaws in the future because, in their view, universal proxy simply improves the process when there is a proxy contest with competing proxy cards.[335]

Alternatively, an increase in the incidence or perceived threat of proxy contests could be magnified by complementary mechanisms whose effectiveness and therefore usage may increase (such as by activists being more likely to acquire blockholdings) in an environment in which proxy contests are more frequent. Such interactions may have significant effects on the overall economic effects of the final amendments. However, because so many different governance mechanisms are closely interrelated, it is difficult to predict the extent and impact of such interactions.

5. Specific Implementation Choices

In this section, we discuss, to the extent possible, any costs and benefits specifically attributable to individual aspects of the final amendments. We also discuss significant implementation alternatives and their benefits and costs compared to the amendments.

a. The Short Slate and Bona Fide Nominee Rules

Elimination of the Short Slate Rule

For registrants other than funds, we are eliminating the short slate rule in Rule 14a–4(d)(4), which currently permits a dissident seeking to elect a minority of the board and running a slate of nominees that is less than the number of directors being elected to round out its slate by soliciting authority to also vote for certain registrant nominees. The elimination of the short slate rule will potentially impose costs on certain dissidents. Under the existing proxy rules, dissidents qualifying to use the short slate rule can select the set of registrant nominees that they prefer to round out their slate. Eliminating this rule, and requiring a universal proxy, will take away this choice on the part of the dissident, reducing any related strategic advantage that the dissident may expect to gain, and will instead allow shareholders voting on the dissident proxy card to select the registrant nominees, if any, that they prefer.

We have considered whether, as an alternative to the final amendments, the proxy rules should instead be revised to treat contests that do not involve a potential change in the majority of the board differently from contests in which control of the board is at stake, as in the current short slate rule and as previously recommended by some observers.[336] For example, we have considered an alternative approach that would not require the use of universal proxies in contests that may involve a potential change in a majority of the board. When a dissident is seeking a majority of seats on the board, electing a mixed board where a minority of seats would be held by dissident nominees may be inconsistent with the intentions and goals of both the dissident and the registrant. Not requiring universal proxy cards in such cases could reduce the likelihood of electing a mixed board when such an outcome is undesirable to both parties to the contest and could be disruptive. However, under this alternative, shareholders would continue to have more limited voting options when voting by proxy than when voting in person in contests that involve a potential change in a majority of the board. Furthermore, the risk of electing a mixed board when it would be disruptive or contrary to the goals of both parties to the contest could also be mitigated through disclosure emphasizing the importance of achieving (or retaining) majority control of the board and clarifying the willingness of each nominee to serve in the case control is not achieved.

Modification of the Bona Fide Nominee Rule

We are amending the definition of a bona fide nominee under Rule 14a–4(d)(4) for registrants other than funds to include all director nominees that have consented to being named in any proxy statement, whether that of the registrant or that of a dissident, relating to the registrant's next meeting of shareholders at which directors are to be elected.

The final amendment to the definition of a bona fide nominee will remove the impediment imposed by the current rule to including other parties' nominees on one's own proxy card. We believe that this amendment will, in and of itself, likely impose no direct cost on parties to contested elections because it would not require parties to change their slates of nominees or their proxy materials. However, revising Rule 14a–4(d)(4) is a prerequisite to any rule that would allow or require universal proxies. As such, all of the other costs and benefits discussed above, the details of which depend on the other implementation choices in the final rule, are conditional on this amendment. Additionally, revising Rule 14a–4(d)(4) alone, without the other amendments we are adopting, would permit the optional use of universal proxies, an alternative we discuss below.

Solicitations Without a Competing Slate

Under existing rules, a party may solicit proxies without presenting a competing slate, such as when soliciting proxies against some or all of the registrant nominees (a ''vote no'' campaign) or when soliciting proxies in favor of one or more proposals on matters other than the current election of directors. The final amendment to the bona fide nominee rule would permit, but not require, proponents conducting solicitations without a competing slate to also solicit authority with respect to some or all registrant nominees in their proxy statements and proxy cards. Because the registrant in a contest without competing slates does not need to include the proponent's proposals on its own card, shareholders who are positively inclined to the proponent's proposals (and solicited by the proponent) may be more likely to use the proponent's card if they are also offered the ability to vote on the election of some or all of the director nominees. As a result, the change to the bona fide nominee rule may result in somewhat increased support for proponents in solicitations without a competing slate.

This potential increase in support may increase proponents' incentives to

[333] We note that proxy contests may be a complementary mechanism for certain types of takeovers. In particular, proxy contests can facilitate some hostile takeovers by removing directors who oppose the transaction in question. *See* Mulherin & Poulsen Study, at 309.

[334] *See* letters from CCMC; CGCIV.

[335] *See* letter from CII dated Dec. 28, 2016.

[336] In 2013, the IAC recommended that the Commission consider providing proxy contestants with the option to provide universal proxies in connection with short slate director nominations. At that time, the IAC did not make such a recommendation in the case of elections in which majority control of the board is at stake. *See* Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots (Jul. 25, 2013), available at *https://www.sec.gov/spotlight/investor-advisory-committee-2012/universal-proxy-recommendation-072613.pdf* (''IAC 2013 Recommendation''), at 2.

initiate such campaigns. As in the other contexts discussed above, it is difficult to predict to what extent proponents may increase the incidence of such campaigns, or to what degree the involved parties may react in other ways to the potential for somewhat higher support in solicitations without a competing slate. For example, any resulting increase in the frequency of such campaigns may be partially offset by accompanying changes in incentives for registrants to engage with proponents. Such interventions could also substitute, in some cases, for contested elections. It is unclear whether increased support for, or an increased incidence of, proponent initiatives would generally enhance or detract from the effectiveness of boards and the efficiency and competitiveness of registrants.

Some commenters were concerned about negative unintended consequences from permitting proponents conducting solicitations without a competing slate to include nominees in their proxy statements and proxy cards, and therefore opposed this approach.[337] Two of these commenters in particular argued that the bona fide nominee rule revisions could lead to misleading or confusing proxy materials and adverse impacts on voting results in otherwise uncontested elections.[338]

We do not think there is a high risk of confusion among shareholders in the case where the soliciting proponent includes all nominees. Instead, in these cases the amendments we are adopting will serve to further shareholder enfranchisement by adding the director election to the menu of voting choices faced by shareholders voting on the proponent's card. We acknowledge that there is some risk of confusion when the soliciting proponent includes some but not all nominees on its proxy card. However, above we have clarified that when a dissident includes some but not all nominees on its proxy card, the dissident should disclose that shareholders who wish to vote for nominees not included on the dissident's proxy card may do so on the registrant's proxy card in order to avoid potential liability under Rule 14a–9 for omission of material facts.[339] Such disclosures should help mitigate any confusion among shareholders in these cases.

An alternative to the final amendments would be to require proponents conducting solicitations without a competing slate to include the names of all duly nominated director candidates on their proxy cards (unless they are soliciting votes against all nominees). This approach may have limited effect in the case of a ''vote no'' campaign, because shareholders would already be able to vote ''for'' and ''against'' their choice of any registrant nominees by using the registrant proxy card. By contrast, in the case of a proponent that solicits in favor of a particular proposal, the registrant may choose to not include the proposal on its proxy card, in which case, shareholders voting on the proponent's proxy card would be disenfranchised as to the selection of directors under current rules and similarly may be disenfranchised under the final approach unless the proponent chooses to include all director nominees on its proxy card. This alternative would remove the risk of such disenfranchisement with respect to voting for directors. However, the risk of such disenfranchisement under the final amendments is likely mitigated because we expect that such proponents would have the incentive to include the director nominees on their proxy card to increase the incentive for shareholders to use their card and would generally not have strategic reasons to exclude nominees from their proxy card because of the lack of a competing slate.

b. Use of Universal Proxies

Mandatory Use of Universal Proxies in Non-Exempt Solicitations in Contested Elections

Mandatory vs. Optional Use of Universal Proxies

Requiring both the registrant and the dissident in any contested election with competing slates to use universal proxies will enable all shareholders to vote for the combination of candidates of their choice in all such elections, whether they vote by proxy or in person at the meeting. As discussed in more detail above, imposing this mandate on the registrant as well as the dissident may impose some direct costs on both parties and may result in potentially significant, but uncertain, strategic advantages or disadvantages for these parties, leading to further costs and benefits for these parties and either benefits or costs for shareholders at large. Mandating the use of universal proxies by registrants in particular may have certain significant implications. Specifically, requiring registrants to use universal proxies will likely result in all shareholders receiving a proxy card that will allow them to vote for any combination of the full set of director nominees, more accurately reflecting the voting options available to shareholders at the meeting. However, requiring the names of the dissident nominees to appear on the registrant's proxy card will allow a form of access to the registrant's proxy materials without the eligibility criteria that accompany other forms of access,[340] and could result in an increased incidence of nominal contests that capitalize on this new channel for such access. As discussed in Section IV.C.4.b above, it is unclear to what extent any dissidents would choose such an approach and whether any such contests would be beneficial or detrimental.

Some commenters were in favor of making the use of universal proxies optional for all parties rather than mandatory,[341] which also has been recommended by certain observers in the past.[342] Under an optional approach, whether or not a party chose to provide a universal proxy likely would depend on strategic considerations. Having the option rather than a requirement to use a universal proxy may benefit either registrants or dissidents, depending on the nature of individual contests. Optional universal proxies likely would be used by a contesting party, to the possible detriment of its opponent, when the party believes that including the names of the opponent's nominees on its own card would be in its best interest, but not otherwise. For example, a party that expects strong support for its opponent's nominees may prefer to include those nominees on its proxy card to increase the likelihood that shareholders use its card, since they would be able to do so without giving up the ability to support at least some of the opponent's nominees. Optional universal proxies may also mitigate the risk, relative to that under the final amendments, of electing a mixed board when such an outcome is inconsistent with the intentions of both the dissident and the registrant, because both parties may be less likely to use a universal proxy in such cases. This alternative may also reduce the likelihood of an increase in nominal contests because the registrant would control whether or not the names of dissident candidates were included on its proxy card. Finally, because allowing the optional use of universal proxy cards would necessarily entail removing the impediments to such proxies in the existing proxy rules, such an approach might facilitate the ''private ordering'' of

[337] *See* letters from BR; Society; Sidley.

[338] *See* letters from BR; Society.

[339] *See supra* Section II.I.2.c.

[340] For example, proxy access bylaws, where available, generally apply certain eligibility criteria including an ownership threshold.

[341] *See, e.g.,* letters from Davis Polk; Society.

[342] *See* IAC 2013 Recommendation, at 2.

a universal proxy requirement—that is, the ability of shareholders to request that individual registrants commit to a policy of using universal proxies in future contests through changes to their corporate governing documents—at only those registrants where shareholders believe mandatory universal proxies would be beneficial.[343]

However, under an optional approach it is likely that in many cases neither registrants nor dissidents would include their opponent's nominees on their proxies, to avoid diluting the potential support for their own nominees among those shareholders that use their proxy card. To the extent that contesting parties were further given the option to determine how many and which of their opponent's nominees to include, it is likely that the contesting parties would often include fewer than all of the duly-nominated candidates on their proxy cards, even when they did include some of their opponent's nominees. In any such cases, shareholders would continue to have more limited voting options when voting by proxy than when voting in person. Thus, we expect that an optional approach would result in inconsistent application and not fully achieve the goal of allowing shareholders the ability to vote by proxy for their preferred combination of director candidates, as they could at a shareholder meeting. Several commenters also raised concerns about an optional approach based on the risk for such inconsistent application of universal proxy due to strategic considerations by both registrants and dissidents.[344] As discussed in more detail in the Proposing Release, we additionally note that Canada's system of optional universal proxies has not resulted in widespread and consistent application of universal proxy in director contests.[345]

Some commenters recommended different versions of an opt-out approach rather than a mandatory approach. For example, one commenter advocated a mandatory requirement that registrants could opt out of with approval of a majority of (non-insider) shareholders.[346] Another commenter advocated that registrants be able to opt out of universal proxy through a board vote.[347] Theoretically, such opt-out approaches could maximize the benefits and minimize the costs of a mandatory approach if shareholders or boards would only opt out from the mandatory use in those cases where it is expected to be harmful to shareholders. However, in practical application this is less likely to be the case, since there is a risk that self-interested large shareholders or board members would vote to opt out precisely in such cases where mandated use of universal proxy and shareholder enfranchisement in director elections is optimal to shareholders at large. In addition, such opt-out alternatives would run counter to the objective of allowing shareholders to elect their preferred candidates through the proxy process as they can at the annual meeting, and the efficiency gains to shareholders that are interested in split-ticket voting would be lost for the registrants that would opt out of mandatory universal proxies.

In the Proposing Release, we also considered hybrid alternatives that would require at least one party to a contest to use a universal proxy, potentially allowing a greater number of shareholders to split their ticket using a proxy compared to an optional approach but also potentially allowing fewer shareholders the ability to split their ticket compared to the final rule. We discuss the potential economic effects of these hybrid alternatives in more detail in the Proposing Release.[348] We did not receive any support for the hybrid alternatives from commenters, whereas two commenters were explicitly against such approaches.[349]

Applicability of Mandatory Universal Proxies to Registered Investment Companies and Business Development Companies

As discussed above, the Commission is continuing to consider the application of a universal proxy mandate to some or all funds.[350]

Notice Requirements

The final amendments would require that dissidents in all contested elections provide notice to registrants of their intention to solicit proxies in favor of other nominees, and the names of those nominees, no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date.[351] A notice to the registrant is necessary for the registrant to be able to include the names on the universal proxy card it prepares and distributes to shareholders. Without providing such notice, a dissident would not be permitted to run a non-exempt solicitation in support of its director nominees. The final amendments would also require registrants to provide similar notice to dissidents no later than 50 days before the anniversary of the previous year's annual meeting date, to allow dissidents sufficient time to include the names of registrant nominees on the universal proxy card that they prepare and disseminate to shareholders.

Because advance notice bylaws commonly require a similar amount of notice by dissidents seeking to nominate alternative candidates, the effect of the notice requirement for dissidents may be limited.[352] As discussed above, we understand that advance notice bylaws generally have deadlines ranging from 90 to 120 days before the meeting anniversary date.[353] However, it is possible that some registrants have advance notice bylaws with later deadlines. Also, some registrants do not currently have such bylaws and it is possible that boards may waive the applicability of such bylaws.[354] Further, relatively smaller registrants are somewhat less likely to have advance notice provisions than larger registrants, and proxy contests are more common among these relatively smaller registrants.[355] The final amendments would, in effect, replicate the primary effects of an advance notice bylaw applying to contested elections even at registrants that currently have no advance notice bylaws (or bylaws with later deadlines, to the extent these exist).

Although we believe that only a small fraction of registrants do not already have a comparable or stricter notice requirement, because the bylaws at different registrants may have been designed to reflect their individual

[343] The availability of such private ordering may depend on developments in state law. Also, if only a minority of shareholders is potentially interested in splitting their votes, it may be difficult to obtain the support required to revise bylaws or other corporate governing documents to require universal proxies.

[344] *See* letters from SIFMA; CCGG; Fidelity.

[345] *See* Section IV.D.5.b of the Proposing Release. *See also* letter from CCGG (stating that ''Universal proxy ballots are currently legal in Canada, and nothing prevents parties from using them now and yet they are seldom used, presumably because the parties do not see an advantage.'').

[346] *See* letter from Prof. Hirst.

[347] *See* letter from Sidley.

[348] *See* Section IV.D.5.b of the Proposing Release.

[349] *See* letters from CII Dec. 28, 2016; Colorado PERA.

[350] *See supra* section II.J.

[351] If the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then the final amendments would require that notice must be provided no later than 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant, whichever is later.

[352] It has been estimated that 99% of S&P 500 firms and 95% of Russell 3000 firms had an advance notice bylaw at the end of 2020. *See supra* Section IV.B.2.b.

[353] *See* S&C 2015 Report.

[354] *See supra* note 214.

[355] *See supra* Section IV.B.2.b.

circumstances, imposing this new requirement on all registrants may result in costs. In particular, the notice requirements would impose a new constraint on dissidents in cases in which the same degree of notice was not otherwise required, potentially imposing some incremental costs on such dissidents. The final amendments would also prevent the incidence (and eliminate the threat) of contests initiated later than the required notice deadline (''late-breaking'' proxy contests) at all registrants. As in the case of other potential effects of the final amendments on the incidence and perceived threat of contested elections, these effects of the notice requirements may reduce either the degree of board discipline or the risk of unproductive distraction for boards.[356]

To consider potential effects on late-breaking proxy contests, we reviewed the timing of recent proxy contests. As shown in Table 2 above, we estimate that dissidents filed their initial preliminary proxy statements on average 65 days before the meeting anniversary date for contested elections initiated in years 2017–2020.[357] We also estimate that approximately 57% of these contested elections had an initial preliminary proxy statement filed by the dissident within 60 days of the meeting anniversary date, which may represent some late-breaking contests.[358] While the filing of a preliminary proxy statement does not mark the earliest point at which a dissident initiates a proxy contest and finalizes a slate of nominees, it does provide a threshold date before which these actions must have occurred. We also considered the earliest date at which a dissident either directly communicated its intent to nominate directors to the registrants or publicly announced its intent to pursue a proxy contest in a regulatory filing. For those contests for which we have such information, we estimate that in approximately 10% of these contested elections the dissident communicated or publicly announced its intent to pursue a proxy contest within 60 days of the meeting anniversary date, which is another measure of potential late-breaking contests.[359] The initial communication or public announcement of intent does not necessarily coincide with providing notice of the names of the dissident nominees, but it may mark a threshold date after which such notice could have been provided.

We therefore cannot rule out that the notice requirement may prevent some proxy contests that would otherwise have occurred. However, dissidents who might have initiated late-breaking contests may simply adjust their timetable to be compatible with the notice requirement. Also, any effects of the notice requirements on the incidence or threat of late-breaking contested elections may be offset somewhat by the ability of dissidents who are unable to meet the notice deadline to take other actions, such as initiating a ''vote no'' campaign, using an exempt solicitation,[360] or calling a special meeting (to the extent possible under the bylaws) to remove existing directors and elect their own nominees, which may allow them to achieve similar goals with respect to changes to the board.

While advance notice bylaws currently apply to dissidents at many registrants, registrants are not currently subject to a requirement that they provide notice of their nominees to dissidents. Thus, the notice requirement for registrants would represent a new obligation for registrants in contested elections. We estimate that 61% of registrants filed a preliminary proxy statement (or definitive proxy statement if they did not file a preliminary) at least 50 days before the meeting anniversary date for contested elections initiated in years 2017–2020,[361] so we expect that the majority of registrants will have a list of nominees ready by the notice deadline. However, the notice requirement may require some registrants to finalize their list of nominees somewhat earlier than they would otherwise.

Also, to the extent that a registrant might consider changing its selected nominees after providing notice and after the dissident thereby disseminates its definitive proxy materials (but perhaps before the registrant does so), the notice requirement may provide registrants with an increased incentive not to make such changes because of the risk that votes for registrant nominees on the dissident card could be invalidated. Because the notice requirement may require some registrants to finalize their nominees earlier than they would otherwise and may increase registrants' incentives not to change their nominees, there is a possibility that this requirement could have a detrimental effect on the quality of candidates that registrants nominate. However, the majority of registrants in recent contests filed a preliminary proxy statement at least 50 days before the meeting anniversary date, so the notice deadline is close to the date by which registrants typically disclose their nominees. We therefore expect any such effects to generally be comparatively minor.

We have also considered alternatives to the notice requirements included in the final amendments, such as earlier as well as later potential notice deadlines for dissidents. In these alternatives, we have assumed that the notice deadline for registrants would also be revised to be 10 days after the revised deadline for the dissident, to allow the registrant sufficient time to prepare its notice and list of nominees in reaction to the receipt of a notice from a dissident. Under a later notice deadline, the risk of preventing late-breaking proxy contests that would otherwise have occurred, particularly at registrants without advance notice bylaws, would be reduced. For example, when considering a deadline of no later than 45 calendar days (as opposed to 60 calendar days, as in the final rule) prior to the meeting anniversary date, we found that in approximately 7% of contested elections initiated in years 2017–2020, the dissident announced its intent to pursue a proxy contest within 45 days of the anniversary (as compared to 10% within 60 days), and in 25% of the contests initiated in years 2017–2020, the dissident filed a preliminary proxy statement within 45 days of the meeting (as compared to 57% within 60 days).

Additionally, a later deadline for registrants would reduce the likelihood that some registrants may have to finalize their nominees earlier than they would otherwise. For example, we estimate that in approximately 19% of contested elections initiated in years 2017–2020, the registrant filed its preliminary proxy statement within the 35 days before the meeting anniversary date (as compared to 39% within 50 days).

However, a later deadline may increase the risk of confusion among shareholders and impose additional solicitation costs if the registrant's non-universal proxy card has already been disseminated and requires revision. In particular, we estimate that in 22% of contests initiated in years 2017–2020, registrants filed a definitive proxy statement at least 45 days before the

[356] *See supra* Section IV.C.4.

[357] *See supra* Section IV.B.2.b.

[358] *Id.*

[359] *Id.*

[360] In this case, the total number of persons solicited could be no more than 10. *See* Section IV.B.3.

[361] Based on data from Factset's SharkRepellent database and staff analysis of EDGAR filings.

meeting anniversary date.[362] By contrast, we estimate that in fewer than 10% of contests in this sample did the registrant file a definitive proxy statement earlier than 60 days before the meeting anniversary date.[363]

An earlier deadline, such as 90 days prior to the anniversary of the prior year's meeting, would reduce the risk, relative to the final amendments, of the potential confusion or costs related to notice being received after non-universal registrant proxy cards have already been disseminated. However, the risk that registrants will have distributed their proxy cards prior to the 60-day deadline seems relatively low, and an earlier deadline may further preclude late-breaking contests beyond those prevented by the required deadline. For example, when considering a deadline of no later than 90 calendar days (as opposed to 60 calendar days, as in the final rule) prior to the anniversary of the previous year's annual meeting date, we found that in a significant percentage of contested elections initiated in years 2017–2020, the dissident communicated or announced its intent to pursue a proxy contest or filed its preliminary proxy statement between 60 and 90 days prior to the meeting anniversary date. Some of these contests may have been permitted under a 60-day deadline but excluded in the case of a 90-day deadline.[364]

Additionally, an earlier deadline for registrants would increase the likelihood that some registrants may have to finalize their nominees earlier than they would otherwise. For example, we estimate that in approximately 52% of contested elections initiated in years 2017–2020, the registrant filed its preliminary proxy statement between 80 and 50 days before the meeting anniversary date.[365]

A further alternative would be to require universal proxies in cases where the dissident provides notice to the registrant, and not require them in cases where the dissident does not meet the notice deadline. Under this alternative, the dissident would be permitted to initiate a late-breaking proxy contest but, because of the risk of confusion if proxies have already been disseminated, would not trigger the use of universal proxies, while other contests (in which notice was provided) would require universal proxies. This alternative may raise similar concerns to those discussed above with respect to the optional use of universal proxies, in that there would still be some elections without universal proxies, and the dissident could strategically time its actions to avoid triggering universal proxies when it believes there is an advantage to doing so.

One commenter claimed that registrants typically re-evaluate their contemplated slate after receiving advance notice of a contest, often leading to recruitment of new nominees, and that such important decisions will not be possible within 10 days.[366] As an alternative that would address this comment, we have also considered not requiring registrants to provide notice to dissidents of their nominees. In this case, dissidents would generally become aware of the registrant nominees when the registrant files its preliminary proxy statement, which is required to be filed at least 10 calendar days prior to the date the registrant's definitive proxy statement is first sent to shareholders, and would have to finalize their own proxy cards thereafter. This alternative would avoid imposing a new notice obligation on registrants, and may reduce the risk that such an obligation could marginally reduce the quality of registrant nominees in some cases. However, requiring that notice be provided by both parties to the contest would limit the possibility that registrants may gain a strategic advantage by learning about and being able to react to the dissident's slate of nominees significantly earlier than when the dissident may be informed of the registrant's slate.

Minimum Solicitation Requirement for Dissidents

As discussed above, we have raised the threshold from the proposed majority of the voting power to 67% of the voting power in response to commenters' concerns that setting the threshold at the majority of the voting power would insufficiently deter the potential for ''freeriding'' of dissident nominees on the registrant's proxy card.[367] As discussed in more detail above,[368] because the vast majority of typical proxy contests will not be affected by this increase in solicitation requirement, and in the infrequent cases in which there may be an effect this requirement will impose minor incremental costs to dissidents, we maintain our assessment from the Proposing Release that the solicitation requirement will not have significant effects on the costs of typical proxy contests.[369]

Nevertheless, we expect that the solicitation requirement in the final amendments will impose a cost on any dissidents that may try to capitalize on the ability to introduce the names of alternative candidates on the registrant's proxy card by running a nominal proxy contest, in which minimal resources are spent on solicitation. As discussed above, in addition to the existing cost of pursuing a nominal proxy contest, we estimate that, using the least expensive approach, it will cost on average between $5,300 and $9,800 depending on the size of the registrant to meet the minimum solicitation requirement through an intermediary.[370] Under the proposed threshold of a majority of the voting power, the equivalent estimated range would instead be approximately $5,100 to $6,200, depending of the size of the registrant.[371] Thus, raising the threshold to 67% from a majority of the voting power will increase the cost of nominal contests somewhat across the board, but especially for dissidents targeting larger registrants. Therefore, the additional cost required to comply with the minimum solicitation requirement, beyond current expenditures in contests, is likely to represent a relatively larger incremental cost in the case of nominal contests relative to the baseline. We expect that the minimum solicitation requirement to some degree may deter dissidents from initiating nominal contests, as discussed in Section IV.C.4.b above.

In the Proposing Release we considered the alternative of requiring universal proxies without imposing any minimum solicitation requirement on

[362] Based on data from Factset's SharkRepellent database and staff analysis of EDGAR filings.

[363] *Id.*

[364] Staff estimates that in 25% of contested elections initiated in years 2017–2020, the dissident communicated or announced its intent to pursue a proxy contest between 60 and 90 days prior to the meeting, and that in 30% of contested elections initiated in years 2017–2020, the dissident filed a preliminary proxy statement between 60 and 90 days prior to the meeting. *See supra* Section IV.B.2.b. Neither the date on which intent to pursue a contest is initially communicated/announced nor that on which a preliminary proxy statement is filed need correspond to the date on which notice could have been provided in these contests, though they may provide some indication of the universe of contests that might have been affected by a particular notice deadline.

[365] Based on data from Factset's SharkRepellent database and staff analysis of EDGAR filings.

[366] *See* letter from Society dated Jan. 10, 2017.

[367] *See supra* Section II.D.3.

[368] *See supra* Section IV.C.2.a.

[369] *See supra* Section IV.C.2.b.

[370] *Id.*

[371] *See supra* note 273 for estimation details. The lower estimated costs compared to the 67% threshold case is due to fewer accounts needed to be solicited and a reduction in the estimated number of nominees causing lower nominee coordination fees. Note that the estimated costs are bounded from below at $5,000, which is the minimum intermediary unit fee per NYSE Rule 451.

dissidents,[372] but did not receive much support from commenters in favor of such an alternative.[373] By contrast, we received significant support for a minimum solicitation requirement on dissidents when mandating the use of universal proxies in director elections, generally based on concerns related to the risk that dissidents could otherwise ''freeride'' on registrants' solicitation efforts and launch potentially frivolous contests without meaningful solicitation efforts of their own.[374] We share these concerns and continue to believe, for reasons discussed in more detail in the Proposing Release,[375] that without such a requirement, dissidents' ability to introduce an alternative set of nominees to all shareholders on registrants' universal proxy cards without incurring meaningful solicitation expenditures may result in an increase in frivolous contests that do not enhance shareholder value. Such contests could also cause registrants to incur significant expenses to advocate against the dissident's position and could distract management from critical business matters. However, we acknowledge that by imposing a minimum solicitation requirement it may make some otherwise beneficial contests cost-prohibitive. We believe such instances will be rare, as dissidents in most typical contests already meet the solicitation requirement, or, in the few cases they do not, we estimate they face relatively limited increases in solicitation costs to meet the requirement, as discussed above.

Although some of the commenters in favor of the solicitation requirement also supported the proposed threshold of a majority of the voting power, other commenters in favor recommended higher thresholds, such as two-thirds, 75%, or 100% of the voting power.[376] In the Proposing Release we considered the alternative of requiring that dissidents solicit all shareholders,[377] and concluded that this alternative could increase minimum solicitation costs to such an extent that it may reduce the incidence of nominal contests that might not be in the interests of shareholders at large. However, we also concluded that this alternative may significantly increase the costs borne by dissidents in a large fraction of typical proxy contests and may prevent some value-enhancing contests from taking place. In response to commenters who recommend that we require dissidents to solicit all shareholders,[378] we have updated and expanded our estimations of the costs to dissidents of meeting such a requirement both for nominal and typical contests, respectively.

Specifically, we estimate that the average cost for a dissident soliciting all shareholders using the least expensive approach [379] in a nominal contest would be approximately $14,900 at companies with less than $300 million in market capitalization, approximately $26,200 at companies with between $300 million and $2 billion in market capitalization, approximately $58,300 at companies with between $2 billion and $10 billion in market capitalization, and approximately $516,900 at companies with market capitalization above $10 billion.[380] These are significantly higher estimated costs, especially for larger registrants, than what we estimated above for using the least expensive approach to meet the final rule's 67% minimum solicitation requirement through an intermediary, which vary between on average $5,300 and $9,800 depending on the registrant's size in terms of market capitalization.[381]

In addition, a requirement that dissidents solicit all shareholders would also affect the cost to dissidents in more typical proxy contests. As discussed above, we understand that in 48% of recent proxy contests, dissidents solicited a number of shareholders fewer than all of the shareholders eligible to vote.[382] We estimate that, using the least expensive approach,[383] it would have cost dissidents in these contests approximately an additional $9,000 to $4.0 million, with a median of approximately $37,000, beyond the costs they already incurred, to increase their level of solicitation to include all shareholders.[384] These new cost estimates strengthen our belief that requiring dissidents to solicit all shareholders would increase the costs borne by dissidents in most typical proxy contests and may prevent some contests that may be beneficial to shareholders at large from taking place.

As another alternative, we have also considered a 75% threshold of the voting power for the minimum solicitation requirement, as recommend by at least one commenter.[385] Repeating our estimations above using this threshold, we estimate that the average cost for a dissident to meet a 75% minimum solicitation requirement using the least expensive approach [386] in a nominal contest would be approximately $5,600 at companies with less than $300 million in market capitalization, approximately $6,400 at companies with between $300 million and $2 billion in market capitalization, approximately $7,300 at companies with between $2 billion and $10 billion

[372] *See* Section IV.D.5.b of the Proposing Release for a more detailed discussion of this alternative.

[373] Only one commenter supported no solicitation requirement. *See* letter from Bulldog.

[374] *See supra* Section II.D.2 for a review of the comments received on the minimum solicitation requirement.

[375] *See* Section IV.D.5.b of the Proposing Release.

[376] *See supra* Section II.D.2 for a review of the comments received on the minimum solicitation requirement.

[377] *See* Section IV.D.5.b of the Proposing Release for a more detailed discussion of this alternative.

[378] *See* letters from SIFMA; Mediant.

[379] *See supra* note 262.

[380] These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. *See supra* note 273 (providing assumptions for the estimation of the average costs of solicitation at a registrant in each of four different market capitalization categories). In this case, staff estimated the costs of NYSE Rule 451 fees and postage for soliciting the average total number of accounts in each size category (*see supra* Section IV.B.1.a for the average number of total accounts in each category of registrant) using notice and access delivery, and assumed that the number of brokers and banks involved for the purpose of determination of the nominee coordination fee is equal to 84, 130, 214, and 701, respectively.

[381] *See supra* Section IV.C.2.b.

[382] *See supra* Section IV.B.2.

[383] *See supra* note 262.

[384] These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider for a sample of 31 proxy contests for annual meetings held between July 1, 2018 and June 30, 2019. In particular, the required increase in expenses to solicit all shareholders was estimated based on the number of additional accounts that would have to be solicited among the 15 cases where all shareholders were not solicited and the applicable fees under NYSE Rule 451 and postage costs for notice and access delivery. For the purpose of the nominee coordination fee, staff also used the provided data on the proxy contests to estimate the increase in the number of banks or brokers considered ''nominees'' under NYSE Rule 451 that might be involved at the higher solicitation level. The estimated incremental solicitation cost for each contest includes nominee coordination fees of $22 for each of the additional nominees expected to be involved, plus basic processing fees, notice and access fees, preference management fees, and postage totaling $1.57 (for suppressed accounts, such as those that have affirmatively consented to electronic delivery) to $1.80 (for other accounts) per account for additional accounts solicited within the first 10,000 accounts solicited, and on a declining scale for additional accounts thereafter. Staff assumed that half of the additional accounts to be solicited are suppressed and that none of these accounts requested full set delivery by prior consent or upon receipt of the notice (because such delivery requirements may apply to only a small fraction of accounts and are not expected to significantly affect the overall estimate of costs). Additional notice and access fees of $0.25 per account for the first 10,000 accounts, and on a declining scale thereafter, were assumed to be required for each account that was solicited prior to increasing the level of solicitation because of the use of notice and access delivery for some accounts. The estimates also include incremental intermediary unit fees of $0.25 per account for each additional account above 20,000 accounts solicited. This estimate does not include printing costs for the notice, for which we do not have relevant data to make an estimate.

[385] *See* letter from CII dated Nov. 8, 2018.

[386] *See supra* note 262.

in market capitalization, and approximately $13,100 at companies with market capitalization above $10 billion.[387] Not surprisingly, increasing the threshold to 75% would increase the expected average costs of nominal contests compared to the 67% threshold we are adopting, even if the increase is modest for the smaller registrant categories.

As discussed above, it is our understanding that dissidents in very few typical contests in recent years solicit shareholders representing less than 75% of the voting power.[388] However, based on the few cases we have observed, we estimate the average additional cost those dissidents would have incurred, beyond their actual incurred solicitation expenses, to meet the 75% requirement using the least expensive approach through an intermediary to be approximately $20,000.[389] This estimated additional cost is approximately four times the additional cost we estimated for the 67% threshold we are adopting. This indicates that increasing the threshold to 75% (or beyond) would materially increase costs for dissidents in typical contests.

As an alternative to a solicitation requirement based on voting power, one commenter recommended a minimum solicitation threshold of a majority of shareholder accounts entitled to vote on director nominations, asserting that this would help ensure meaningful dissident solicitation efforts.[390] Repeating our estimations using a 50% of shareholder accounts threshold, we estimate that the average cost for a dissident soliciting all shareholders using the least expensive approach[391] in a nominal contest would be approximately $10,900 at companies with less than $300 million in market capitalization, approximately $17,100 at companies with between $300 million and $2 billion in market capitalization, approximately $33,200 at companies with between $2 billion and $10 billion in market capitalization, and approximately $270,600 at companies with market capitalization above $10 billion.[392] Thus, the increase in costs of nominal contests under this alternative solicitation requirement is significantly greater than the increase in costs we expect under the 67% of the voting power threshold we are adopting, which we estimate would be on average approximately $5,300 to $9,800 depending on the size of the registrant.[393]

For the recent typical contests discussed above in which dissidents solicited a number of shareholders fewer than all of the shareholders eligible to vote,[394] dissidents solicited less than 50% of accounts in 13 out of 15 contests. We estimate that the alternative of requiring solicitation of at least 50% of shareholder accounts in these 13 cases would have cost approximately an additional $3,000 to $1.9 million, with a median of approximately $28,000,[395] beyond the costs they already incurred, to increase their level of solicitation to meet this threshold, using the least expensive approach.[396] Even though this alternative would increase solicitation costs of typical contests less than the alternative of requiring solicitation of all shareholders, it still represents a significant increase compared to the current rules and also compared to the increase in costs we expect under the 67% of the voting power threshold we are adopting, which we estimate would be zero for most typical contests and on average approximately $5,400 for the infrequent typical contests soliciting less than 67% of the voting power.[397]

In general, any solicitation requirement that imposes a very low cost on the dissident may increase the risks discussed above that are associated with permitting the dissident to obtain exposure for its nominees on the registrant's card with minimal expenditure of its own resources in the solicitation, while a solicitation requirement that imposes a very high cost may deter value-enhancing proxy contests. Based on the estimated dissident solicitation costs for both nominal and typical contests under different alternative minimum solicitation requirements, we think the 67% of the voting power solicitation requirement we are adopting achieves a reasonable balance of reducing the risk of frivolous contests without materially impeding legitimate contests.

One concern raised by several commenters related to the proposed minimum solicitation requirement is that retail shareholders would not receive solicitation materials from dissidents soliciting the minimum required.[398] One of these commenters indicated that shareholders omitted from the dissident's solicitation would be at an informational disadvantage, making it difficult for those shareholders to make informed voting decisions, which would potentially discourage shareholders from participating in the election.[399]

We acknowledge that any approach that requires the dissident to solicit less than all of the shareholders entitled to vote (such as under the final amendments) may result in many shareholders, especially those with relatively few shares in their accounts such as many retail investors, not receiving proxy material directly from the dissident. As noted in the Proposing Release, any shareholders not solicited by the dissident will still see the names of the dissident's nominees on the registrant's proxy card but would have to seek out the dissident's proxy statement in the EDGAR system (as directed by the registrant's proxy

[387] These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. *See supra* note 273 (providing assumptions for the estimation of the average costs of solicitation at a registrant in each of four different market capitalization categories). In this case, staff estimated the costs of NYSE Rule 451 fees and postage for soliciting the minimum number of accounts representing at least 75% of the voting power in each size category (estimated at 79, 149, 256, and 898, respectively) using notice and access delivery, and assumed that the number of brokers and banks involved for the purpose of determination of the nominee coordination fee is equal to 20, 50, 85, and 299, respectively.

[388] *See supra* Section IV.B.2.b.

[389] These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. *See supra* note 263 (providing assumptions for the estimation of the average costs of solicitation in a typical contest). In this case, staff estimated the average additional costs of NYSE Rule 451 fees and postage needed to meet a minimum solicitation requirement of 75% of the voting power, using the two cases out of the 35 contests from June 30, 2015 through April 15, 2016 provided by a proxy services provider in which less than 75% of the shares eligible to vote were originally solicited by the dissident.

[390] *See* letter from Elliott.

[391] *See supra* note 262.

[392] These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. *See supra* note 273 (providing assumptions for the estimation of the average costs of solicitation at a registrant in each of four different market capitalization categories). In this case, staff estimated the costs of NYSE Rule 451 fees and postage for soliciting the average total number of accounts in each size category (estimated at 79, 149, 256, and 898, respectively) using notice and access delivery, and assumed that the number of brokers and banks involved for the purpose of determination of the nominee coordination fee is equal to 20, 50, 85, and 299, respectively.

[393] *See supra* Section IV.C.2.b.

[394] *See supra* Section IV.B.2.

[395] These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. *See supra* note 384 (providing assumptions for the estimation of the average costs of solicitation in a typical contest in which the dissident does not solicit all shareholders). In this case, staff estimated the average increase in costs of NYSE Rule 451 fees and postage based on the number of additional accounts that would have to be solicited to reach 50% of accounts based on the sub-sample of 13 proxy contests in which the dissident solicited less than 50% of accounts.

[396] *See supra* note 262.

[397] *See supra* Section IV.C.2.a.

[398] *See* letters from BM; SIFMA; ABC; BR; CCMC; CGCIV; Davis Polk.

[399] *See* letter from BR.

statement) to learn about those nominees and make an informed voting decision.[400] For a shareholder that is motivated enough to vote in a director election, we generally do not think that having to seek out the dissident's proxy statement online through EDGAR is a burden large enough to discourage the investor from making the effort to become informed about the dissident's nominees. However, we cannot rule out that there will be some shareholders at the margin who will not be willing to expend the effort required to find the information, and consequently become discouraged enough that they do not follow through on their plans to vote in the election, but we think this will be a small fraction of otherwise interested shareholders. More importantly, given that there is no minimum solicitation requirement in place currently under the baseline, and assuming current dissidents conducting typical contests will not reduce their solicitation efforts under the final amendments, we expect that more rather than fewer shareholders will directly receive dissidents' proxy statements.

Dissemination of Proxy Materials

The final amendments will require any dissident in a contested election to file a proxy statement by the later of 25 calendar days prior to the meeting date, or five calendar days after the date that the registrant files its definitive proxy statement, regardless of the choice of proxy delivery method. This requirement will help to ensure that all shareholders who receive a universal proxy, which will not be required to include complete information about the opposing party's nominees, will have access to information about all nominees a sufficient time before the meeting. We do not expect this requirement to impose a substantial burden or constraint on dissidents given existing requirements and the notice requirement of the final amendments.

In particular, dissidents that elect notice-only delivery are currently required to make their proxy statement available at the later of 40 calendar days prior to the meeting date or 10 calendar days after the registrant files its definitive proxy statement. For such dissidents, the required filing deadline will provide five fewer days to furnish a proxy statement in cases in which the registrant files its definitive proxy statement within fewer than 30 calendar days of the meeting date, which we estimate occurred in approximately 11% of recent contested elections, and this new deadline should not otherwise present an incremental timing constraint for such dissidents.[401] Dissidents that elect full set delivery are not currently subject to any such requirement, and thus the dissemination requirement would impose a new filing deadline for all such dissidents. Some dissidents may therefore be required to prepare their proxy statements earlier than they would otherwise. In particular, we estimate that dissidents filed a definitive proxy statement within 25 days of the meeting in 18% of recent contested elections.[402]

In the absence of other requirements, the required filing deadline might prevent late-breaking proxy contests. However, because the final amendments separately require dissidents to provide notice of the contest and the names of their nominees by the 60th calendar day before the anniversary of the prior year's meeting (with alternative treatment for cases in which the meeting date has changed significantly since the prior year), we do not expect this requirement to impose a significant further limitation on late-breaking contests. Also, while the filing deadline will require some dissidents to prepare their proxy statements earlier than they would otherwise, we do not expect this requirement to impose a substantial incremental constraint or burden in most cases. In particular, because of the notice requirement, dissidents will generally have approximately one month to furnish a definitive proxy statement after having provided the names of their nominees to the registrant.

Alternatively, we have considered proposing an earlier filing deadline for dissidents. While an earlier filing deadline may reduce the risk that some shareholders receive the registrant's proxy statement and make their voting decisions before the dissident's proxy statement is available, such a deadline may also impose an incremental burden on dissidents and could prevent some late-breaking proxy contests beyond those prevented by the notice requirement.

One commenter expressed concerns that imposing a filing deadline on the dissident without imposing a similar filing deadline on registrants would confer a strategic advantage to registrants.[403] As an alternative, we considered adopting a similar 25-day filing deadline also for registrants, which would mitigate such concerns. However, as discussed in more detail above, registrants already have incentives to file their definitive proxy statement well in advance of the meeting date.[404] Providing further evidence for such incentives, we find that 95% of registrants in a sample of recent contest filed their definitive proxy statement at least 25 days before the annual meeting.[405] Thus, despite the absence of a filing deadline for registrants, it is unlikely that the required 25-day filing deadline for dissidents in the final amendments will confer significant strategic benefits to registrants.

Formatting and Presentation of the Universal Proxy Card

The final amendments specify certain presentation and formatting requirements for universal proxies. We do not expect the presentation and formatting requirements to impose any significant direct costs on registrants or dissidents, though they may bear some indirect costs in the form of reduced flexibility to strategically design their proxy card.

These presentation and formatting requirements are expected to mitigate the risk that shareholders receiving universal proxies may be confused about their voting choices and how to properly mark their card. For example, shareholders could otherwise be unsure about the total number of candidates for which they can grant authority to vote, or about which candidates are nominated by which party. Such confusion could increase the likelihood that some shareholders submit invalid proxies or submit proxies that do not reflect their intentions.[406] This may be exacerbated in the case of nominees being put forth by multiple dissidents or when there are proxy access nominees as well as dissident and registrant nominees.[407]

In addition to preventing confusion, these presentation and formatting requirements may also promote the fair and equal presentation of all nominees on the proxy cards. In particular, these requirements would prevent registrants and dissidents from strategically choosing the font, style, sizing, and order of candidate names in ways that could create an advantage for their slate. For example, political science research has found that the order of placement of

[400] See Section IV.D.5.b of the Proposing Release.

[401] Based on staff review of contested elections initiated in years 2017–2020.

[402] *Id.*

[403] *See* letters from Olshan.

[404] *See supra* Section II.E.3.

[405] Based on a review of the 101 contested elections initiated from 2017 through 2020.

[406] *See* letter from BR for similar concerns.

[407] *See, e.g.,* Roundtable Transcript, comment of David Katz, Partner, Wachtell, Lipton, Rosen and Katz, at 42.

candidates' names on ballots can affect voting outcomes.[408]

One commenter raised a concern that the presentation and formatting requirements we are adopting do not adequately address the risk that a shareholder who returns a paper universal proxy card may inadvertently vote for more nominees than are up for election, resulting in all of that shareholder's votes being wholly invalidated.[409] We disagree with this assessment and think that we are adequately addressing this risk in the final amendments by requiring prominent disclosure in the proxy card regarding the effect and treatment of the proxy in such cases.

Some commenters argued for more standardization of the universal proxy, including some that wanted a requirement for identical proxy cards.[410] We acknowledge that further standardization may come with some added incremental benefits in terms of reducing potential confusion and potential gamesmanship. However, we think the requirements we are adopting strike a good balance by promoting clarity and fairness of the presentation while preserving some flexibility in design choices for registrants and dissidents, who may have particular views on what they think is an effective presentation of their proxy cards and therefore may experience some costs from an overly prescriptive approach.

In the Proposing Release we also considered alternatives that would provide for more flexibility in presentation and formatting of the universal proxy card.[411] We have received little support by commenters for such approaches and our original assessments of these alternatives stand.

c. Voting Standards Disclosure and Voting Options

The final amendments require certain disclosures with respect to voting options and voting standards in proxy statements, which would also apply to funds. We expect that the costs to registrants of such additional disclosures will be minimal. In particular, as discussed below, even though we expect registrants may need to update certain standardized portions of their proxy statements and proxy cards, many of those disclosures, once revised, are not likely to require significant revision from year to year, and for the purpose of the Paperwork Reduction Act of 1995 (''PRA''), we estimate the average burden per affected registrant to be 10 minutes.[412] To the extent that such disclosures reduce shareholder uncertainty or confusion as to the effect of their votes, the efficiency of the voting process may be improved. However, we do not anticipate significant changes in voting outcomes or corporate decisions as a result of these disclosures.

V. Paperwork Reduction Act

A. Summary of the Collection of Information

Certain provisions of our rules, schedules, and forms affected by the amendments contain ''collection of information'' requirements within the meaning of the PRA.[413] The Commission published a notice requesting comment on changes to these collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[414] While several commenters provided comments on the potential costs of the Proposed Rules, no commenters specifically addressed our PRA analysis.[415]

The hours and costs associated with preparing, filing, and distributing the schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not confidential and there is no mandatory retention period for the information disclosed. The titles for the affected collections of information are:

(1) Regulation 14A (Commission Rules 14a–1 through 14a–21 and Schedule 14A) (OMB Control No. 3235–0059); and

(2) 17 CFR 270.20a–1 (Rule 20a–1 under the Investment Company Act of 1940), Solicitations of Proxies, Consents, and Authorizations (OMB Control No. 3235–0158).

The Commission adopted Regulation 14A pursuant to the Exchange Act and Rule 20a–1 pursuant to the Investment Company Act. These rules set forth the disclosure and other requirements for proxy statements filed by soliciting parties to help investors make informed investment and voting decisions.

A description of the final amendments, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the expected economic effects of the final amendments can be found in Section IV above.

B. Effect of the Final Amendments on Existing Collections of Information

For operating companies, the amendments revise the consent required of a bona fide nominee, eliminate the short slate rule, and establish new procedures for the solicitation of proxies, the preparation and use of proxy cards, and the dissemination of information about all director nominees in contested elections.[416] The amendments will affect the collection of information requirements of soliciting parties by requiring the use of a universal proxy card in all non-exempt solicitations in connection with contested elections. They will also establish requirements for universal proxy cards, including specified formatting and presentation mandates. The amendments require all parties to refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement on the Commission's website. In addition, the amendments require dissidents in election contests to provide a notice of intent to solicit and a list of their nominees to the registrant and they eliminate the ability of dissidents to round out their slate with registrant nominees through use of the short slate rule. The amendments further establish filing deadlines for a dissident's definitive proxy statement and require dissidents to solicit at least 67% of the voting power of shares entitled to vote on the election of directors. These requirements for contested elections do not meaningfully impact the reporting and cost burden associated with the collection of information.[417]

[408] *See, e.g.,* Joanne Miller & Jon Krosnick, *The Impact of Candidate Name Order on Election Outcomes,* 62 Pub. Opinion Q. 291 (1998); David Brockington, *A Low Information Theory of Ballot Position Effect,* 25 Pol. Behav. 1 (2003); Jonathan G.S. Koppell & Jennifer A. Steen, *The Effects of Ballot Placement on Election Outcomes,* 66 J. Pol. 267 (2004).

[409] *See* letter from BR.

[410] *See supra* Section II.G.2.

[411] *See* Section IV.D.5.b of the Proposing Release.

[412] *See infra* Section V.C.

[413] 44 U.S.C. 3501 *et seq.*

[414] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[415] *See supra* Section II.

[416] These amendments do not apply to funds.

[417] Our current proxy rules do not prescribe a minimum solicitation requirement for either registrants or dissidents; however, customary practice has been for soliciting parties to solicit more than 67% of the voting power of shares entitled to vote on the election of directors because either, in the case of a registrant, it wishes to meet notice, informational and quorum requirements for the annual meeting, or, in the case of a dissident, such solicitation is necessary in order to

Continued

We are also amending the proxy rules for all director elections to:

- Specify that the proxy card must include an ''against'' voting option when applicable state law gives effect to a vote ''against'' a nominee;
- require proxy cards to give shareholders the ability to ''abstain'' in an election where a majority voting standard is in effect; and
- mandate disclosure about the effect of a ''withhold'' vote in an election.

We arrived at the estimates discussed below by reviewing our burden estimates for similar disclosure. The amendments regarding the use of a universal proxy card, required notices and related disclosure should result in only a small amount of additional required disclosure and the addition of only a limited amount of information (the names of duly nominated director candidates for which the soliciting party has complied with Rule 14a–19 on proxy cards). The application of these amendments will be limited to contested elections. In addition, the additional disclosure and changes to the proxy card relating to the appropriate use of ''against,'' ''abstain'' or ''withhold'' voting options should similarly result in only a small incremental increase in required disclosure; however, those changes will apply to proxy materials in all director elections, not just contested elections.

C. Aggregate Burden and Cost Estimates for the Amendments

We derived our burden hour and cost estimates by estimating the total amount of time it will take to prepare and review the required disclosures called for by the final amendments. This estimate represents the average burden for all soliciting parties, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among soliciting parties. Some soliciting parties may experience costs in excess of this average in the first year of compliance with the amendments and some parties may experience less than the average costs.

As discussed more fully in Section IV.C.4 above, it is unclear whether the amendments will result in an increase or decrease in the number of election contests, and we therefore estimate no change in the number of proxy statement filings as a result of the amendments. We estimate that the average incremental burden for a registrant to prepare a universal proxy card in a contested election and include the required disclosure will be two hours. We similarly estimate that the average incremental burden for a dissident to prepare a universal proxy card in a contested election and include the required disclosure will be two hours. We additionally estimate that the average incremental burden for a dissident and registrant to prepare the notice to the opposing party containing the names of its nominees in a contested election will be approximately one hour. Thus, we estimate that the total incremental burden for Schedule 14A will increase by three hours per election contest for registrants and three hours per election contest for other soliciting parties.[418] For purposes of the PRA, we estimate there will be 25 annual election contests per year,[419] resulting in 150 additional total incremental burden hours (6 hours × 25 election contests) under Schedule 14A as a result of adopted Rule 14a–19 and the related amendments.

We estimate that the additional disclosure and changes to the proxy card relating to the appropriate use of ''against,'' ''abstain'' or ''withhold'' voting options in proxy materials for all director elections will be considerably less than one hour for each proxy statement and card relating to an election of directors. Unlike the other amendments relating specifically to election contests, these amendments will apply to all director elections, including director elections for funds. As a result of these amendments, registrants may need to update certain standardized portions of their proxy statements and proxy cards, and many of those disclosures, once revised, are not likely to require significant revision from year to year. We estimate that these changes will result in an average of 10 minutes of additional burden per response.[420] For purposes of the PRA, we estimate the changes will result in 1,062 hours of additional total incremental burden under Regulation 14A (10 minutes × 6,369 filings) and 222 hours of total incremental burden under Rule 20a–1 (10 minutes × 1,333 filings).[421]

These estimates include the time and cost of preparing disclosure that has been appropriately reviewed, including, as applicable, by management, in-house counsel, outside counsel and members of the board of directors. This burden will be added to the current burden for Regulation 14A and Rule 20a–1, as applicable. For proxy statements under Regulation 14A, we estimate that 75% of the burden of preparation is carried internally and that 25% of the burden of preparation is carried by outside professionals retained at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried internally is reflected in hours. We estimate a similar allocation between internal burden hours and outside professional costs with respect to the PRA burden for Rule 20a–1.

As a result of the estimates discussed above, we estimate for purposes of the PRA that the total incremental burden on all soliciting parties of the final amendments under Regulation 14A will be 909 hours for internal time (1,212

successfully wage a proxy contest. Based on staff analysis of the industry data provided by a proxy services provider for 31 proxy contests between July 1, 2018 and June 30, 2019, less than 67% of the voting power was solicited by a dissident in not a single proxy contest in that sample. Of the 35 proxy contests between June 30, 2015 and April 15, 2016 analyzed in the Proposing Release (*see* Section IV.B.2.b of the Proposing Release), only 2 dissidents solicited less than 67% of the voting power. In those instances, we estimate that the proposed amendments would have resulted in average incremental solicitation expenses (exclusive of printing costs) to the dissident of approximately $5,400 if the least expensive approach to soliciting through an intermediary had been used to solicit the required additional number of shareholders. *See supra* notes 262 and 263. For PRA purposes, we therefore estimate that there would be one contest annually that would not have otherwise solicited 67% and thus would incur additional solicitation costs of $5,400, which amount we add to the estimated reporting and cost burden associated with Regulation 14A.

[418] There may be a range of burdens by soliciting parties as they determine exactly how to present the proxy card and the language of the required disclosure; however, we estimate the burdens described above as the average burden for soliciting parties.

[419] We do not estimate that there will be additional election contests as a result of the final rules. We estimate approximately 25 election contests per year based on the average of actual proxy contests for elections of directors in calendar years 2017–2020.

[420] We estimate that the incremental burden for the additional disclosure and changes to the proxy card will increase by 20 minutes in the first year and then be reduced to five minutes in years two and three, resulting in a three-year average of an increased 10-minute burden per response.

[421] For purposes of the Regulation 14A and Rule 20a–1 collections of information, the number of filings corresponds to the estimated number of new filings that will be made each year under Regulation 14A and Rule 20a–1, which include filings such as DEF 14A; DEFA14A; DEFM14A; and DEFC14A. When calculating the PRA burden for any particular collection of information, the total number of annual burden hours estimated is divided by the total number of annual responses estimated, which provides the average estimated annual burden per response. The current inventory of approved collections of information is maintained by the Office of Information and Regulatory Affairs (''OIRA''), a division of OMB. The total annual burden hours and number of responses associated with Regulation 14A and Rule 20a–1, as updated from time to time, can be found at *https://www.reginfo.gov/public/do/PRAMain.* We recognize that the adopted rules may only effect a subset of the estimated proxy filings in the OMB inventory, but we are using the estimate for all proxy filings to provide a conservative estimate of the impact of the rule amendments.

total incremental burden hours[422] × 75%) and $121,200 (1,212 total incremental burden hours × 25% × $400), plus $5,400 in professional costs due to the additional solicitation burden, for the services of outside professionals. We further estimate for purposes of the PRA that the total incremental burden on all soliciting parties of the final amendments under Rule 20a–1 will be 166.5 hours for internal time (222 total incremental burden hours × 75%) and $22,200 (222 total incremental burden hours × 25% × $400) for the services of outside professionals.

A summary of the estimated changes is included in the table below.

TABLE 1—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES

	Current annual responses (A)	Estimated annual responses (B)	Current burden hours (C)	Estimated increase in burden hours (D)	Estimated total burden hours (E) = C + D	Current professional costs (F)	Estimated increase in professional costs (G)	Estimated total professional costs = F + G
Schedule 14A	6,369	6,369	777,590	1,212	778,802	$103,678,712	$126,600	$103,805,312
Rule 20a–1	1,333	1,333	113,305	222	113,527	39,990,000	22,200	40,012,200

VI. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA'')[423] requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act,[424] to consider the impact of those rules on small entities. We have prepared this Final Regulatory Flexibility Analysis (''FRFA'') in accordance with Section 604 of the RFA.[425] An Initial Regulatory Flexibility Act Analysis (''IRFA'') was prepared in accordance with the RFA and was included in the Proposing Release. The FRFA relates to the amendments to Exchange Act Rules 14a–2, 14a–3, 14a–4, 14a–5, 14a–6, and 14a–101, and new Exchange Act Rule 14a–19.

A. Need for, and Objectives of, the Final Amendments

The final amendments will allow a shareholder voting by proxy to choose among director nominees in an election contest in a manner that more closely reflects the choice that could be made by voting in person at a shareholder meeting. To this end, we are amending the proxy rules applicable to operating companies to:

- Revise the consent required of a bona fide nominee;
- eliminate the short slate rule;
- require the use of universal proxy cards in all non-exempt solicitations in connection with contested elections; and
- prescribe requirements for universal proxy cards including notice, filing and solicitation requirements.

We are also adopting amendments that will apply to all director elections and will require disclosure regarding the effect of shareholder action to vote ''against,'' ''withhold'' or ''abstain'' and require that the appropriate voting option be included on the proxy card.

The need for, and objectives of, the amendments are discussed in more detail in Section I, above. We discuss the economic impact, including the estimated compliance costs and burdens, of the amendments in Sections IV and V above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on all aspects of the IRFA, including how the Proposed Rules could further lower the burden on small entities, the number of small entities that would be affected by the Proposed Rules, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the Proposed Rules. We did not receive any comments specifically addressing the IRFA. However, we received a number of comments on the Proposed Rules generally,[426] and have considered these comments in developing the FRFA.

C. Small Entities Subject to the Final Amendments

The final amendments will affect small entities that file proxy statements under the Exchange Act. The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.''[427] For purposes of the RFA, under our rules, an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities that does not exceed $5 million.[428] We estimate that there are approximately 660 issuers that file with the Commission, other than investment companies, that may be considered small entities and are potentially subject to all of the final amendments.[429] Under 17 CFR 270.0–10, an investment company, including a business development company, is considered to be a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. Commission staff estimates that, as of June 2021, there were 70 registered investment companies that would be subject to the proposed amendments that may be considered small entities.[430]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

As noted above, the purpose of the final amendments is to allow a shareholder voting by proxy to choose among director nominees in an election contest in a manner that more closely reflects the choice that could be made by voting in person at a shareholder meeting. In addition, we are adopting amendments that apply to all director elections and require disclosure

[422] This figure represents the sum of the aforementioned 150 additional total incremental burden hours from election contests and the aforementioned 1,062 additional total incremental burden hours from director elections generally.

[423] 5 U.S.C. 601 *et seq.*

[424] 5 U.S.C. 553.

[425] 5 U.S.C. 604.

[426] *See supra* Section II.

[427] 5 U.S.C. 601(6).

[428] *See* 17 CFR 230.157 under the Securities Act and 17 CFR 240.0–10(a) under the Exchange Act.

[429] This estimate is based on staff analysis of issuers potentially subject to the final amendments, excluding co-registrants, with EDGAR filings on Form 10–K, or amendments thereto, filed during the calendar year of January 1, 2020 to December 31, 2020, or filed by September 1, 2021, that, if timely filed by the applicable deadline, would have been filed between January 1 and December 31, 2020. Analysis is based on data from XBRL filings, Compustat, Ives Group Audit Analytics, and manual review of filings submitted to the Commission.

[430] These estimates are based on staff analysis of Morningstar data and data submitted by investment company registrants in forms filed on EDGAR as of June 30, 2021.

regarding the effect of shareholder action to vote ''against,'' ''withhold'' or ''abstain'' and mandate that the appropriate voting option be listed on the proxy card. The changes in reporting requirements for soliciting parties are outlined in detail in Section I above. Compliance with certain provisions of the amendments may require the use of professional skills, including legal skills.

These amendments are unlikely to impose significant recordkeeping requirements. We discuss the economic effects, including the estimated costs and burdens, of the final amendments on all registrants, including small entities, in Sections IV and V above.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. Accordingly, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- clarifying, consolidating, or simplifying compliance and reporting requirements under the rule for small entities;
- using performance rather than design standards; and
- exempting small entities from all or part of the requirements.

The current proxy rules relating to election contests and the proxy rules generally do not impose different standards or requirements based on the size of the registrant or dissident. These rules contain both performance and design standards in order to achieve appropriate disclosure in the proxy voting process under the Exchange Act.[431]

The final amendments require very limited additional disclosure by either the registrant or the dissident, but do impose additional filing and solicitation requirements on dissidents and an obligation on both parties in an election contest to include the other side's nominees on their respective proxy cards and to notify the other party of the names of their respective director nominees.

The final amendments are intended to permit shareholders voting by proxy in an election contest to reflect their choices as they could if voting in person at a shareholder meeting. We believe the final amendments are equally appropriate for parties of all sizes engaged in an election contest because they facilitate the important objective of shareholder enfranchisement, which does not depend on the size of the soliciting party. For that reason, we are not adopting different compliance or reporting requirements or timetables for small entities, or an exception for small entities. Similarly, we believe that the final amendments do not need further clarification, consolidation, or simplification for small entities.

Finally, as with the current proxy rules, the final amendments include both performance and design standards. In particular, the universal proxy card is subject to certain presentation and formatting requirements, but there is flexibility as to the exact design of the card within the guidelines established by the amendments.

VII. Statutory Authority

We are adopting the rule amendments contained in this release under the authority set forth in Sections 14 and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we are amending title 17, chapter II, of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 2. Amend § 240.14a–2 by revising paragraph (b) introductory text to read as follows:

§ 240.14a–2 Solicitations to which § 240.14a–3 to § 240.14a–15 apply.

* * * * *

(b) Sections 240.14a–3 through 240.14a–6 (other than § 240.14a–6(g) and (p)), 240.14a–8, 240.14a–10, 240.14a–12 through 240.14a–15, and 240.14a–19 do not apply to the following:

* * * * *

§ 240.14a–3 [Amended]

■ 3. Amend § 240.14a–3 as follows:

■ a. In paragraph (a)(3)(i), remove the period at the end of the paragraph and add in its place ''; or''; and

■ b. In paragraph (a)(3)(ii), remove the semicolon and add a period in its place.

■ 4. Amend § 240.14a–4 as follows:

■ a. Revise paragraph (b)(2);

■ b. Remove the undesignated paragraph and instructions following paragraph (b)(2);

■ c. Redesignate paragraph (b)(3) as paragraph (b)(5);

■ d. Add new paragraph (b)(3), paragraph (b)(4), and instruction 1 to paragraphs (b)(2), (3), and (4);

■ e. Revise paragraphs (c)(5) and (d)(1);

■ f. In paragraph (d)(2), remove the comma at the end of the paragraph and add a semicolon in its place;

■ g. In paragraph (d)(3), add a semicolon before ''or'' at the end of the paragraph; and

■ h. Revise paragraph (d)(4).

The revisions and additions read as follows:

§ 240.14a–4 Requirements as to proxy.

* * * * *

(b) * * *

(2) A form of proxy that provides for the election of directors shall set forth the names of persons nominated for election as directors, including any person whose nomination by a shareholder or shareholder group satisfies the requirements of an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

(3) Except as otherwise provided in § 240.14a–19, a form of proxy that provides for the election of directors may provide a means for the security holder to grant authority to vote for the nominees set forth, as a group, provided that there is a similar means for the security holder to withhold authority to vote for such group of nominees (or, when applicable state law gives legal effect to votes cast against a nominee, a similar means for the security holder to vote against such group of nominees and a means for security holders to abstain from voting for such group of nominees). Any such form of proxy which is executed by the security holder in such manner as not to withhold authority to vote for the election of any nominee, or not to grant authority to

[431] For example, the proxy rules include filing deadlines and some required specific disclosure. However, Schedule 14A generally permits parties to craft their disclosure as they deem appropriate.

vote against the election of any nominee, shall be deemed to grant authority to vote for the election of any nominee, provided that the form of proxy so states in bold-face type. Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group or to vote against any nominees as a group may not be provided if the form of proxy includes one or more shareholder nominees in accordance with an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

(4) When applicable state law gives legal effect to votes cast against a nominee, then in lieu of providing a means for security holders to withhold authority to vote, the form of proxy shall provide a means for security holders to vote against each nominee and a means for security holders to abstain from voting. When applicable state law does not give legal effect to votes cast against a nominee, such form of proxy shall not provide a means for security holders to vote against any nominee and such form of proxy shall clearly provide any of the following means for security holders to withhold authority to vote for each nominee:

(i) A box opposite the name of each nominee which may be marked to indicate that authority to vote for such nominee is withheld; or

(ii) An instruction in bold-face type which indicates that the security holder may withhold authority to vote for any nominee by lining through or otherwise striking out the name of any nominee; or

(iii) Designated blank spaces in which the security holder may enter the names of nominees with respect to whom the security holder chooses to withhold authority to vote; or

(iv) Any other similar means, provided that clear instructions are furnished indicating how the security holder may withhold authority to vote for any nominee.

Instruction 1 to paragraphs (b)(2), (3), and (4). Paragraphs (b)(2), (3), and (4) do not apply in the case of a merger, consolidation or other plan if the election of directors is an integral part of the plan.

* * * * *

(c) * * *

(5) The election of any person to any office for which a bona fide nominee is named in a proxy statement and such nominee is unable to serve or for good cause will not serve.

* * * * *

(d) * * *

(1) To vote for the election of any person to any office for which a bona fide nominee is not named in the proxy statement:

(i) A person shall not be deemed to be a bona fide nominee and shall not be named as such unless the person has consented to being named in a proxy statement relating to the registrant's next annual meeting of shareholders at which directors are to be elected (or a special meeting in lieu of such meeting) and to serve if elected.

(ii) Notwithstanding paragraph (d)(1)(i) of this section, if the registrant is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), a person shall not be deemed to be a bona fide nominee and shall not be named as such unless the person has consented to being named in the proxy statement and to serve if elected. Provided, however, that nothing in this section shall prevent any person soliciting in support of nominees who, if elected, would constitute a minority of the board of directors of an investment company registered under the Investment Company Act of 1940 or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940, from seeking authority to vote for nominees named in the registrant's proxy statement, so long as the soliciting party:

(A) Seeks authority to vote in the aggregate for the number of director positions then subject to election;

(B) Represents that it will vote for all the registrant nominees, other than those registrant nominees specified by the soliciting party;

(C) Provides the security holder an opportunity to withhold authority with respect to any other registrant nominee by writing the name of that nominee on the form of proxy; and

(D) States on the form of proxy and in the proxy statement that there is no assurance that the registrant's nominees will serve if elected with any of the soliciting party's nominees;

* * * * *

(4) To consent to or authorize any action other than the action proposed to be taken in the proxy statement, or matters referred to in paragraph (c) of this section.

* * * * *

■ 5. Amend § 240.14a–5 as follows:

■ a. Revise paragraph (c);

■ b. In paragraph (e)(2), remove the ''and'' at the end of the paragraph;

■ c. In paragraph (e)(3), remove the period and add ''; and'' in its place; and

■ d. Add paragraph (e)(4).

The revisions and addition read as follows:

§ 240.14a–5 Presentation of information in proxy statement.

* * * * *

(c) Any information contained in any other proxy soliciting material which has been or will be furnished to each person solicited in connection with the same meeting or subject matter may be omitted from the proxy statement, if a clear reference is made to the particular document containing such information.

* * * * *

(e) * * *

(4) The deadline for providing notice of a solicitation of proxies in support of director nominees other than the registrant's nominees pursuant to § 240.14a–19 for the registrant's next annual meeting unless the registrant is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)).

* * * * *

■ 6. Amend § 240.14a–6 by revising note 3 to paragraph (a) to read as follows:

§ 240.14a–6 Filing requirements.

* * * * *

(a) * * *

Note 3 to paragraph (a): Solicitation in Opposition. For purposes of the exclusion from filing preliminary proxy material, a ''solicitation in opposition'' includes: {a} Any solicitation opposing a proposal supported by the registrant; {b} any solicitation supporting a proposal that the registrant does not expressly support, other than a security holder proposal included in the registrant's proxy material pursuant to § 240.14a–8; and {c} any solicitation subject to § 240.14a–19. The inclusion of a security holder proposal in the registrant's proxy material pursuant to § 240.14a–8 does not constitute a ''solicitation in opposition,'' even if the registrant opposes the proposal and/or includes a statement in opposition to the proposal. The inclusion of a shareholder nominee in the registrant's proxy materials pursuant to an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials does not constitute a ''solicitation in opposition'' for purposes of paragraph (a) of this section, even if the registrant opposes the shareholder nominee and solicits against the shareholder nominee and in favor of a registrant nominee.

* * * * *

■ 7. Add § 240.14a–19 to read as follows:

§ 240.14a–19 Solicitation of proxies in support of director nominees other than the registrant's nominees.

(a) No person may solicit proxies in support of director nominees other than the registrant's nominees unless such person:

(1) Provides notice to the registrant in accordance with paragraph (b) of this section unless the information required by paragraph (b) of this section has been provided in a preliminary or definitive proxy statement previously filed by such person;

(2) Files a definitive proxy statement with the Commission in accordance with § 240.14a–6(b) by the later of:

(i) 25 calendar days prior to the security holder meeting date; or

(ii) Five (5) calendar days after the date that the registrant files its definitive proxy statement; and

(3) Solicits the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors and includes a statement to that effect in the proxy statement or form of proxy.

(b) The notice shall:

(1) Be postmarked or transmitted electronically to the registrant at its principal executive office no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date, except that, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice must be provided by the later of 60 calendar days prior to the date of the annual meeting or the 10th calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant;

(2) Include the names of all nominees for whom such person intends to solicit proxies; and

(3) Include a statement that such person intends to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant's nominees.

(c) If any change occurs with respect to such person's intent to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant's nominees or with respect to the names of such person's nominees, such person shall notify the registrant promptly.

(d) A registrant shall notify the person conducting a proxy solicitation subject to this section of the names of all nominees for whom the registrant intends to solicit proxies unless the names have been provided in a preliminary or definitive proxy statement previously filed by the registrant. The notice shall be postmarked or transmitted electronically no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date, except that, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice must be provided no later than 50 calendar days prior to the date of the annual meeting. If any change occurs with respect to the names of the registrant's nominees, the registrant shall notify the person conducting a proxy solicitation subject to this section promptly.

(e) Notwithstanding the provisions of § 240.14a–4(b)(2), if any person is conducting a proxy solicitation subject to this section, the form of proxy of the registrant and the form of proxy of any person soliciting proxies pursuant to this section shall:

(1) Set forth the names of all persons nominated for election by the registrant and by any person or group of persons that has complied with this section and the name of any person whose nomination by a shareholder or shareholder group satisfies the requirements of an applicable state or foreign law provision or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials;

(2) Provide a means for the security holder to grant authority to vote for the nominees set forth;

(3) Clearly distinguish between the nominees of the registrant, the nominees of the person or group of persons that has complied with this section and the nominees of any shareholder or shareholder group whose nominees are included in a registrant's proxy materials pursuant to the requirements of an applicable state or foreign law provision or a registrant's governing documents;

(4) Within each group of nominees referred to in paragraph (e)(3) of this section, list nominees in alphabetical order by last name;

(5) Use the same font type, style and size for all nominees;

(6) Prominently disclose the maximum number of nominees for which authority to vote can be granted; and

(7) Prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for the election of fewer or more nominees than the number of directors being elected and the treatment and effect of a proxy executed in a manner that does not grant authority to vote with respect to any nominees.

(f) If any person is conducting a proxy solicitation subject to this section, the form of proxy of the registrant and the form of proxy of any person soliciting proxies pursuant to this section may provide a means for the security holder to grant authority to vote for the nominees of the registrant set forth, as a group, and a means for the security holder to grant authority to vote for the nominees of any other soliciting person set forth, as a group, provided that there is a similar means for the security holder to withhold authority to vote for such groups of nominees unless the number of nominees of the registrant or of any other soliciting person is less than the number of directors being elected. Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group may not be provided if the form of proxy includes one or more shareholder nominees in accordance with an applicable state or foreign law provision or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

(g) This section shall not apply to:

(1) A consent solicitation; or

(2) A solicitation in connection with an election of directors at an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)).

Instruction 1 to paragraphs (b)(1) and (d). Where the deadline falls on a Saturday, Sunday, or holiday, the deadline will be treated as the first business day following the Saturday, Sunday, or holiday.

Instruction 2 to paragraph (f). Where applicable state law gives legal effect to votes cast against a nominee, the form of proxy may provide a means for the security holder to grant authority to vote for the nominees of the registrant set forth, as a group, and a means for the security holder to grant authority to vote for the nominees of any other soliciting person set forth, as a group, provided that, in lieu of the ability to withhold authority to vote as a group, there is a similar means for the security holder to

vote against such group of nominees (as well as a means for security holders to abstain from voting for such group of nominees).

■ 9. Amend § 240.14a–101 as follows:

■ a. Revise Instruction 3(a)(i) and (ii) to Item 4;

■ b. Add Item 7(f); and

■ c. In Item 21, revise paragraph (b) and add paragraph (c).

The revisions and addition read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 4. * * *

Instructions. * * *

* * * * *

(a) * * *

(i) In the case of a solicitation made on behalf of the registrant, the registrant, each director of the registrant and each of the registrant's nominees for election as a director;

(ii) In the case of a solicitation made otherwise than on behalf of the registrant, each of the soliciting person's nominees for election as a director;

* * * * *

Item 7. * * *

(f) If a person is conducting a solicitation that is subject to § 240.14a–19, the registrant must include in its proxy statement a statement directing shareholders to refer to any other soliciting person's proxy statement for information required by Item 7 of this Schedule 14A with regard to such person's nominee or nominees and a soliciting person other than the registrant must include in its proxy statement a statement directing shareholders to refer to the registrant's or other soliciting person's proxy statement for information required by Item 7 of this Schedule 14A with regard to the registrant's or other soliciting person's nominee or nominees. The statement must explain to shareholders that they can access the other soliciting person's proxy statement, and any other relevant documents, without cost on the Commission's website.

* * * * *

Item 21. * * *

* * * * *

(b) Disclose the method by which votes will be counted, including the treatment and effect under applicable state law and registrant charter and bylaw provisions of abstentions, broker non-votes, and, to the extent applicable, a security holder's withholding of authority to vote for a nominee in an election of directors.

(c) When applicable, disclose how the soliciting person intends to treat proxy authority granted in favor of any other soliciting person's nominees if such other soliciting person abandons its solicitation or fails to comply with § 240.14a–19.

* * * * *

By the Commission.

Dated: November 17, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–25492 Filed 11–30–21; 8:45 am]

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Part IV

The President

Proclamation 10315—Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019

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Presidential Documents

Title 3—

The President

Proclamation 10315 of November 26, 2021

Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019

By the President of the United States of America

A Proclamation

The national emergency caused by the coronavirus disease 2019 (COVID–19) outbreak in the United States continues to pose a grave threat to our health and security. As of November 26, 2021, the United States has experienced more than 47 million confirmed COVID–19 cases and more than 773,000 COVID–19 deaths. It is the policy of my Administration to implement science-based public health measures, across all areas of the Federal Government, to act swiftly and aggressively to prevent further spread of the disease.

On November 24, 2021, the Republic of South Africa informed the World Health Organization (WHO) of a new B.1.1.529 (Omicron) variant of SARS–CoV–2, the virus that causes COVID–19, that was detected in that country. On November 26, 2021, the WHO Technical Advisory Group on SARS–CoV–2 Virus Evolution announced that B.1.1.529 constitutes a variant of concern. While new information is still emerging, the profile of B.1.1.529 includes multiple mutations across the SARS–CoV–2 genome, some of which are concerning. According to the WHO, preliminary evidence suggests an increased risk of reinfection with this variant, as compared to other variants of concern. Further, the WHO reports that the number of cases of this variant appears to be increasing in almost all provinces in the Republic of South Africa. Based on these developments, and in light of the extensive cross-border transit and proximity in Southern Africa, the detection of B.1.1.529 cases in some Southern African countries, and the lack of widespread genomic sequencing in Southern Africa, the United States Government, including the Centers for Disease Control and Prevention (CDC), within the Department of Health and Human Services, has reexamined its policies on international travel and concluded that further measures are required to protect the public health from travelers entering the United States from the Republic of Botswana, the Kingdom of Eswatini, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Mozambique, the Republic of Namibia, the Republic of South Africa, and the Republic of Zimbabwe. In addition to these travel restrictions, the CDC shall implement other mitigation measures for travelers departing from the countries listed above and destined for the United States, as needed.

Given the recommendation of the CDC, working in close coordination with the Department of Homeland Security, described above, I have determined that it is in the interests of the United States to take action to suspend and restrict the entry into the United States, as immigrants and nonimmigrants, of noncitizens of the United States (''noncitizens'') who were physically present within the Republic of Botswana, the Kingdom of Eswatini, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Mozambique, the Republic of Namibia, the Republic of South Africa, and the Republic of Zimbabwe during the 14-day period preceding their entry or attempted entry into the United States.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States, by the authority vested in me by the Constitution and the laws of the

United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act, 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that the unrestricted entry into the United States of persons described in section 1 of this proclamation would, except as provided for in section 2 of this proclamation, be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

Section 1. *Suspension and Limitation on Entry*. The entry into the United States, as immigrants or nonimmigrants, of noncitizens who were physically present within the Republic of Botswana, the Kingdom of Eswatini, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Mozambique, the Republic of Namibia, the Republic of South Africa, and the Republic of Zimbabwe during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended and limited subject to section 2 of this proclamation.

Sec. 2. *Scope of Suspension and Limitation on Entry.*

(a) Section 1 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any noncitizen national of the United States;

(iii) any noncitizen who is the spouse of a U.S. citizen or lawful permanent resident;

(iv) any noncitizen who is the parent or legal guardian of a U.S. citizen or lawful permanent resident, provided that the U.S. citizen or lawful permanent resident is unmarried and under the age of 21;

(v) any noncitizen who is the sibling of a U.S. citizen or lawful permanent resident, provided that both are unmarried and under the age of 21;

(vi) any noncitizen who is the child, foster child, or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR–4 or IH–4 visa classifications;

(vii) any noncitizen traveling at the invitation of the United States Government for a purpose related to containment or mitigation of the virus;

(viii) any noncitizen traveling as a nonimmigrant pursuant to a C–1, D, or C–1/D nonimmigrant visa as a crewmember or any noncitizen otherwise traveling to the United States as air or sea crew;

(ix) any noncitizen

(A) seeking entry into or transiting the United States pursuant to one of the following visas: A–1, A–2, C–2, C–3 (as a foreign government official or immediate family member of an official), E–1 (as an employee of TECRO or TECO or the employee's immediate family members), G–1, G–2, G–3, G–4, NATO–1 through NATO–4, or NATO–6 (or seeking to enter as a nonimmigrant in one of those NATO categories); or

(B) whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement;

(x) any noncitizen who is a member of the U.S. Armed Forces or who is a spouse or child of a member of the U.S. Armed Forces;

(xi) any noncitizen whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee; or

(xii) any noncitizen or group of noncitizens whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their designees.

(b) Nothing in this proclamation shall be construed to affect any individual's eligibility for asylum, withholding of removal, or protection under

the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consistent with the laws and regulations of the United States.

Sec. 3. *Implementation and Enforcement.* (a) The Secretary of State shall implement this proclamation as it applies to visas pursuant to such procedures as the Secretary of State, in consultation with the Secretary of Homeland Security, may establish. The Secretary of Homeland Security shall implement this proclamation as it applies to the entry of noncitizens pursuant to such procedures as the Secretary of Homeland Security, in consultation with the Secretary of State, may establish.

(b) The Secretary of State, the Secretary of Transportation, and the Secretary of Homeland Security shall endeavor to ensure that any noncitizen subject to this proclamation does not board an aircraft traveling to the United States, to the extent permitted by law.

(c) The Secretary of Homeland Security may establish standards and procedures to ensure the application of this proclamation at and between all United States ports of entry.

(d) Where a noncitizen circumvents the application of this proclamation through fraud, willful misrepresentation of a material fact, or illegal entry, the Secretary of Homeland Security shall consider prioritizing such noncitizen for removal.

Sec. 4. *Relationship to Other Suspensions, Limitations, or Restrictions on Entry.* Individuals described in section 2 of this proclamation may nevertheless be subject to an entry suspension, limitation, or restriction under Proclamation 10294 of October 25, 2021 (Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic). Nothing in this proclamation shall be construed to affect any other suspension, limitation, or restriction on entry.

Sec. 5. *Termination.* This proclamation shall remain in effect until terminated by the President. The Secretary of Health and Human Services shall, as circumstances warrant and no more than 30 days after the date of this proclamation and by the final day of each calendar month thereafter, recommend whether the President should continue, modify, or terminate this proclamation.

Sec. 6. *Effective Date.* This proclamation is effective at 12:01 a.m. eastern standard time on November 29, 2021. This proclamation does not apply to persons aboard a flight scheduled to arrive in the United States that departed prior to 12:01 a.m. eastern standard time on November 29, 2021.

Sec. 7. *Severability.* It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the national security, public safety, and foreign policy interests of the United States. Accordingly, if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its provisions to any other persons or circumstances shall not be affected thereby.

Sec. 8. *General Provisions.* (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

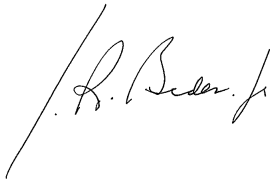
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-sixth day of November, 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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When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

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December 21	Jan 5	Jan 11	Jan 20	Jan 25	Feb 4	Feb 22	Mar 21
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